In the name of
His Highness Sheikh Mohamed bin Zayed Al Nahyan
President of the United Arab Emirates/ Ruler of the Emirate of Abu Dhabi

COURT OF FIRST INSTANCE
COMMERCIAL AND CIVIL DIVISION
BETWEEN

AC NETWORK HOLDING LIMITED
First Claimant

AC POOL HOLDING LIMITED
Second Claimant

KHALIL MOHAMED BINLADIN
Third Claimant

DALIA KHALIL BINLADIN
Fourth Claimant

HORIZON LIGHT INVESTMENTS LLC
Fifth Claimant

and

POLYMATH EKAR SPV1
First Defendant

POLYMATH EKAR SPV2
Second Defendant

VILHELM NIKOLAI PAUS HEDBERG
Third Defendant

RAVI NAGESH BHUSARI
Fourth Defendant

ALI HASHEMI
Fifth Defendant

LUX 2 INVCO
Sixth Defendant

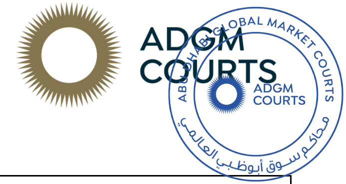
CLARA FORMATIONS LIMITED
Seventh Defendant

EKAR HOLDING LIMITED
Eighth Defendant

15 November 2022 09:11 AM

Neutral Citation:	[2022] ADGMCFI 0009
Before:	Justice William Stone SBS KC
Decision Date:	15 November 2022
Hearing Dates:	5 – 22 September 2022 inclusive, and 24 and 25 October 2022
Decision:	1. The Drag Notice issued on 27 April 2020 was invalid. 2. The share capital of Ekar Holding Limited as at 27 April 2022 is assessed at US$3 million. 3. The expert witnesses retained by the Claimants and the Defendants (with the exception of the Seventh Defendant) do reconvene, and if possible agree, their further assessment of the value of the Claimants' individual shareholdings in Ekar Holding Limited as at 27 April 2020. 4. The experts do prepare a further report, either jointly or individually, containing such assessments (or agreed assessments) in light of (1) the finding of the Court in this Judgment as to the market value of the entire share capital of Ekar Holding Limited; (2) the characteristics as to voting rights, size of shareholding, and preferential rights of distribution of surplus assets (as may be the case) of each of the Claimants' individual shareholding as at 27 April 2020. 5. That such further report (or reports) be filed within 28 days of the date of the Order.
Date of Order:	15 November 2022
Catchwords:	Shareholders' dispute; "Drag Along" procedure in shareholders' agreement; Whether sale of shares to a bona fide purchaser on arm's length terms; Validity of Drag Along Notice; Inducing breach of contract; Unlawful means conspiracy; Remedies of rectification or damages; Date of assessment of claim; Valuation of company at date of breach; Expert evidence of value; Precedent and English judicial decisions.
Legislation Cited:	Application of English Law Regulations 2015

15 November 2022 09:11 AM



Cases cited:	Wood v Capita Insurance Services Limited [2017] AC 1173 Mansworth v Jelley [2002] EWHC 442 (Ch) Midland Bank Trust v Green, [1981] AC 513 at 528D-G Kawasaki Kishen Kaisa Ltd v James Kemball Ltd [2021] 3 All ER 978 (CA) Allen v Pollock [2020] QB 781 (CA) Kuwait Oil Tanker Co v Al Bader (No 3), [2000] 2 All ER (Comm) 271 Meretz Investments NV v ACP Ltd, [2008] Ch 244 (CA) JTS BTA Bank v Ablyazov (No 14), [2020] AC 727 Racing Partnership v Done Bros Ltd [2021] Ch 233 Al-Nehayan v Kent [2018] 1 CLC 216 Alcoa Minerals of Jamaica Inc v Broderick [2002] 1 AC 371, at 377G-378D Johnson v Agnew [1980] AC 367 (at 400H-401B) Smith New Court Securities Ltd v Scrimgeour Vickers Ltd [1997] AC 254 (at 265H-267G) County Personnel (Employment Agency) Ltd v Alan R Pulver & Co [1987] 1 WLR 916, at 925-6 Bunge SA v Nidera BV [2015] 3 All ER 1082 Shanda Games Ltd v Maso Capital Investments Ltd [2020] UKPC 2
Case Number:	ADGMCFI-2020-015
Parties and representation:	Mr David Halpern KC for the Claimants Instructed by Al Tamimi & Company Mr Alan Choo-Choy KC for the First to Sixth and Eighth Defendants Instructed by DLA Piper Middle East LLP

JUDGMENT

This Case

1. This is a dispute between two groups of shareholders in the Eighth Defendant, Ekar Holding Limited ("**Ekar**"), a start-up car sharing company active within Abu Dhabi, Dubai, and Saudi Arabia.

2. It arises because on 27 April 2020 the shares of the Claimants (the "**Claimants**"), minority shareholders in Ekar, were compulsorily acquired consequent upon service of a Drag Along Notice (the "**Drag Notice**"), issued at the behest of the majority shareholders under the provisions of the Shareholders' Agreement dated 29 October 2019 (the "**SHA**"), which process resulted in the entirety of the issued shares of Ekar being purchased by, and thereafter transferred to, the Sixth Defendant ("**Lux**"), for the consideration of US$1.00.

3. The fundamental issue to be decided in this case is whether this was a valid exercise of the Drag Notice.

4. If the Drag Notice is held to have been valid, that is the end of the Claimants' case.

5. Conversely, if the Drag Notice is held to be in breach of the contractual requirements set out in the SHA, as the Claimants claim, questions arise as to the remedy (or remedies), which in turn requires consideration of consequential issues, including whether the appropriate remedy is that of damages or rectification, the valuation of the shares thus lost, the counterclaims made by Lux and by Ekar against the Claimants, and a personal claim in tort mounted by the Claimants against the Fifth Defendant, Mr Hashemi.

6. Somewhat oddly in a trial that lasted fourteen days, in which a substantial proportion of the hearing was given over to evidence given by seven witnesses of fact, there are relatively few significant factual disputes, with the result that this is not a case which turns upon primary findings of fact but rather upon the characterisation of events which for the greater part are undisputed.

The Parties

7. The Claimants fall into two groups: the First and Second Claimants are ADGM companies wholly owned by Audacia Capital Limited, a private equity company based in the DIFC, and an early investor in Ekar; (together "**Audacia**"). The CEO of Audacia is Mr Emad Mansour, and the Vice President is Mr Wissam Hussain, both of whom gave evidence.

8. The second group, the Third to Fifth Claimants (the "**Binladin Investors**"), also were early investors in Ekar.

9. The Third Claimant, Khalil Binladin, is the father of Dalia Binladin, the Fourth Claimant, and the Fifth Claimant, Horizon Light Investments LLC ("**Horizon Investments**"), is a Saudi investment entity controlled by the Binladin family. Ms Dalia Binladin was the third witness to give evidence for the Claimants.

10. The First to Fifth Defendants similarly are shareholders in Ekar or control such shareholders.

11. The First and Second Defendants, ("**Polymath 1**" and "**Polymath 2**" respectively) are special purpose investment vehicles and subsidiaries of Polymath Holdings Limited ("**Polymath Holdings**"), all companies being registered in the Cayman Islands.

12. The Fifth Defendant, Mr Hashemi, the central figure in this case, is a director of Polymath Holdings; he is neither a director nor shareholder of Polymath 1 or Polymath 2, the beneficial owner of these subsidiaries being named as his wife, Ms Zeina Abdalla. Mr Hashemi was one of two witnesses from Polymath to give evidence, the other being Mr Rohit Gupta, who had acted as a consultant providing CFO advisory services to Polymath for a period of ten months between January and October 2020.

13. The Third Defendant, Mr Hedberg, was the founder of Ekar, and was its CEO from inception until his resignation on 30 April 2020, only to be re-appointed as CEO on 15 May 2020. Mr Bhusari, the Fourth Defendant, was a co-founder with Mr Hedberg, and acted as Company Secretary of Ekar. Both Mr Bhusari and Mr Hedberg were called as witnesses.

14. Lux, the purchaser and transferee of the shares in Ekar pursuant to the Drag Notice, is a Cayman Islands company: the sole shareholder therein is Polymath Holdings, the sole director and beneficial owner again being Ms Zeina Abdalla.

15. The Seventh Defendant, Clara Formations Limited, is the current Registrar of Ekar, which has been joined solely to give effect to rectification of the Cayman Islands Register should such relief be ordered.

Factual Background: Establishment and Funding of Ekar

16. Ekar, the shares in which are the subject of this case, initially was the brainchild of Mr Bhusari, who together with his friend Mr Hedberg, in 2015 took the concept of establishing a car sharing business in the UAE to Ms Binladin in the hope that she and/or her family might be interested in investing.

17. At the time of this initial meeting the only company in existence was Ekar Carshare LLC, which had been incorporated but was not yet trading.

18. The Binladin family was interested, and it was agreed that they would hold 49% in return for a capital investment of AED 900,000, together with a further loan of AED 600,000 (since repaid).

19. On 3 March 2016, Ekar FZ LLC ("**Ekar FZ**") was incorporated in lieu of Ekar Carshare, and started business in a small way in the UAE. The founders, Mr Bhusari and Mr Hedberg, each had 25.5% of the issued shares, whilst Mr K Binladin had 24.5% and Ms Binladin and her brother Mr S Binladin each had 12.5%.

20. Audacia made its appearance on the investment scene in late 2016, when Mr Mansour, the CEO, who had met Mr Bhusari, agreed with Ekar FZ and its shareholders that it would invest AED5.5 million in return for a 25% shareholding in the company; this Audacia investment subsequently became known as the "***Series A***" fundraising.

21. The capital thus raised was soon to diminish, and Ekar FZ again was in urgent need of further funds with which to continue operating.

22. Accordingly, on 20 August 2017, the existing shareholders agreed to make loans to the company totalling AED3.55 million, of which sum Audacia provided AED2.88M, the Binladin Investors AED589,000 and Mr Hedberg AED72,000. Save in the case of Ms Binladin's contribution, these were convertible loans, and were converted into shares at the conclusion of what became known as the "***Series B***" fundraising, which was shortly to follow.

23. In late 2017 Ekar FZ began this second round of fundraising, which extended to the end of 2019, with the intention of raising US$5 million, based upon an informal pre-money valuation of US$25 million.

24. During this fundraising period, the car sharing business had begun to expand, and the amount required had increased to US$10 million, although the earlier pre-money valuation (based on 500 cars times US$25,000) was not revisited.

25. Two main sources of finance emerged during the Series B fundraising round: loans from Audacia, which by this stage had introduced a group of client investors who invested in the business via the Second Claimant ("**AC Pool**"), and from Mr Hashemi, recently introduced to Ekar FZ by Messrs Hedberg and Bhusari, and whom had agreed to invest via his corporate entity Polymath Holdings, in which Mr Hashemi's wife, Ms Abdalla, is named as sole director and shareholder.

26. Mr Hashemi began to put significant amounts of money into Ekar FZ. Polymath Holdings made two convertible loans totalling US$3.5 million, and Mr Hashemi also persuaded the existing shareholders of Ekar FZ, the Binladin and Audacia shareholders, to enter into a secondary sale

and divest part of their shareholdings to Polymath Holdings at a discounted rate, with the result that a total of slightly over 7 million shares were sold for just over US$5 million. In all, including this secondary purchase of shares, Mr Hashemi was to put US$12 million into Ekar.

27. Polymath 1, and latterly Polymath 2, were incorporated on 23 March 2019 to act as Special Purpose Vehicles for the Ekar FZ shareholding thus accumulated by Polymath Holdings.

28. The parent of Ekar FZ, Ekar, had been incorporated on 26 February 2018, with the intention that it should act as the holding company, but this process was not completed until October 2019, and on 29 October 2019 the reconstruction was completed, with shares issued in Ekar FZ being transferred to Ekar, which in turn issued its own shares in lieu of the shares in Ekar FZ.

29. At this point the existing shareholders entered into the SHA, the provisions of which, in particular Clause 17, are in issue in this case. The signatories to the SHA were the then-shareholders of the First Claimant ("**AC Network**"), Mr K Binladin, Ms Binladin, Horizon Investments, Polymath 1, Mr Hedberg (who also signed as Founder) and Mr Bhusari, together with Ekar itself.

30. It was necessary for Deeds of Adherence to the SHA subsequently to be entered into by the Second Defendant, AC Pool Holding Limited ("**AC Pool**"), which had been allotted shares for the benefit of Audacia who had invested in Ekar, and by Polymath 2 which similarly had been allotted Ekar shares.

31. These various transactions resulted in the existence of four different classes of shareholding: Ordinary Shares, Preferred Ordinary Shares (priority for return of capital upon liquidation), Series B1 Shares (one vote for every 2 shares held), and Series B2 Shares (priority for return of capital upon liquidation).

32. In total there were 13,439,202 Ordinary Shares, variously held between the Claimants (8,539,202) and by Mr Hedberg and Mr Bhusari (4,864,686), 7,232,619 Preferred Ordinary Shares held by Polymath 2, 6,483,001 Series B1 Shares held by AC Pool, and 8,077,930 Series B2 shares held by Polymath 2.

33. After a relatively slow start, Ekar was growing and trading in three Emirates, Abu Dhabi, Dubai and Sharjah, and had launched the car sharing concept in Riyadh: by this stage Ekar's commercial prospects were not unpromising, although Ekar had not yet begun to be in profit.

34. Further capital was required, but just as Ekar was anticipating the launch of a third fund raising round, the "***Series C***" fundraising, with the intention of raising an additional US$30 million in working capital, Covid 19 was making its appearance in the UAE, and rapidly turned the developing car sharing market on its head.

Events leading to the Drag Notice

35. The Covid pandemic, which brought with it lockdowns and a widespread standstill in commercial activities the world over, wrought havoc with the car leasing business model adopted by Ekar: the cars utilised in the Ekar fleet were leased from car dealerships (lease commitments being secured by post-dated cheques), and suddenly these cars were no longer being used because, consequent upon lockdowns and other government-imposed restrictions, there was no-one available to hire them – at one stage the company was prevented from operating in Dubai by order of the Road Traffic Authority which was concerned about virus spread with cars subject to frequent communal use – with the result that the Ekar car sharing business effectively ground to a halt, with potentially disastrous financial consequences.

36. As revenue streams suddenly ceased, the underlying lease and associated business costs did not, with the result that Ekar continued burning cash at a significant rate but no longer with any income to defray its ongoing overheads.

37. The situation rapidly was becoming dire, and caused significant concern, both within Ekar management and with the Ekar investors, prompting a series of urgent meetings in which Mr Hedberg, the Ekar CEO, presented these problems to his Board members in an effort to find solutions to what was a commercial crisis.

38. In turn, this stimulated a series of urgent Board and shareholder meetings, together with associated email exchanges, all of which were concentrated within April 2020. These meetings have attracted considerable profile in this case, and graphically chart the erosion of shareholder trust and co-operation.

39. It is evident from the Minutes of these meetings that there emerged a significant difference as to appropriate interim funding between the two significant groups, namely Mr Mansour and the Bin Ladin Investors on the one hand, and Mr Hashemi on the other; Mr Hedberg and Mr Bhusari, who each held ‘Founder Shares’, were not significant shareholders, but in effect held the balance of power between the two groups.

40. On 2 April 2020, at an emergency Board Meeting, Mr Hedberg, the Company CEO made a presentation about the impact of Covid 19, and proposed two options: liquidation or stringent cost-cutting combined with ongoing financial support from the shareholders. The latter option made the assumption that revenue would reduce by 70% in the second quarter of 2020 and by 40% in the third quarter, before returning to pre-pandemic level in the fourth quarter.

41. This was followed, on 5 April 2020, with a specially convened Shareholder Working Group to consider available options, and on 9 April 2020 there was a further Board Meeting, subsequent to which proposals were sought from all shareholders, these proposals being canvassed at the next Board Meeting on 12 April 2020. This Board Meeting highlighted the differing approaches of the parties.

42. Mr Mansour, representing the Audacia Investors, (which in addition to Audacia itself further comprised Audacia clients within AC Pool), proposed a capital injection of US$6 million, to be paid in four instalments, with each shareholder contributing pro rata to this injection; this figure was discounted from the amount of US$7.2 million which Mr Hedberg as CEO had requested in order to sustain Ekar through the following twelve months.

43. In turn the Binladin Investors made their own proposals for interest-free loans to Ekar with reviews of the situation after three months.

44. For his part Mr Hashemi, on behalf of Polymath Holdings, took a tougher line, and insisted that a capital injection of US$10 million was the minimum that was necessary to establish a runway for Ekar of a minimum of 12 months going forward, and he raised a draft Resolution to that effect for consideration at the next meeting (the “**Hashemi Resolution**”). Mr Hashemi’s Resolution involved contribution *pro rata* from all shareholders, save for Mr Hedberg and Mr Bhusari, whose shareholdings were not to be diluted; Mr Hashemi’s apparent view was that any other less aggressive approach would amount to no more than an ineffectual “*drip feeding*” of the company which would achieve nothing save to delay the inevitable demise of the company.

45. The Hashemi Resolution was passed at 12 April 2020 Board Meeting by 5 votes to 2: Mr Hedberg and Mr Bhusari voted with Mr Hashemi, as did Mr Farrow and Mr Gupta, while Mr Mansour and

Ms Binladin voted against. The Hashemi Resolution recited that the Company had less than 2 weeks cash runway remaining, that Ekar was unable to fund an orderly winding down, that Management had recommended cost-cutting strategies and had developed a mitigation plan for the next 12 months, that the Company required additional funding "*of at least USD10 million to ensure minimum 12-18 months runway*" and that Ekar had been unable to attract external sources of funding; accordingly it was resolved that "*the shareholders shall provide the necessary financial support to the company to enable it to continue its operations and meet its obligations as they fall due*" and all shareholders "*shall provide funding proportional to their fully diluted shareholding*" net of the shares of the Founders, Mr Hedberg and Mr Bhusari.

46. An email from Mr Bhusari informing shareholders of the Hashemi Resolution as passed was immediately met with email correspondence protesting the situation: on 16 April 2020, Mr Khalil Binladin replied querying why only this proposal was put to the Board, and on 18 April 2020 Mr Mansour wrote to all shareholders noting that there had been no shareholders' meeting convened, and that what had occurred was "*an infringement on shareholders rights*", and that the resolution as passed had been put forward on a 'take it or leave it' basis, which in itself was a further violation and again was unacceptable.

47. On 20 April 2020 a further emergency Shareholders' Meeting was convened, which did not indicate any alteration in the position of those attending although it did occasion Mr Hedberg's evident frustration with the shareholder deadlock, the Minutes recording him saying that the "*outcome is there is no consensus and we are again going back in circles from what the board recommended*" and that the situation would not be solved at board level but that the shareholders needed to talk through how to break the deadlock. He is recorded as noting that "*no shareholder resolution will pass without Ali [Mr Hashemi] agreeing as he has a block*", and reminded those present that the financial situation was becoming desperate since the company had at most 2 weeks' cash in place and liquidation loomed.

48. In light of this increasingly fraught financial situation, on 24 April 2020 Mr Hedberg called a further emergency Board Meeting for 30 April 2020 with the view once more to discuss ways to remedy the position. Agenda items were canvassed for this meeting, and were received from Ms Binladin and on 27 April 2020 from Mr Hashemi, who had objected to yet another meeting to discuss funding options when the Board Resolution of 12 April 2020 now was in place: in the event, by an email timed at 16.53 hours on 27 April 2020 Mr Hashemi sent Mr Hedberg a request to add three items to the meeting agenda: first, the appointment of CMS as company counsel, second, to discuss the status of company insolvency, and third, to discuss alternative paths forward to avoid insolvency.

49. Later on that same day, however, and no more than forty minutes after Mr Hashemi's email to Mr Hedberg, at 1733 hrs on 27 April 2020 a bombshell dropped. The Company Secretary, Mr Bhusari, with the agreement of Mr Hashemi and Mr Hedberg, whom each had been consulted privately by Mr Hashemi, sent an email attaching the Drag Notice to each of the Claimants as "*Called Shareholders*".

50. This email was sent on behalf of Polymath 1 and Polymath 2, Mr Hedberg and Mr Bhusari himself as "*Selling Shareholders*" whom, as holders of more than 50% of Ekar shares, gave notice that they wished "*to transfer all of our Shares to a Proposed Purchaser*", and immediately required the Called Shareholders to transfer all of their shares under Clause 17 of the SHA: the Proposed Purchaser of all Ekar shares was to be Lux and the consideration for the shares which were to be transferred was US$1.00, the proposed date of transfer being stated on the Drag Notice to be 30 April 2020.

15 November 2022 09:11 AM

51. Attached to the Drag Notice was a transfer form pursuant to which the "*Proposed Purchaser*" was to acquire the shares, with each Called Shareholder being required immediately to deliver to Ekar a duly executed share transfer form, and in any event no later than three business days from the date of the Drag Notice; any failure by a Called Shareholder to deliver a duly executed share transfer form to Ekar would result in the immediate execution of the share transfer form by a Director of Ekar as deemed agent for the Called Shareholders in accordance with clause 17.9 of the SHA.

52. The Drag Notice was signed by Mr Hashemi on behalf of Polymath 1 and Polymath 2, by Mr Hedberg and by Mr Bhusari, and caused a real degree of shock in the recipients, who had had no warning of what now had transpired.

53. Mr Mansour immediately obtained legal advice, which resulted in a letter from Al Tamimi & Co. contesting the validity of the Drag Notice and detailing its perceived deficiencies. This letter variously asserted that: Lux was not a *bona fide* purchaser which had made an offer on an arms-length basis; the sale of Ekar required the approval of 75% of the shareholders; by reason of the "*Founder's lock-in*" the purported sale of his shares by Mr Hedberg could not be counted as part of the alleged majority shareholding; full details of the purchase offer received from Lux had not been promptly provided to the other shareholders; and that since the Drag Notice was invalid, in the performance of their fiduciary duty, any Director should refuse to register any purported transfer.

54. Notwithstanding the issue of the Drag Notice but three days earlier, the scheduled meeting of 30 April 2020 at 4.00 pm nevertheless still took place in usual Zoom format, wherein, on the Agenda at least, the current state of the company's affairs was set to be discussed. Shortly after the meeting opened an email from Mr Hedberg (timed at 4.03 pm) was received wherein Mr Hedberg resigned with immediate effect as CEO of Ekar. The timing was curious, since this resignation was proffered between service of the Drag Notice on 27 April 2020, and the subsequent execution of the Share Transfers pursuant to the Drag Notice: in his evidence Mr Hedberg said that although the legal advice which had been given by CMS, the Company's legal counsel, was that his resignation was not necessary, he chose to do so to be on the safe side and to ensure that his Founder's shareholding constituted a valid part of the 51% majority shareholding required for issuance of the Drag Notice.

55. This last meeting of 30 April 2020, which took place virtually, was less than good-tempered, and in the event was in two phases: Mr Mansour, the Chair, purported to adjourn the meeting and together with Ms Binladin left not long after the start, with the remaining directors (Mr Hashemi, Mr Farrow, Mr Bhusari and Mr Hedberg) opting to continue. Before he left the call Mr Mansour had "*pleaded with the directors to consider the fate of the company*" and had offered immediate emergency funding of US$1 million which, he said, would have lasted Ekar for at least two months, thereby giving time to the company "*while the shareholders worked to resolve the drag issue*". This plea was to no avail, and Mr Mansour recounted that each of the directors simply had said that they had no comment to make, and that toward the end of the call Mr Hashemi commented to the effect that "*the directors had decided on what they want to do*". Mr Mansour said that he expressed disappointment at their attitude, and that thereafter he adjourned the meeting: this, he said in evidence, was his "*last personal interaction with the Defendants*".

56. After the departure of Mr Mansour and Ms Binladin, the meeting continued, and various documents were considered by those remaining, including the Drag Notice, the share transfer forms in favour of Lux as signed and returned by the majority shareholders, a letter from CMS regarding the validity of the Drag Notice, and a pre-emption notice from AC Network dated 28 April 2020, the day following issuance of the Drag Notice.

15 November 2022 09:11 AM

57. It was resolved that the drag along procedure had been properly followed, and that, having considered legal advice received from CMS, the tenor of which was that the Drag Notice was valid, it followed that any Director could be appointed by the Company to execute the unexecuted Share Transfer Forms on behalf of the minority "*Called Shareholder*"'.

58. The result was that the transfer of the shares to Lux was approved, and it was resolved that Ekar's then-registered agent, Foundra Corporate Services, be requested to record the details of the share transfers into the Register of Members of Ekar.

59. The Transfer Forms in question were executed on 3 May 2022, Mr Bhusari countersigning on behalf of Ekar.

60. Thus it was that the shareholding of the Claimants was summarily extinguished, setting the scene for the litigation the subject of this Judgment.

LIABILITY ISSUES

Validity of the Drag Notice

61. Clause 37 of the SHA provides for English law to apply, and Clause 38 gives the ADGM Courts exclusive jurisdiction to deal with disputes arising thereunder.

62. Mr Halpern KC argues on behalf of the Claimants that the service of the Drag Notice is invalid and a 'nullity' by reason of four independent breaches of provisions of the SHA.

<u>Non-compliance with pre-emption provisions under Clause 13 prior to service of the Drag Notice</u>

63. Clause 13.1 of the SHA provides that any transfer of shares by a shareholder is subject to a right of pre-emption, so that a shareholder wishing to transfer any or all of his shares must go through the procedure laid down in Clause 13 and offer other shareholders presently in the company the opportunity to acquire his shares before seeking to sell elsewhere.

64. In contrast the "*drag along*" procedure in Clause 17 governs the quite different situation in which the majority shareholders, the holders of more than 50% of the shares in the company, wish to sell and transfer *all* the shares of the company to a Proposed Purchaser, and by means of this drag provision are in a position to compel minority shareholders, who may not otherwise wish to exit their investment, likewise to sell their shareholding.

65. The problem which has stimulated this objection is the relationship between Clauses 13 and 17: in short, as the Claimants contend, do these provisions require that prior to service of a "*Drag Along Notice*" there first should be compliance with the pre-emption provisions of the SHA, in the absence of which the Drag Notice must be considered to be invalidly served?

66. At first blush Clause 13.1 suggests that indeed this should be the case, since this clause provides that *"Save where the provisions of clauses 11, 12, 16, or 17 apply, any transfer of Shares by a Shareholder shall be subject to the pre-emption rights contained in clause 13".*

67. However, Clause 17.10 states to the contrary, providing that *"Any transfer of Shares to a Drag Purchaser pursuant to a sale in respect of which a Drag Along Notice has been duly served shall **not** be subject to the provisions of Clause 13"* (emphasis added).

68. Mr Halpern deals with this conundrum by arguing that Clause 17.10 does not apply at the stage of service of the Drag Along Notice, and to the contrary it is Clause 13.1 which applies at this stage, so that what contractually is envisaged is a two-stage process: Stage 1 wherein the pre-emption procedure in Clause 13 is followed, so that a Drag Along Notice cannot be served if the remaining shareholders in fact exercise their right to buy the majority shares; and Stage 2, if that right is not exercised, then a Drag Along Notice can be served, and the resulting sale to the Proposed Purchaser can take place without the need once more to go through the pre-emption procedure; the key, he says, lies in the word *"duly"* in clause 17.10, since the Drag Along Notice cannot be regarded as being "*duly served*" unless and until the Selling Shareholders first have complied with the pre-emption process in Clause 13.

69. If this be correct, Mr Halpern argues, the opening words of Clause 13.1 which provide, inter alia, for the exception of Clause 17 must be a reference to Clause 17.10 and not to Clause 17.1.

70. Mr Choo-Choy KC does not agree. He says that there is no reason to read the reference to Clause 17 in the words at the outset of Clause 13 as being a specific reference to Clause 17.10, and that to do so constitutes an unnatural reading of the proviso, which is no more than a general reference to the provisions of the clauses therein specified.

71. He emphasises the simultaneous reference in the proviso to Clause 13 to other situations where the clear intention is that the pre-emption procedure in Clause 13 is inapplicable, these being situations where there are expressly permitted transfers (Clause 11), a change in control of a Shareholder (Clause 12) or where the "*Tag Along"* procedure applies (Clause 16), and viewed thus there is no reason to construe the reference in Clause 13.1 to be a specific, and limited, reference to Clause 17.10.

72. Mr Choo-Choy disputes that Clause 17.10 is about preventing the successive application of the pre-emption procedure to the same Drag Along process, since the clause is not expressed in terms which suggest any distinction is to be drawn between the giving of notice under Clause 17.2 (prior to which there had to be compliance with the pre-emption procedure), and the subsequent share transfer pursuant to the Drag Notice (where it did not), and the absence of express language to that end reinforces taking Clause 17.10 at face value, and reaffirms the parties' agreement that a transfer of shares pursuant to an exercise of the Drag Along option is *not* to be subject to Clause 13.

73. Nor, he submitted, was there any warrant to read the words "*duly served*" in Clause 17.10 as being an implied reference to service of the Drag Notice after compliance with the pre-emption procedure, since the natural meaning of "*duly served*" is "*served by the holders of more than 50 per cent of the shares who wish to transfer all of their shares to the Drag Purchaser*".

74. It is clear that the opening words of Clause 17.1 cannot be taken literally if effect is to be given to the clear stipulations to the contrary in Clauses 13.1 and 17.10 and looking at the matter in the round the Court takes the view that the special situation embodied by the Drag Along procedure stands proud of and distinct from the requirements of the pre-emption provisions in Clause 13.

75. The Court bears in mind established canons of construction, which warrant rejection of words, indeed whole provisions, if they are inconsistent with the main purpose of the contract (*Lewison, The Interpretation of Contracts (7th ed), para 9.82*): not only does the proviso to Clause 13.1 create a clear exception to the operation of the pre-emption procedure in the context of the Drag Along option in Clause 17, but as an earlier provision it assumes primacy over the subsequent conflicting words in Clause 17.1 (*Lewison, op cit. para 9.79*).

15 November 2022 09:11 AM

76. Such mechanistic approach apart, Mr Choo-Choy's more attractive and purposive point is that since the main purpose of the Clause 17 Drag Along procedure is to preclude minority shareholders from impeding the wish of the majority to exit their investment by selling to a third party purchaser wishing to acquire all of the shares in the company on arm's length terms, plainly it would be inconsistent with that purpose to require the Selling Shareholders to go through the pre-emption procedure before exercising their Drag Along option, and thus there is no reason in principle to suppose that the relevant clause is to be subjugated to the pre-emption process.

77. He buttresses his argument by reliance upon the summary of the principles of contractual construction under English law by the UK Supreme Court in *Wood v Capita Insurance Services Limited [2017] AC 1173* at paras 10-12, wherein the Court observed that ascertaining the objective meaning of the parties in the language used in their agreement *"is not a literalist exercise focussed solely on a parsing of the wording of the particular clause but that the Court must consider the contract as a whole",* and that *"where there are rival meanings the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense…",* and emphasises that the pre-emption procedure is specifically expressed to be subject to the application of Clause 17.

78. The Court agrees, and rejects the Claimants' objection to the validity of the Drag Notice on the basis of failure to comply with the Clause 13 pre-emption procedure.

<u>Lack of prior approval of at least 75% of the voting rights attached to all shares</u>

79. This is a short point. The Claimants contend that Clause 17.2 envisages that the Selling Shareholders serve a Drag Along Notice on the Company, which then is required to send copies to the other shareholders, whilst Clause 17.9 provides for the Board to enforce the transfer occasioned by the Notice and to register such transfer.

80. The argument is that in performing this role the Company is engaged in "*negotiating or permitting the disposal of shares in a Company amounting to a Sale*", as provided in Schedule 3, Part 1, paragraph 4 of the SHA; that "*Sale*" includes a Share Sale, which means a sale of shares resulting in the purchaser acquiring a Controlling Interest in the Company; and thus as such constitutes a Reserved Matter, which under Clause 9.1 attracts Shareholder Majority Consent, defined as meaning the consent of at least 75% of the voting rights attached to the shares.

81. The response of the Defendants is that this argument is misconceived because the requirement for "*Shareholder Majority Consent*" in the specified Schedule does not apply to the Drag Along procedure simply because Clause 9.1 relates to "*Reserved Matters*" which "*the Company shall not effect*" absent Shareholder Majority Consent, and that this Clause and Schedule are concerned only with that which the Company may not do without Shareholder Majority Consent, and are not concerned with the exercise of rights under the SHA specifically conferred upon shareholders, such as the Drag Notice, which Clause 17.1 provides can be exercised by "*holders of more than 50% of the Shares*".

82. Mr Choo-Choy adds that if the Claimants' argument were to be correct, it would follow that a simple majority of holders of more than 50% of the shares of the Company would never be able to exercise their contractual Drag Along rights, unless additional shareholders representing a further 25% of the voting rights were to provide their prior written consent to the exercise of the Drag Along option. Mr Choo-Choy adds that this would be fundamentally inconsistent with the express provision of Clause 17.1, which is that the Drag Notice could be exercised by a simple majority of shareholders to compel each shareholder other than the majority exercising the option to sell and transfer all their shares to the Proposed Purchaser.

15 November 2022 09:11 AM

83. The Court accepts that this argument is precluded by the express language of Clause 17.1. It follows that this basis for impugning the validity of the Drag Notice also is rejected.

Mr Hedberg's entitlement to exercise the Drag Along Option

84. This objection once more is procedural, and focuses upon the fact that without the shares held by Mr Hedberg, *qua* Founder of Ekar, being available to be included within the majority shareholding required by the Drag Notice, the Selling Shareholders could not have achieved the requisite majority, and thus the Drag Notice could not have been validly issued.

85. Clause 10.7 of the SHA provides that "*subject to clauses 10.8, 11, 15, 16 and 17, no Shares held by the Founder shall be transferred*" for four years after the date of the SHA, which period would expire on 29 October 2023.

86. In turn, this is subject to Clause 10.8, important in this context, which provides that the restriction shall cease to have effect "*on and from the date the Founder…resigns*" as CEO.

87. It is a matter of record that Mr Hedberg resigned on 30 April 2020 at or shortly before the final emergency Board Meeting of that date, and it is this sequence that prefaces the argument on behalf of the Defendants that Clause 10.7 is concerned solely with the date of the transfer of shares pursuant to the Drag Notice and not with the date of the Drag Notice itself.

88. To this Mr Halpern argues that this ignores the obvious purpose behind the provision, which was to lock the Founder into the Company for at least four years and to ensure that he does not have the power to make a decision to sell shares based on his own interest as shareholder, and that it can neither have been intended nor envisaged that the Founder could evade this provision by resigning after service of a Drag Notice but prior to completion of the transfer of the subject shares.

89. Mr Halpern further castigates the resignation of Mr Hedberg as a "*sham*" given that he did not resign as Director but resigned without notice only as CEO, and continued to participate in the Board Meeting of 30 April 2020, and thereafter to carry out the same CEO functions as previously – a fact which was recognised by his reappointment, albeit not as CEO but as Managing Director of Ekar, on 15 May 2020.

90. The "*sham*'" allegation does not seem to the Court to make much analytical difference, since it is undisputed that the reason for Mr Hedberg's sudden resignation was to avoid the provisions of Clause 10, Mr Choo-Choy accepting that Mr Hedberg resigned as CEO precisely to ensure that he was legally able to transfer his shares to Lux, and thus in the circumstances the resignation was genuinely intended.

91. Mr Choo-Choy argues that on its proper construction Clause 10.7 cannot be taken to govern the circumstances in which Mr Hedberg as Founder may be in a position to participate in a Drag Along Notice, nor that Mr Hedberg qua holder of shares is prevented from requiring the Claimants as Called Shareholders from transferring their shares to Lux consequent upon issuance of a Drag Notice.

92. He also says that even if Mr Hedberg had transferred his shares to Lux in breach of Clause 10 (which was disputed), that in itself would not avoid the Claimants' obligation as "*Called Shareholders*" to transfer their shares to Lux pursuant to that Notice.

93. The Court agrees. The contention that Mr Hedberg could not have participated in the Drag Notice, and thus that his shares (incorrectly regarded at the time as necessary to achieve the 51% benchmark) could not be counted within the shareholding required to underpin issuance of the Drag Notice, is rejected.

Sale of the Claimants' shares not to a bona fide purchaser who had made an offer on arm's length terms

94. This attack upon the validity of the Drag Notice strikes the Court as Mr Halpern's most persuasive point.

95. Clause 17.1 of the SHA provides that if the "*Selling Shareholders*", who must be the holders of more than 51% of the Shares, wish to transfer all their Shares to a Proposed Purchaser, the Selling Shareholders shall have the "*Drag Along Option*" to compel each other holder of Shares, the "*Called Shareholders*" to sell and transfer all their Shares to the Proposed Purchaser, whilst Clause 1 of the SHA defines "Proposed Purchaser" as "*a proposed bona fide purchaser who at the relevant time has made an offer on arm's length terms*".

96. This requirement comprises twin elements: first, that the Purchaser must act bona fide, and second that the offer must be on "*arm's length terms".*

97. As to bona fides, Mr Halpern cites the observations of Lord Wilberforce in *Midland Bank Trust v Green, [1981] AC 513 at 528D-G*, wherein his Lordship stated that a bona fide purchaser is a purchaser in good faith, and that good faith means honesty; whilst as to the issue of arm's length terms, he relies upon the observation of Lightman J in *Mansworth v Jelley [2002] EWHC 442 (Ch)*, who said [at para 13] that a bargain at arm's length "*connotes more than a transaction: it connotes a transaction between two parties with separate and distinct interests who have each agreed terms (actually or inferentially) with a mind solely to his own respective interests*."

98. The Purchaser in this instance, Lux, in common with Polymath 1 and Polymath 2, is a wholly owned subsidiary of Polymath Holdings, which Mr Hashemi says is owned and controlled by his wife, Ms Reina Abdalla, who is also the sole Director: Ms Abdalla was not called to give evidence, and indeed none of the Claimants have met her nor have any knowledge of her business interests and expertise.

99. The Court declines to accept Mr Hashemi's evidence as to his wife's exclusive ownership and control, the overwhelming probability being that in all activities of Polymath Holdings and Lux it is Mr Hashemi who is running the show and pulling the strings, and that in holding these corporate positions it is Ms Abdalla who acts as Mr Hashemi's nominee, and not vice versa; in so far as may be necessary the Court so holds, and proceeds on this basis.

100. There is no need to speculate nor make any finding as to the reason Mr Hashemi and his wife chose to adopt this manner of running the corporate affairs of Polymath Holdings, the wholly-owned subsidiaries of which are Polymath 1, Polymath 2 and Lux, and in any event this probably does not matter, given that Mr Hashemi emphasised in his evidence that in commercial and corporate matters he and his wife "*are a single unit*".

101. The commercial reality, in the Court's view, is that through the medium of Lux, the Proposed Purchaser incorporated on 18 March 2020, it was Mr Hashemi who is standing on both sides of the Drag Notice, and when the issue of '*good faith of the 'Proposed Purchaser*' falls to be examined, it is his commercial behaviour that must be subject to scrutiny.

102. On any basis, the issuance of the Drag Notice was a volcanic act in context of the relationship between the shareholder factions in Ekar. There was no warning, although a perceptive observer might have gleaned a hint about what shortly was to come in the final sentence of an email written to Mr Khalil Binladin by Mr Hashemi on 23 April 2020, four days prior to service of the Drag Notice, wherein Mr Hashemi observed that "*there are other external remedies available to a majority of shareholders*" should there be no "*amicable conclusion*" as to funding for the company: in his evidence Mr Hashemi confirmed that it was precisely the possibility of a Drag Notice that he then had in mind when he wrote that email.

103. From at least about 10 April 2020 onwards, there had been an impasse between the two investing groups, the Binladin Investors and Mr Mansour of Audacia on the one hand, and Mr Hashemi/ Polymath Holdings on the other, as to the most appropriate way in which to nurse Ekar through the Covid pandemic, given the massive erosion of company funds in meeting ongoing costs, coupled with the almost total absence of any revenue stream.

104. Each side accepted the undesirability of running up the white flag and causing Ekar to be wound up, although Mr Hedberg, as CEO, kept banging this drum as Ekar's finances continued to deteriorate.

105. It was apparent to all that in order to continue to exist as a viable business, Ekar had to be commercially sustained by a substantial injection of funds, and the debate among the existing shareholders revolved around how much, for how long, and in what manner? Were such funds to be pumped into the company by way of loan, or should this be in exchange for equity participation and a redrawing of the '*cap table'* were any existing shareholder to decide not to participate pari passu, and as a consequence suffer a dilution in their shareholding? To Mr Hedberg's obvious frustration and concern, the shareholders continued to argue whilst Ekar burned.

106. Throughout April 2020 the issue of emergency funding was the subject of a difference of view between the two shareholder groups, the Binladin/ Audacia faction and the Polymath faction. Ms Binladin favoured a '*wait and see*' approach enabled by short term loans, but ultimately the debate crystallised into the competing propositions advanced the two financial heavyweights, Mr Hashemi amd Mr Mansour, who very obviously had begun to butt heads.

107. In response to Mr Hedberg's considered request for an injection of US$7.2 million, Mr Mansour discounted this sum and advocated an equity injection of US$6 million in four tranches over 12 months, with all shareholders to participate, and with those who did not having their shareholdings diluted; Mr Mansour considered that this would have ensured the survival of the company for twelve months "*even with minimal revenues coming in*".

108. Mr Hashemi firmly disagreed. His opinion was that a minimum of US$10 million was required in order to give Ekar a minimum 12 month runway, and that should Mr Hedberg and Mr Bhusari not be able to participate, his view was that as Founder Shareholders their shareholdings should suffer no dilution: anything less than an infusion of US$10 million, he said, was no more than ineffectual '*drip feeding'* which would solve nothing and would serve only to delay the inevitable. Mr Mansour has complained that whilst his proposal was carefully calculated "*based on the company's own projections of costs and revenues*", Mr Hashemi's projection of the US$10 million figure was a figure plucked from the air and had remained wholly unparticularised, that his attitude throughout was "*my way or the highway*", and that it was precisely this intransigence which had created the deadlock which subsequently was used to justify use of the Drag Notice procedure.

109. This stark difference of view as to the appropriate way forward continued during the Board and Shareholder meetings which took place at least from 10 April 2020, and at the same time Mr Mansour was having private conversations with Mr Hashemi about the possibility of Mr Hashemi making an offer to buy out the Binladin and Audacia interests. Detailed reference has been made to telephone conversations between these two men on 23 and 24 April 2020, or possibly a day later on 24 and 25 April 2020, wherein there emerged offer and counter offer, but the undisputed fact was these conversations came to nought, and in fact led to a souring of the hitherto relatively cordial relations between Mr Hashemi and Mr Mansour.

110. Mr Hashemi has given evidence that in his view these telephone conversations were attempts by Mr Mansour to put him between a rock and a hard place and to force him to contribute the lion's share of the monies Ekar undoubtedly required, since by this stage Mr Hashemi had invested the most and thus had the most to lose should Ekar fail, whilst Mr Mansour appears to have taken the view that these conversations represented normal commercial negotiation between businessmen, during which he had inquired whether there was a chance that Mr Hashemi would agree to buy out his shares and those of the Binladins.

111. There is no need to make a finding of fact about the content of these telephone calls, nor, as Mr Hashemi has characterised them, whether they represented "*an extended attempt at extortion*" on the part of Mr Mansour; one man's '*extortion*' is another's negotiation, and the short point is that such exchanges ultimately went nowhere and produced only antagonism in lieu of agreement.

112. What remains highly probable is that this interaction with Mr Mansour served to harden Mr Hashemi's mindset that there could be no negotiated way forward in terms of a mutually agreed capital injection into Ekar, and whilst the Claimants make the submission that Mr Hashemi was intransigent throughout because he knew he had the option of using the Drag Notice, and wanted to justify availing himself of a procedure that he knew was imminent, the evidence is equivocal: in terms of monies invested to date in Ekar, Mr Hashemi had put in substantially more than the other shareholders and had the most to lose were Ekar to fail due to shareholder disagreement, and for his part he declined to continue to function, as he put it, as the "*ATM machine*" for the company or the other shareholders.

113. What is clear, however, is that after these telephone exchanges Mr Hashemi's patience wore thin. He knew what he thought, and why, and was convinced that he was correct as to the appropriate way forward for Ekar, which he was in no doubt required the injection of significantly larger sums than the US$6 million figure Mr Mansour considered appropriate in the circumstances; Mr Hashemi's evidence was that a sum larger than US$10 million was probably required, but at least for immediate '*bail out*' purposes this figure, as against the alternative figures of US$7.2 million (Hedberg) and US$6 million (Mansour), contained a sufficient '*buffer*' against unanticipated eventualities in the coming twelve months.

114. Mr Hashemi's evidence was that indeed he had read the SHA, and well knew about the Drag Notice provisions. Accordingly, he had consulted Mr Majid of CMS, who had advised favourably about service of such a notice, and so unknown to his fellow shareholders, save for Mr Hedberg and Mr Bhusari, he decided to institute the Drag Along procedure.

115. The evidence is that Mr Hashemi spoke to both Mr Hedberg and Mr Bhusari on the telephone two or three days prior to the service of the Drag Notice, informing them of the Lux '*offer*' to purchase the shares of Ekar for the price of US$1, and duly had obtained their agreement to participate in the Drag Notice, which support then was considered vital because their shareholdings enabled the 51% majority required to get the Drag Notice off the ground: what was

not appreciated then, and indeed only was realised during the trial, is that in any event Polymath Holdings and Mr Bhusari together had more than 50% of the votes without recourse to Mr Hedberg's shares, given that AC Pool's shares had only half the voting rights of the other shares.

116. It is undisputed that no warning or any form of advance notice was given to the remaining shareholders, nor was attention apparently paid to the requirement of Clause 8.3 of the SHA, which in material part reads "*Each of the Company and each Shareholder shall promptly provide the other Shareholders with full details of any offer or proposed offer from any person wishing to enter into any Sale or purchase any of the Company's assets or share capital…*"

117. However, no mention of the Lux offer was made to anyone other than Messrs Hedberg and Bhusari, who by this stage had decided to throw in their lot with Mr Hashemi, and otherwise Mr Hashemi played his cards very close to his chest: his proposed addition to the Agenda for the forthcoming 30 April 2020 meeting had given no hint of what was very shortly to unfold, and taken at face value implicitly suggested that a funding debate similar to those of the earlier meetings would continue.

118. This was the background to the Drag Notice which was served on 27 April 2020, in turn followed at the subsequent Board Meeting on 30 April 2020 by Mr Hedberg's emailed letter of resignation as CEO, and very shortly thereafter by production of an email in support from CMS; the highest that that advice seems to have put it was that there was a "*good argument*" that the Notice had been validly issued.

119. Although upon receipt of the Notice Mr Mansour immediately had engaged Al Tamimi to write a letter of protest contesting the validity of the Notice, and also to issue a document entitled *'Pre-emption Notice*', the die effectively was cast, and a few days later, on 3 May 2020, the Share Transfer forms were executed on behalf of the Audacia and Binladin shareholders by Mr Bhusari, as Director of Ekar.

120. The result of this choreographed pincer movement was the Audacia and Binladin shareholdings were, at a stroke, effectively expropriated by Mr Hashemi, acting through Lux, for the price of US$1; through Polymath, Mr Hashemi now had full control of Ekar, which dominant position, the Court has concluded, had been his ulltimate goal since he had begun investing significantly in the Company, and certainly by the stage of the secondary transactions in which he had purchased part of the Binladin and Audacia shareholdings in order to raise his stake in Ekar to 40%; in fact, by the stage of the Drag Notice he had put in a cumulative total of US$12.5 million, and after Lux had *'purchased*' all the shares consequent upon the Drag procedure, and considerably more was to come.

121. Mr Hashemi, precise, highly intelligent and clearly a successful businessman, accepted in cross-examination that whilst it may have been open to the expropriated shareholders to attempt further to negotiate in face of the Drag Notice which had been served, by that stage he probably would not have accepted any negotiation or further offer: the Court accepts this as a truthful (and realistic) response, since by then Mr Hashemi had all of Ekar's shares locked up in Lux, and was free to do exactly as he wished.

122. There is no dispute that covert utilisation of the Drag Along procedure resulted in full control of Ekar for a nominal US$1, and the stage thus was set for Mr Hashemi to develop and further invest in Ekar absent interference from minority shareholders for whose business judgment clearly he held neither respect nor sympathy: in terms of his private conversations with Mr Mansour, Mr Hashemi said that he had been under the impression at the time that Mr Mansour and the Binladins had had the funds sufficient to add to their investment if they had been minded

to do so, but that in the midst of a Covid pandemic evidently had no wish to make any further substantial financial allocation to the Company. In these circumstances it is logical to conclude that he was attracted to the Drag Notice procedure because he was able to put Polymath in pole position to invest and henceforth to manage and develop Ekar unencumbered by minority shareholders like the Binladins whom, in his view, already had retrieved, via share sale to Mr Hashemi, approximately ten times their original investment.

123. It is against this factual background that the Court must come to a view as to the '*good faith*' requirement contractually underpinning the Drag Notice.

124. Whilst Mr Hashemi's commercial judgment as to the money Ekar required in April 2020 to stave off the spectre of liquidation ultimately may have proved correct, it remains difficult to accept as valid the radical and sharp means he employed to break the impasse.

125. On the evidence, the Court has concluded that it is not possible to characterise Mr Hashemi as having acted in good faith in setting the Drag Along procedure in train, or that in so acting he was acting sincerely: he did what he did simply because he believed that he could and that this course validly was open to him, and obviously he regarded the opportunity as too good (and potentially too beneficial) to resist. Service and execution of the Drag Notice was self-serving and cynical, and was a manoeuvre calculated to benefit no-one but himself; at a stroke Mr Hashemi achieved the entire ownership of Ekar together with the summary ejection of the other (and in his view annoyingly unreasonable and contentious) minority shareholders.

126. In terms of the comparative funding suggestions discussed between the shareholding groups in April 2020, in pro-rated terms there was not a great differential between his approach and that of Mr Mansour, and had Mr Hashemi not dug in his heels and instead elected to make a further substantial equity injection, this simply would have resulted in a redrawing of the 'cap table' and dilution of those shareholders who failed to contribute; in this eventuality the Mansour and Binladin minority shareholdings would, of course, have remained extant, and Mr Hashemi would have done no more than he was thereafter to do subsequent to the Drag Notice process. True it is that absent immediate capital injection Ekar was in imminent danger, but the overwhelming probability is that ultimately some funding compromise between the shareholder groups would have been forthcoming in order to prevent liquidation, which at bottom would have been in no-one's interest. Accordingly, it is not correct that in issuing the Drag Notice Mr Hashemi could be said to have saved the Company: in so far as he 'saved' it, he saved it for his benefit alone.

127. That Mr Hashemi, through Polymath Holdings, was in position and willing put in more money to the Company is amply illustrated by his post-Drag funding of Ekar, which currently stands to the tune of in or about US$23 million: after the Drag procedure was completed Ekar was his to do with as he wished untrammelled by inconvenient minority shareholdings, and through Polymath he now, of course, would be sole beneficiary of such profits as might accrue consequent upon such investment.

128. As part and parcel of the Drag Along procedure Mr Hedberg and Mr Bhusari each sold their shares to Lux, their consolation, as each said in evidence, being that the company they had started, and its employees, now appeared to have a more certain future: Mr Hedberg remained in employment, albeit with the changed title of Managing Director of Ekar, together with access to a future interest in the Employee Stock Option Plan ('*ESOP*') which was to be established, and resulting from the new ownership of Ekar by Lux, which now had the security of financial backing from Polymath Holdings, both Hedberg and Bhusari (whose evidence was that he otherwise received nothing in this sale) were now less concerned about the spectre of the loss of personal liberty consequent on default of any of the significant number of post-dated cheques remaining

in the market which each had signed in order to secure the Ekar car leases. The Court sees no reason to doubt their evidence in this regard, which had the ring of truth.

129. The obvious tactical advantage of gaining control of Ekar by means of the Drag Notice procedure was that for a Drag Notice to issue only a bare majority of the issued share capital, that is, 51%, was required, whereas under the SHA a transfer of shareholding would have required a super-majority of 75%, which hurdle Mr Hashemi no doubt estimated that he would been unable to overcome in face of anticipated opposition from the Binladin interests and from Audacia.

130. The Court has concluded, and so finds, that service and execution of the Drag Notice in the circumstances prevailing represented a perversion of its true nature and purpose, which in essence was designed to enable the majority shareholders to '*drag along*' the minority in face of a favourable and publicised third party offer for the company.

131. In the Court's view Mr Hashemi permitted himself to be overborne by frustration and irritation at what he regarded as a lack of commercial realism on the part of his fellow shareholders which, coupled with his investment in and desire to control Ekar resulted in his decision to ambush them with the Drag Notice and thereby summarily to expropriate their shareholdings. In the course of his evidence Mr Hashemi extolled the virtue of commercial acts being subjected to the '*sunlight test*', and ironically in this context his own actions do not happily embrace such scrutiny.

132. It might also be said that the advice he was given, whether by fellow financiers with whom he said he had discussed the situation or the more formal legal advice obtained from CMS, in the Court's view did not serve his best interests, although the advice as to the acceptability of this course no doubt encouraged him to pursue what he frankly accepted in evidence to be the '*nuclear option*' of the Drag Along procedure.

133. It is also unclear why Mr Hashemi should express surprise, as he did in evidence, that the dispossessed minority Claimants should have decided to sue him for what they regarded as an unconscionable deprivation of their shareholdings. In the Court's judgment he knew that what he had done with the Drag Notice was sharp practice and was at the least susceptible to legal redress, and his subsequent actions evidence this concern.

134. After he had gained control of Ekar a Convertible Loan Note and Debenture was entered into between Lux as lender and Ekar as borrower; purportedly dated 20 May 2020 (but, as accepted at the trial by those acting on behalf of the Defendants, in fact wrongly backdated by his advisers from the date of its actual preparation in January 2022); in short, this was a calculated pre-emptive strike should the Claimants succeed in these proceedings.

135. This Loan Note and Debenture provided for an injection of capital by Lux into Ekar of an aggregate amount of Convertible Notes limited to US$10 million, and as such attracted 8% interest. However, upon an '*Event of Default*' there was to be a right of Immediate Redemption of the Notes then outstanding at 1.5 times the principal amount plus interest if any of the Events delimited in paragraph 5 of Part 1 of Schedule 2; one of these Events is stated, at paragraph 5 (c) to be "*if the claimants in the proceedings brought before the Abu Dhabi Global Market Courts under case number ADGMCFI-2020-015 against, amongst others, Lux and the Company, were to succeed in any of their claims, whether in terms of the restoration of their previous shareholdings in the Borrower's share register and/or in terms of an award of damages in their favour…*"

136. Apart from reference in a document dated 20 May 2020 to legal proceedings not in fact filed until 29 July 2020, it is evident that Mr Hashemi was thinking ahead and leaving nothing to chance,

so that were the Claimants to get home in these proceedings, in whole or in part (the possibility of which clearly must have exercised him) then this contractual provision ensured that he was to receive immediate and enhanced repayment from Lux, and thus protect against any financial depredations as might be contained in any Judgment ultimately to issue in this case.

137. As to the corresponding definitional element of "*arm's length*", it is equally difficult to characterise Lux, the "*Proposed Purchaser*" in the Drag Notice, as having made "*an offer on arm's length terms*", and the Court declines to do so because that does that does not represent the reality of what occurred.

138. The International Valuation Standards Council, in a paper entitled "*Market Value: An Established Basis of Value*" (November 2021) has defined an *'arm's length transaction'* as "*one between parties who do not have a particular or special relationship, eg. Parent and subsidiary companies or landlord and tenant, that may make the price level uncharacteristic of the market or inflated*" so that a '*market value transaction*' "*is "presumed to be between unrelated parties, each acting independently*". On any basis, the sale to Lux could not begin to reach this benchmark.

139. Lux, wholly owned by Polymath, was Mr Hashemi's vehicle. It had been incorporated some five weeks prior to service of the Drag Notice, and Mr Hashemi stood on both sides of the fence in the Drag process and the share expropriation that took place: notwithstanding the protestation made regarding the role of Mr Hashemi's wife in Lux and Polymath 1 and Polymath 2 (which the Court does not accept) the effect is the same: the like individual was the beneficial owner on both sides, and the transfer price of US$1 was entirely nominal and did not represent the market value of the Company in April 2020, despite the considerable financial difficulties it then was undergoing.

140. Accordingly the Court holds that the Lux '*offer*' cannot be characterised as having been made at '*arm's length'*: the Court does not accept, contrary to the contention of Mr Hashemi, that since Ekar was in obvious difficulties and scraping along the bottom it then was worth no more than an offer of US$1 made by Lux, a company the constitution and provenance of which remained unknown to the Called Shareholders until interlocutory order of this Court mandating the provision of particulars requested by the Claimants for the purpose of these proceedings.

141. Mr Choo-Choy argues against the conclusion thus reached under both the '*good faith*' and '*arm's length*' heads, and submits that the fact that the Lux offer was for US$1 only did not in itself disqualify it from being an offer on arm's length terms, observing that it is not uncommon for distressed businesses to be sold for nil or nominal consideration in circumstances wherein an incoming purchaser will have to assume significant liabilities and greatly reduced revenue, and will need to inject substantial funding in order to stave off insolvency and enable the business to survive a going concern. It followed from this, he suggested that when the situation facing Ekar is looked at in proper context, with a raging pandemic cutting off revenues, staff retained on half-pay, and absent funds in the bank to meet current outgoings, the Drag Notice in the terms as issued was both justified and essential if the company was not to fail.

142. However, although he is correct about the adverse financial circumstances prevailing at the time, the Court remains of the view, and so finds, that the purported sale of the Claimants' shares was not made to a bona fide purchaser who had made an offer on arm's length terms: hence it follows that the Drag Notice as served on 27 April 2020 was not valid, and represents a contractual breach of the SHA on the part of the First to Fourth Defendants.

Personal Claims against Mr Hashemi

143. In parallel with the contractual claim, the Claimants mount personal claims against Mr Hashemi for the economic torts of: (i) intentionally inducing or procuring Polymath Holdings to commit breaches of the SHA (at para 68 of the Claim); and further or alternatively (ii) conspiracy by Mr Hashemi with Polymath Holdings and/or Mr Hedberg and/or Mr Bhusari to injure the Claimants using unlawful means, viz breach of the SHA (at para 69: the originally pleaded claim also alleging liability of Mr Gupta and/or Mr Farrow under this head has been abandoned). Thus, in the case of each tort, the breach relied upon is the breach resulting from the invalidity of the Drag Notice.

Inducing breach of contract

144. This cause of action, pursued only in terms of Mr Hashemi's interaction with the First and Second Defendants, attracts no controversy in relation to the fundamental ingredients of this tort, which are set out in *Kawasaki Kishen Kaisa Ltd v James Kemball Ltd [2021] 3 All ER 978 (CA)* as follows: *first*, there must be a breach of contract by the party alleged to have been induced or procured the alleged tortfeasor; *second*, that the alleged tortfeasor should know that his conduct will have the effect of persuading, encouraging or assisting a contracting party to act in breach of the contract; and *third*, that the alleged tortfeasor must intend that the breach of contract should occur either as an end in itself or as a means to that end.

145. Mr Hashemi is not listed as a director or shareholder of Polymath 1 or Polymath 2, although it is plain, and the Court accepts that, as Mr Halpern put it, Mr Hashemi was the "*puppeteer*" in the Polymath Group, and it is he who was in full control and pulling the strings.

146. However, the essential (and dispositive) issue in consideration of the inducing breach claim is the issue of knowledge and intention: did Mr Hashemi know that issuance of the Drag Notice would breach the SHA, and did he intend to procure the breach?

147. That knowledge is the key is made clear in *Allen v Pollock [2020] QB 781 (CA)*, wherein after reviewing the authorities Lewison LJ concluded (at para 17) that "*The touchstone is knowledge*" and that "*mere suspicion is not enough*", the judge referred to the speech of Lord Hoffmann in *OBG Ltd v Allan [2008] AC 1*, where his Lordship observed (at para 39):

> *"To be liable for inducing breach of contract, you must know you are inducing a breach of contract. It is not enough to know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realise that it will have this effect. Nor does it matter that you ought reasonably to have done so"…* albeit his Lordship went on to comment (at para 41) that *"a conscious decision not to inquire into the existence of a fact is in many cases treated as equivalent to knowledge of that fact".*

148. Lord Nicholls agreed, emphasising in his speech that the necessary mental element to establish the tort was intentional interference to persuade the contracting party to breach the contract and that such intentional interference presupposes knowledge of the contract, but that *"an honest belief that the outcome sought by him will not involve a breach of contract is inconsistent with him intending to induce a breach"* and that *"it matters not his belief is mistaken in law"* and *"Nor does it matter that his belief is muddle-headed and illogical".*

15 November 2022 09:11 AM

149. However, his Lordship made clear that turning a blind eye to the situation would not avoid liability, observing (at para 192) that *"If the defendant deliberately turned a blind eye and proceeded regardless he may be treated as having intended the consequence he brought about…"*

150. It follows therefore that for the Claimants to get home under this head the Court must be satisfied that in acting as he did in causing the First and Second Defendants to participate in the Drag Notice, Mr Hashemi either knew that this would constitute a breach of the SHA or deliberately turned a blind eye to this issue.

151. Mr Halpern maintains his characterisation of Mr Hashemi as a malevolent Machiavelli who well knew precisely that, and that he had induced the Polymath subsidiaries to act in accordance with a calculated plan to expropriate the Claimants' shares.

152. However, there is neither hard evidence nor inescapable inference that in so acting Mr Hashemi knew a breach of the SHA was to occur consequent upon his actions. It is a matter of record that Mr Hashemi made positive inquiries in order to confirm the lawfulness of the Drag Notice, consulting Ekar's lawyers, CMS, on the issue, and the advice of 30 April 2020 that was forthcoming after these inquiries was to the effect that the Drag Along procedure was not an invalid course of action in terms of the Drag Mechanics, that there was no requirement for the Proposed Purchaser to be a third party, that there were "*clearly good arguments*" that Clause 17 was not subject to the Clause 13 pre-emption provisions, and that the '*lock in*' provisions applicable to Mr Hedberg's shares did not apply and for the purpose of the Drag Notice had no application on the calculation of the Selling Shareholders' shareholding.

153. There is also evidence from Mr Hashemi that he had also received positive advice from lawyers acting for Lux, Latham & Watkins, but this advice has not been put into evidence, and so attracts minimal weight. Mr Halpern also protests at the timing of the CMS advice, in that it was received after issue of the Drag Notice, but in the Court's view little turns on this: the fact of the CMS advice obviates any case that this was an instance of 'blind eye' knowledge, and in any event this advice was received prior to execution of the Drag Notice on 3 May 2020.

154. Mr Choo-Choy must be correct when he submits that the CMS advice did not have to amount to a guarantee of the correct legal position, and in fact it did not have to be correct on the merits, and that what matters for present purposes is that the advice was sought and given to the Defendants, and that the Defendants, including Mr Hashemi, would have had no proper basis for second guessing the advice as given, so that the existence of CMS advice militates against the contention that at the time Mr Hashemi was on notice at that service of the Drag Notice would constitute a breach of the SHA.

155. The further point raised by Mr Choo-Choy to the effect that Mr Halpern failed properly to put to Mr Hashemi that he knew and intended that service of the Drag Notice was wrong and would amount to contractual breach of the SHA is not determinative, the matter being put in more generic terms, but suffice to say that Mr Hashemi emerged relatively unscathed from such cross examination as took place on the point.

156. Lastly, Mr Halpern's reliance on Mr Hedberg's sudden resignation as CEO, thereby disregarding the contrary advice as to his position in the CMS advice, seems to the Court to take the matter no further. It is highly likely that in so resigning Mr Hedberg had decided on a '*belt and braces*' course in terms of including his shares in the Drag Notice, and it was not put Mr Hedberg that he acted as he did because he knew that the CMS advice was wrong: in fact, although the evidence is that Mr Hedberg and Mr Bhusari were told about the CMS advice by Mr Hashemi in the telephone conversation which took place two or three days prior to 27 April, the probability is

that Mr Hedberg never saw the actual letter of advice prior to its introduction at the final Board Meeting of 30 April, or that if he had he had not read and absorbed its contents.

157. The Court thus finds that the allegation of inducing breach of contract is not made out, and accordingly this claim against Mr Hashemi is dismissed.

Unlawful means conspiracy

158. The second limb of Mr Halpern's argument to attach personal liability to Mr Hashemi is in unlawful means conspiracy, in which regard he throws the net wider to encompass not only the Polymath subsidiaries, SPV 1 and SPV2, but also to include Mr Hedberg and Mr Bhusari.

159. It is broadly agreed that in order to succeed in this claim, there must be established *first*, a combination between Mr Hashemi and one or more of the Selling Shareholders which need not be an agreement in the strict sense but may comprise a tacit arrangement: see *Kuwait Oil Tanker Co v Al Bader (No 3), [2000] 2 All ER (Comm) 271, at para 111*; *second*, that the intention to combine was to injure the Claimant(s), although it is not necessary to prove that their primary intention was to injure provided that there was such primary intention to benefit themselves, and that it was realised that the means of doing so inevitably would involve injuring the Claimants: see *Meretz Investments NV v ACP Ltd, [2008] Ch 244 (CA), at paras 125-127,146 and 172-174* ; (in *JTS BTA Bank v Ablyazov (No 14), [2020] AC 727 at para 10*, the Supreme Court proposed an alternative formulation in terms of whether there was any just cause and excuse for the combination); and third, that the unlawful acts pursuant to the combination were carried out as a means of injuring the Claimants, thereby causing loss.

160. However, where this tort differs from the parallel tort of inducing breach of contract is in the requirement of knowledge, given that it appears no longer settled in English law that knowledge of the unlawfulness of the means employed is required to establish unlawful means conspiracy.

161. In *Meretz Investments, op cit*., the Court of Appeal made it clear that in terms of the element of intention to injure that this intention cannot be made out *"where the causative act is something which the party doing it believes he has the contractual right to do as against the relevant person, notwithstanding that the act would coincidentally cause that person detriment or loss"* (per Arden LJ at para 127), and also (per Toulson LJ at para 174) "*it is a defence to an action for conspiracy to injure by unlawful means if the defendant not only acted in order to protect his own interests but did so in the belief that he had the lawful right to act as he did".*

162. As Mr Choo-Choy submits, this is in accordance with common sense, given that it would be odd to characterise a defendant as intending to injure a claimant where the defendant has acted in the belief that he is legally entitled to behave as he did.

163. Against this backdrop, the majority decision of the Court of Appeal (Arnold LJ at paras 136-144) and Phillips LJ (at 171) in *Racing Partnership v Done Bros Ltd [2021] Ch 233* to the effect that knowledge of the unlawfulness of the means employed is *not* required for unlawful means conspiracy has injected uncertainty into the requirement for establishment of this tort. In this case Lewison LJ dissented (see paras 213-265), and in following the approach of Arden and Toulson LJJ in *Meretz op cit,* observed (at para 255) that *"the important point is that…a belief in a contractual right to do something meant that there was no intention to 'cause harm'"* and that (at 265) *"where the unlawful means consist of a violation of some private right, knowledge of unlawfulness is an ingredient of the tort of intention to injure by unlawful means, and of conspiracy to commit that tort".*

164. True it is that in *Racing Partnership*, Phillips LJ to some extent qualified his view when he further observed (at para 171) that *"the interplay between unlawful means conspiracy and inducing breach of contract (where knowledge of an unlawful breach of contract is an essential element) may merit further examination in a suitable case, but not many cases in which a defendant induces a breach of contract without knowing that he is doing so would be capable of being reformulated as an unlawful means conspiracy."*

165. There is thus a dissonance in the current state of English law on the point, with five eminent Court of Appeal judges (Arnold and Phillips LJJ one the hand and Arden, Toulson and Lewison LJJ on the other) expressing opposing views, which appears to have created an unanticipated distinction between these two related economic torts in terms of what analytically is required to establish such claims.

166. In the course of his final submissions Mr Halpern went so far as to suggest that in this case this court effectively is sitting as an English Court of First Instance, and that this Court is bound by the Court of Appeal decision in *Racing Partnership, op cit*.

167. With respect, this submission strikes the Court as incorrect. This Court is sitting in this case as a first instance court within the jurisdiction of the ADGM Courts, and is **not** sitting as an English court of first instance, and as a matter of *stare decisis* is not bound by this majority decision of the English Court of Appeal. For the purposes of Regulation 1 of the *Application of English Law Regulations 2015*, decisions of the English Court of Appeal are highly relevant in so far as they are demonstrative of "*the common law of England (including the principles and rules of equity), as it stands from time to time*", but those Founding Regulations do not justify the conclusion that this court is bound by the doctrine of precedent by a decision of the English Court of Appeal.

168. It follows that in formulating its decisions in any given case this Court must ascertain the correct position under English law on any particular point, and that in so doing it will have regard to all relevant decisions which form part of English jurisprudence. In the case of unlawful means conspiracy, the examination of which has provoked this debate, the current position is far from settled under English law, given the tension created between the leading cases regarding the necessity for knowledge of the unlawfulness of the means employed, and whether such knowledge constitutes a required element of the tort.

169. In the view of this Court the better view is that in unlawful conspiracy claims knowledge of the unlawful means should be a requirement, and pending clarification from the Supreme Court (Mr Halpern helpfully has ascertained that leave to appeal against the majority decision in *Racing Partnership* has been granted) perhaps one way to square this particular circle, as Mr Choo-Choy suggested, is to focus on the undisputed element of an intention to injure the Claimant: in *Ablyazov, op cit*, for example, several of their Lordships made the point that the tort of unlawful means conspiracy remains a tort of intent, so that whether or not knowledge of unlawful means itself requires to be established, no liability arises under this tort where the alleged conspirator believed or understood that he was legally entitled to act as he did.

170. The Court accepts that Mr Hashemi thought that he was so entitled, since he had gone out of his way to obtain legal advice, and there is no evidence that either Mr Hashemi or any of the alleged co-conspirators knew that the Drag Notice as issued constituted a contractual breach. Mr Hedberg and Mr Bhusari had been told of the CMS advice, whilst Mr Bhusari gave unchallenged evidence that in light of the advice the Company had received from CMS, he understood that the Drag Notice was permissible under the SHA in order to break the current deadlock between the shareholder groups. Nor, as Mr Choo-Choy points out, was the evidence of Mr Hashemi, Mr

15 November 2022 09:11 AM

Hedberg and Mr Bhusari to the effect that they understood the Drag Notice to be lawful properly challenged.

171. During argument some emphasis was placed by Mr Halpern on the assertion that Mr Hashemi had attempted to engineer a deadlock through his 7 April 2020 funding proposal for US$10 million to be provided by the existing shareholders (save for Messrs Hedberg and Bhusari) on a pro rata basis, and that his intransigence on this was in some way indicative of impropriety on his part, but it is difficult to see why this should be inferred to be the case, and in any event Court declines to find that in this regard Mr Hashemi's view was confected for ulterior purpose or that his conduct can be considered to support an inference of unlawful means conspiracy.

172. Evidence wins cases, and on this issue, and notwithstanding the obvious suspicion harboured by the Claimants, there is a dearth of probative evidence which would enable the Claimants to discharge the burden upon them, and accordingly this conspiracy allegation brought against Mr Hashemi also is dismissed: the Court so holds.

The Counterclaims

173. Two counterclaims were raised by the Defendants in this case.

Counter-restitution to Lux

174. This was a claim by the Sixth Defendant, Lux, for counter-restitution to be provided by the Claimants were the remedy of rectification to have been pursued, and in that event Lux counterclaimed for a declaration and consequential order that the Claimants' original shares in Ekar should not be returned to them unless and until the Claimants had provided appropriate counter-restitution to Lux based on the Claimants' pro rata share of the substantial increase in share value that had accrued subsequent to the Drag Notice and which was attributable to the considerable funding of Ekar by Lux.

175. This counterclaim has fallen by the wayside given the Claimants election to pursue the remedy of damages (see para 212, infra), and thus is no longer relevant.

176. Accordingly, it stands dismissed.

Inducement/procurement of breach of the Watar SPA

177. This is a counterclaim mounted by Ekar against AC Network and AC Pool, the First and Second Claimants associated with Mr Mansour and Audacia Capital.

178. The basic facts underpinning this counterclaim are not in dispute. In order to extend its operations in Saudi Arabia, Ekar entered into a joint venture agreement with Watar in relation to a company known as CSR, a Saudi-based shared car rental business.

179. This Joint Venture arrangement initially was constituted by a Co-Operation Agreement dated 9 August 2018 between Ekar and Watar, and a Promise to Sell of the same date between Watar, the Company, and a Saudi national named Talal Saud Arifi, with the Company having a 65% interest and Watar having a 35% interest in the joint venture.

180. This joint venture evolved, and by August 2019 its key terms were contained in the Watar SPA, pursuant to which the Company agreed to purchase Watar's 35% interest on the following basis: Mr Arifi, who had held all the shares in CSR on behalf of the joint venture, undertook to sell and transfer those shares to an ADGM-incorporated company called Ekar 966 Holding Limited, in

which another Saudi national, Mr Anas Mohammed Zaidan held 65% of the shares of Ekar 966 for the benefit of the Company. The other 35% of the Ekar 966 shares was held by Mr Arifi, who undertook to sell and transfer those shares to Mr Zaidan, the result being that Mr Zaidan then would hold 100% of the Ekar 966 shares for the ultimate benefit of the Company, and Ekar 966 in turn would hold 100% of the shares of CSR, the Saudi operating entity.

181. In early September 2019 the shares of CSR were transferred by Mr Al Arifi to Mr Zaidan on the instructions of Audacia Capital/Mr Mansour as an interim measure pending their onward transfer to Ekar 966 so as to comply with the provisions of Clause 2.1(b) of the Watar SPA, but in the event these shares never were transferred to Ekar 966.

182. What appears factually to have happened is that Mr Zaidan had executed a Power of Attorney in order to authorise a law firm, Hourani, to sell the CSR shares in his name, and which then would have enabled Hourani to transfer the CSR shares to Ekar 966. However – and this is the nub of this particular story – on or around 1 May 2020, and shortly after the Drag Notice was served on the Claimants, Mr Zaidan cancelled the Power of Attorney, thus preventing transfer of the shares to Ekar 966 which in turn prevented Ekar 966 from obtaining the economic benefit of taking over CSR's Saudi operations.

183. The Defendants' case is that the 1st and 2nd Claimants, through Audacia Capital and/or Mr Mansour, caused Mr Zaidan, who had been a co-director of Audacia with Mr Mansour, to cancel the Power of Attorney, thereby frustrating compliance with Clause 2.1(b) of the Watar SPA, whilst the Claimants' pleaded response is that Mr Zaidan "was afraid, following the wrongful service of the Drag Along Notice, that the power would be misused by the company".

184. In evidence Mr Hussein suggested, as did Mr Mansour, that whilst everyone at Audacia remained aware of the obligation to transfer the CSR shares to Ekar 966, Mr Zaidan had been worried about the risk of personal liability, and after taking advice from a lawyer, had decided of his own motion to cancel the Power of Attorney to prevent Hourani from transferring the shares to Ekar 966.

185. Mr Choo-Choy attacks this explanation as not making sense, submitting that it was difficult to see how personal liability could be visited upon Mr Zaidan, and that "*it defies belief*" that an arrangement that Mr Zaidan had entered into with Audacia Capital, and ultimately the 1st and 2nd Claimants, should have been unilaterally cancelled by Mr Zaidan: far more probable, he suggested, was that Mr Zaidan had agreed the cancellation with Mr Mansour and Mr Hussein in retaliation for the service of the Drag Along Notice on 27 April 2020 and the ensuing acquisition by Lux of the Claimant's shares shortly thereafter.

186. He also points to the fact that Mr Zaidan, as legal owner of 100% of the shares in Ekar 966 removed Mr Hedberg as Director of that company on 14 May 2020, the inference being drawn that this was done on the instructions of Audacia Capital or Mr Mansour. Thus, he concluded, the 1st and 2nd Claimants practically destroyed Ekar's interest in the business of CSR, which remained in the control of Audacia and Mr Zaidan, and not long afterwards, in July 2020, CSR actually ceased operations.

187. Thus Ekar, now in the control of Mr Hashemi, had to restart its business in Saudi Arabia from scratch, and hence the Counterclaim, which asserts that through Audacia and/or Mr Mansour, the 1st and 2nd Claimants induced or procured breach of Clause 2.1(b) of the Watar SPA by preventing the transfer of the CSR shares to Ekar 966 in retaliation for the Claimants' shares having been '*dragged along*' in April 2020, thereby causing considerable loss to Ekar; Mr Davie

estimated that the 12 month period that it took the Company to set up its new Saudi operation cost in the range of US$5 to US$6.9 million.

188. For his part Mr Halpern castigates this Counterclaim as "*both misconceived and mischievous*" and submits that it should never have been brought.

189. He says that it is misconceived because the allegation (in para 5A of the Defence) of Audacia knowingly inducing the non-transfer of CSR shares by Mr Zaidan to Ekar 966 goes nowhere, because if the shares had been transferred this would have been of no benefit to the Company unless Mr Zaidan, as sole shareholder of Ekar 966, had agreed to hold these shares as agent for Ekar, and that it never had been part of the Defendants' case that Mr Zaidan should have thus acted, nor that Audacia had procured Mr Zaidan to cancel the Power of Attorney he had granted to Hourani.

190. Mr Halpern noted that by early February 2020 Ekar had been exploring the possibility of being able to obtain a car sharing licence in the Kingdom of Saudi Arabia in its own name, despite the fact that it was not a Saudi company, hitherto a requirement: in fact, Ekar subsequently succeeded in obtaining such a licence in the name of Ekar KSA. More to the immediate point, at this stage CSR had liabilities of SAR 20 million, and Mr Hussein's evidence was that he had heard Mr Hashemi say that the Company had no intention of taking over these liabilities: what actually had happened, he asserted, was that in a classic 'Phoenix from the ashes' operation to evade creditors, when Ekar had set up Ekar KSA it had taken over CSR's staff, premises and database, leaving Mr Zaidan with the accrued CSR liabilities.

191. It also had been mischievous even to mount this Counterclaim, Mr Halpern said, because there was no evidence that the First and Second Claimants, AC Network and AC Pool, acting through Mr Mansour, knowingly had induced Mr Zaidan to commit a breach of the Watar Agreement, and indeed Mr Hashemi's own witness statement merely had stated that Audacia failed "whether intentionally or unintentionally I do not know" to procure the transfer, and that to make the allegation on the basis of inference only was improper unless the inference sought to be drawn was the most likely one. Which it was not, the obvious inference, he submitted, being that following the sudden issuance of the Drag Notice Mr Zaidan had taken fright and had not been prepared to remain as sole shareholder of Ekar 966 since he might be exposed to personal liability under KSA law for future decisions taken by Mr Hashemi and Mr Hedberg.

192. The short point here is that it may never be known why what happened occurred as it did. Mr Zaidan was not called to give evidence, and in evaluating this counterclaim the Court is left grasping at straws in the wind. These are murky waters, and absent more cogent evidence the Court declines to make a finding one way or the other. In this regard the burden of proof lies upon he whom alleges, and the Defendants have failed to discharge that burden.

193. Accordingly, diverting though this tale is, this Counterclaim is dismissed.

Incidental Arguments

194. During the course of his oral submissions Mr Halpern has made submissions collateral to his main arguments and from which he sought to garner incidental support.

Breach of Clauses 3 and 8.3 of the SHA

195. Whilst the main allegation made by the Claimants is that the Drag Along Notice was in breach of Clause 17, at para 61.5 of the Amended Particulars of Claim it is asserted that in breach of their

duties under Clause 3, the Selling Shareholders "*caused their nominee directors on the Board to give effect to the Drag Along Notice, notwithstanding its invalidity, by serving it on the Claimants and by instructing Clara [company secretary] to register the transfer of the Claimant's shares to Lux.*"

196. Clause 3 requires each party to the SHA to *"exercise all its voting rights and other powers in relation to the Company to procure that the provisions of this agreement are properly and promptly observed and given full force and effect according to the spirit and intention of* the agreement."

197. As an independent head of claim this finds no place in the Claimants' opening or closing skeleton arguments, perhaps because, as Mr Choo-Choy submits, in itself Clause 3 does not define the substance of the parties' rights and obligations under the other provisions of the SHA, and is dependent upon proof of breach of other provisions of the Agreement, and does not assist in determining whether such other breaches occurred.

198. Clause 8(3) provides that *"Each of the Company and each Shareholder shall promptly provide the other shareholders with full details of any offer or proposed offer from any person wishing to enter into any Sale or purchase of the Company's assets or share capital or loan capital which may from time to time be brought to its or their attention."*

199. Para 61.2 of the Amended Particulars of Claim makes complaint of the failure by the Selling Shareholders "*to provide full details of Lux's offer as required by Clause 8.3 of the Agreement*" and from the failure to give such notice under Clause 8.3 para 70.7 pleads "*that it is to be inferred that they agreed to conceal this information from the Claimants in order to prevent the Claimants from having time to object*".

200. It is difficult to see what turns on this, given that, as this Court now has found, the Drag Notice procedure was *not* subject to the pre-emption procedure within Clause 13, so that information earlier than the Drag Notice would have been nothing to the point, and on the evidence there was no prospect of the Claimants being able to enlist the support of Mr Hedberg or Mr Bhusari, nor was there any prospect of the Defendants selling their shares to the Claimants in place of Lux: in fact, what evidence as there is indicates that if anything it was the Claimants, and in particular Mr Mansour, who wished to offload their shares to Mr Hashemi.

201. Accordingly, the Court agrees with the submission of Mr Choo-Choy that if there was a technical breach of Clause 8(3), such caused no loss, which no doubt is why there is no pleading of any specific loss flowing from the failure to notify pursuant to Clause 8(3).

<u>'Quasi Partnership'</u>

202. The concept of the Ekar SHA creating a 'quasi-partnership' in the sense explained by Lord Wilberforce in *Re Westbourne Galleries [1973] AC 360 at 379* has appeared at various stages of this case in Mr Halpern's submissions, initially in his Skeleton Argument prepared for this hearing, in which (at para 49) he suggested that the SHA created an arrangement formed on the basis of a personal relationship involving mutual confidence, an agreement that all or some of the members shall participate in the conduct of the business, and a restriction upon transfer of shares so that, if confidence is lost or one member is removed from management, he cannot take out his stake.

203. This was allied with the submission that Clause 3 of the SHA required each party to use their rights and powers to procure that full effect is given to the "spirit and intention" of the Ekar

Agreement, with the rider that Clause 3 makes explicit that this is a 'relational contract' imposing a duty of good faith as explained by Leggatt LJ (as he then was) in *Al-Nehayan v Kent [2018] 1 CLC 216.*

204. These concepts generally were invoked during argument as to the validity of the Drag Notice, and latterly regarding the treatment of minority shareholders' shares being bought out at a value which did not involve a discount to their pro-rata value as against the overall value of the company.

205. The purported introduction of these concepts is of no consequence, since this Court does not regard the Ekar SHA as creating a 'quasi partnership', nor for that matter as constituting a 'relational contract' in so far as this imposes on the shareholder relationship obligations over and above that which Leggatt LJ in *Al-Nehayan, op cit*., described as "the normative standard of good faith".

206. This conclusion is bolstered by the terms of the Ekar SHA, which make it clear that the parties intended the Agreement to define their rights and obligations completely: hence the Entire Agreement specification at Clause 28.1 to 28.6, and Clause 30, which, under the heading of 'No Partnership', states that "Nothing in this agreement is intended to or shall be construed as establishing or implying any partnership of any kind between the parties."

REMEDIES

207. Having considered the issues of liability raised in this case, the Court now turns to the question of the Claimants' remedies.

Rectification or Damages?

208. In their Claim the Claimants plead the alternative remedies of damages or rectification of the Company Register pursuant to Section 129 of the Companies Regulations 2020, section 129 providing that anyone who is omitted from the company's register of members *"may apply to the Court for rectification of the register"* and that in its discretion it is open to the Court to grant such rectification: one of the Orders sought in the Amended Particulars of Claim is "Rectification of the Register" pursuant to section 129 by deleting Lux and restoring the Claimants as holders of their respective shares, viz: AC Network (542,138 ordinary shares), Horizon (865,796 82 ordinary shares), Khalil (2,266,582 ordinary shares), AC Pool (8,077,930 preferred ordinary shares), and Dalia Binladin (900,000 ordinary shares).

209. Since these are alternative remedies, the Claimants have been required to elect between them.

210. When such election should take place became something of a running debate during the course of this case, and Mr Choo-Choy's request that this should occur formed part of the argument early in the piece at the time the Claimants made application for a split trial, which application was dismissed by the Court.

211. The issue arose again at the outset of this trial, and the Court declined to accede to Mr Halpern's suggestion that he and his clients should be permitted to wait and be given sight of this Court's Judgment prior to electing. The Court declined to permit its Judgment to act as a form of advisory opinion from the content of which the Claimant then could select, and the fact that no authority could be found suggesting that it should do so reinforced its conclusion. Accordingly, the view

was taken that such election, at latest, was to take place at the conclusion of this hearing, since by that stage the entirety of the evidence, factual and expert, would have been given, and the Claimants would have access to the entirety of relevant information upon which to make a fully informed election.

212. In the event Mr Halpern requested, and was granted, the right to elect two days after the formal conclusion of this hearing, and by email dated 26 September those representing the Claimant formally elected for damages as the remedy they wished to pursue.

213. It follows that the Court no longer is required to consider the discretionary nature of rectification and the contentious issue of counter-restitution in favour of Lux, which represented one of two Counterclaims pleaded in this case, and which now no longer needs to be considered.

Date for Assessment of Damage

214. Contractual breach having been established against Defendants 1 to 4, and the election having been made to pursue the remedy of damages as opposed to rectification, the question arises as to the date at which such damages should be assessed.

215. In *Alcoa Minerals of Jamaica Inc v Broderick [2002] 1 AC 371, at 377G-378D*, the Privy Council confirmed that the starting point for damages assessment is the '*breach date*' rule, namely that damages are assessed at the date of breach, but that *"in a case where damages are the appropriate remedy, if adoption of the breach date rule in assessing them produces injustice, the court has a discretion to take some other date".*

216. In his opening skeleton submissions Mr Halpern canvassed two potential dates in this case as being April 2020, namely the date of breach, and September 2022, the date of trial. No positive case has been pleaded on behalf of the Claimants that the valuation date should be the trial date, but in his closing submissions Mr Halpern submitted that this was unnecessary so to plead, and that in any event both sides had prepared for trial on the basis that selection of the relevant date was a live issue.

217. Whilst accepting that the '*default position*' under English law is that damages are assessed as at the date of breach, Mr Halpern submitted that the court will assess damages at a different date where this would "*more accurately reflect the overriding compensatory principle*". In this regard he accepted that the burden lay upon the party seeking to have the damages assessed at a different date, but that if the circumstances were appropriate for it to do so this was not a heavy burden to discharge.

218. He buttressed his argument by reference to dicta in three cases: *Johnson v Agnew [1980] AC 367 (at 400H-401B)*, wherein Lord Wilberforce observed that in contracts of sale, although the normal rule was that damages were assessed as at the date of breach, nevertheless "*this is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances*"; *Smith New Court Securities Ltd v Scrimge*our *Vickers Ltd [1997] AC 254 (at 265H-267G)*, wherein Lord Browne-Wilkinson considered a situation where the plaintiff had purchased shares in reliance on a fraudulent misrepresentation, and observed that the damages at date of breach rule was "*only a general rule: where it is necessary in order adequately to compensate the plaintiff for the damage suffered by reason of the defendant's wrong a different date of assessment can be selected*", and further, quoting Bingham LJ in *County Personnel (Employment Agency) Ltd v Alan R Pulver & Co [1987] 1 WLR 916, at 925-6*, wherein it was suggested that the breach-date rule "*should not be mechanistically applied in circumstances where assessment of another date may more accurately reflect the*

15 November 2022 09:11 AM

overriding compensatory rule"; and finally *Bunge SA v Nidera BV [2015] 3 All ER 1082, at paras 14-17*, where the Supreme Court noted that in a sale of goods context, the breach-date rule depends on there being an available market.

219. Accordingly, Mr Halpern submitted that in the current case there were three separate but related reasons why damages should not be assessed as at the date of breach: *first*, that there was no available market in which the Claimants could have bought shares in an equivalent private company at the date of breach, and in any event this is not a sale of goods case; *second*, although the Claimants had elected not to seek rectification, which would have meant that their shares would have been restored to them as at the date of trial, giving them the benefit of any change in value since the date of breach, they had not done so because there was a risk that the court might have exercised its discretion to refuse the remedy, effectively leaving the Claimants with nothing, whereas an award of damages as at the date of judgment would be capable of putting the Claimants into the financial position they would have been in had they obtained rectification; and *third*, that having committed a breach of contract on the date of their own choosing, which was after the full force of Covid had been unleashed on Ekar, by the same token it would be unjust to permit the Defendants to dictate the date by reference to which damages are to be assessed.

220. Mr Choo-Choy's response to the argument that the trial date should be the relevant valuation date was to point out that the trial date argument had been adumbrated for the first time in the Claimants' closing address, and that in the circumstances of this case there was no reason why the well-established breach-date rule should not be applied in this case.

221. He accepted that the general rule was subject to being displaced where its application would give rise to injustice, but did not accept that any case had been made out on behalf of the Claimants that any injustice would result from application of the general rule or that application of this rule would not truly compensate the Claimants for their loss.

222. Mr Choo-Choy pointed out that *Johnson v Agnew* and *Smith New Court, op cit*., were cases where the claimants had continued to retain assets which they should not have had, and that in such instances it was easy to see how the breach-date rule could produce injustice because any subsequent fall in the value of the asset is for the claimant's account, hence displacement of the general rule in favour of quantification at a later date in order to provide just compensation to the claimant; as for *Bunge v Videra, op cit.,* this was a sale of goods case, and the issue of the appropriate date of assessment of damages was considered from the perspective of whether there was an available market.

223. To the contrary this was not a sale of goods case, where consideration of whether there is an available substitute market is relevant, and in the circumstances of the present case the Claimants were not seeking compensation in respect of losses suffered as a result of being locked into ownership of an asset they wished to unload, but are seeking compensation in respect of the value of an asset they lost at the time of service of the Drag Along Notice on 27 April 2020, which is the date from which the Claimants were required to transfer their shares to Lux, hence it is logical that the loss was to be measured as of that date (or the date of transfer a few days later on 3 May 2020, the gap of a few days making no practical difference.)

224. Moreover, the breach-date rule for damages assessment was not specific to contracts for the sale of goods, but a rule of general application in respect of breach of any type of contract – see *Chitty on Contracts, 34th Ed., at para 29-105* – and the Claimants' attempted analogy of the characterisation of Lux's compulsory acquisition of the Claimants' shares with a conventional sale of goods case and the relevance of an available market was a false analogy.

225. In terms of the argument that a trial date valuation may be justified by reference to the position that would have pertained if the Claimants in fact had elected for the remedy of rectification, this was irrelevant, because after due (and lengthy) consideration they chose not to do so, and what was not permissible, as part of the argument for the date of assessment of damage, was to speculate as to how this claim, if made, might have turned out, or in this context to ask the Court to make favourable assumptions in their favour as a reason for displacement of the general breach-date rule.

226. The contention that the Defendants should not be able to choose the date of assessment, having earlier chosen the date of service of the Drag Notice, represented a mischaracterisation of the general rule, Mr Choo-Choy argued: the date of assessment of damages is a function of application of the breach-date rule, and it is wrong to characterise this as an exercise of choice by the Defendants, and there was nothing in the authorities to suggest that the breach-date rule applied only where the breach was inadvertent, but not where it was conscious or deliberate.

227. Accordingly, leading counsel submitted, assessment of damage as at the date of breach was consistent with general principle, coincided with the point in time when the Claimants' loss crystallised, and avoided opportunistic reliance on subsequent changes in share value at the time when the Claimants no longer owned the shares and no longer funded the company; in fact, choice of the 2020 valuation date would ensure that the Claimants were not able unfairly to take advantage of the massive funding of Ekar which took place subsequent to the date of the Drag Notice, which clearly served to increase shareholder value over the ensuing two years, whilst a trial date valuation would produce an wholly undeserved windfall for the Claimants when not only were they reticent properly to fund Ekar when the company was mired in the Covid crisis, but they had not contributed to any funding after the Drag Notice procedure, and thus had not been exposed to any risk of loss should the company have failed.

228. The Court agrees with the Defendants' submissions, and in the circumstances of this case declines to depart from the breach-date rule in the assessment of damage.

229. To accede to the Claimants' argument for a trial date valuation strikes the Court as verging on a back door means of achieving rectification absent the need to grapple with the exercise of judicial discretion and the obstacle of counter-restitution, which election for such remedy necessarily would have involved.

230. The Court also bears in mind that had the subsequent substantial investment in Ekar as made by Mr Hashemi/Lux not yielded positive results in terms of increase in share value, and had the value of Ekar fallen following the Drag Notice and consequent share transfer, the Claimants would no doubt have reversed the argument and submitted that they were entitled to the value of their shares as at the date of breach in late April 2020, and that any post-Drag Notice decrease in share value was not a matter which properly should enter the valuation equation: if this be correct, it would be illogical, unfair, and productive of potential injustice were they now to be entitled, via choice of trial date valuation, to take advantage of a post-Drag Notice increase in share value to which they had made no contribution and assumed no risk.

231. Accordingly, the Court now proceeds to assess the valuation of the share capital of Ekar as at 27 April 2020, from which assessment the value of each Claimant's parcel of shares may in due course be calculated.

Expert Evidence: Valuation of Ekar as at 27 April 2020

232. The Court has had the advantage of expert evidence from two reputable experts, Mr Andy Cottle, formerly a Partner in the forensic practice of BDO LLP, based primarily in London and Dubai, who has been retained by the Claimants, and from Mr Alexander Davie, Senior Managing Director in FTI Consulting in London, retained by the Defendants.

233. Mr Cottle and Mr Davie each made an initial Report dated 13 May 2022, together with a Second Report in Reply dated 22 June 2022, with Mr Davie then making a Third Report dated 22 July 2022, this latter Report being made on the basis of information not earlier available to him, before the experts convened and as a result made a Joint Statement, dated 12 August 2022.

234. The terms of reference of the experts were to consider four distinct issues: first, the valuation of Ekar at the 2020 Valuation Date, both with and without the value of the share capital of CSR, the Ekar operation in Saudi Arabia; second, the valuation of Ekar at the Trial Date; third, the increase in the value of Ekar between the 2020 Valuation Date and the Trial Valuation Date; and four, the effect on the value of Ekar consequent upon the alleged failure on the part of the Claimants to transfer the shares in CSR, a Saudi company, to Ekar 966, the Ekar Holdings subsidiary formed to conduct and operate car sharing operations in Saudi Arabia.

235. In light of findings made by the Court in this Judgment, only Issue 1 continues to be pertinent, and the Court proceeds on this basis.

236. It must be said at the outset that valuation of a start-up such as Ekar, which at no stage had been in profit, and which had had a history of periodically being short of money and requiring capital injections in order to continue to function properly, represents a daunting task: when coupled with factoring in the effect of a Covid pandemic which laid waste to its commercial operations and reduced the operation to bare maintenance to stay alive, the task becomes yet more problematic, and almost impossible accurately to divine overall shareholding value in late April/early May 2020: the best that can be done, it seems to the Court, is to make a sensible guess aided by independent expert guidance on the issue.

237. Consideration of this expert evidence has as its logical starting point the differing methodologies employed by Mr Cottle and Mr Davie when opining as to the value to be attributed to Ekar as at 27 April 2020, the date of the Drag Notice.

238. Mr Cottle, retained by the Claimants, takes the view that a Discounted Cash Flow (‘DCF’) valuation approach is the most appropriate to value a company such as Ekar which was at the early stage of its operations and was facing increased losses as the result of the Covid-19 pandemic; in fact, he goes further, and opines that “the only valuation approach that can conceivably be used for Ekar is a DCF valuation”.

239. He emphasises that a DCF valuation requires both the adoption of cash flow forecasts coupled with use of an appropriate discount rate, and that his valuation is prepared on the primary assumption that sufficient funding would have been made available to enable the survival of Ekar either from existing shareholders, or from an investor who was prepared to buy the company on 27 April as a going concern.

240. Mr Cottle’s starting point for his analysis is the financial forecasts in March 2020 made by Ekar management for the purposes of what was intended to be the ‘Series C’ fundraising round (which never in fact got off the ground due to the onset of Covid), coupled with the necessary adjustments which then require to be made in order to address the duration of the Covid-19

pandemic and the effect on short-term revenues, to the ability of Ekar to transition to the 'Ekar Fleet model' (the change of business plan so that the leasing of vehicles from dealers would no longer take place, the cars so used being employed on a revenue-sharing basis), and to the extent and timing of the proposed expansion plans into Thailand and Malaysia.

241. The March 2020 forecast upon which Mr Cottle relies had projected that Ekar's revenue growth would grow rapidly and that it would be in profit in 2022, notwithstanding its loss-making history to-date; moreover over 40% of the revenue projected for 2023 was expected to arise from a change in business plan to what has become known as the 'Ekar fleet' model, which was yet to be implemented, and essentially involved revenue sharing with the car dealers who permitted their cars to be utilised as opposed to the original leasing model, which had required entry into lease contracts of finite duration with such car dealers.

242. In what he termed his 'Base Case,' and using the DCF valuation method Mr Cottle estimated that the equity value of Ekar as at the 2020 valuation date was US39.8 million, including the value of the Saudi operations; he accepted that a valuation as at the end of April 2020 must take account of the adverse effect of Covid, and thus he assumed a deferral in scheduled expansion plans of 12 months, and made adjustments principally involving a revenue reduction for the period May-December 2020 from $16.8 million to $5.23 million, a probability discount of 10%, and an increase in the discount rate initially adopted from 25% to 27.5%.

243. Mr Cottle also prepared an 'alternative valuation' of Ekar, wherein he concluded that on a DCF basis the value of Ekar was US$18.7 million including the Saudi operations, and nil without them: this alternative valuation was based on an assumption of an extended duration of the impact of Covid on revenues, and hence a longer deferral of expansion plans and the adoption of a higher discount rate of 30%.

244. It is hard not to consider the March 2020 forecast prepared by Mr Hedberg as other than a striking case of 'blue sky thinking'. The hard financial facts were, that by end of 2019 Ekar had earned a total revenue of US$6.9 million over four years, albeit this financial forecast nevertheless now projected that Ekar would earn revenue of US$20.6 million in 2020, and that revenue growth would continue at an average rate of 78% such that it would earn revenue of US$116.8 million in 2023. That this is highly aspirational is self-evident, and indeed Mr Cottle accepted that this was so, although by the same token he insisted that this remained achievable: to the contrary, and as Mr Davie drily observed, this scenario did not reflect the most probable outcome, even absent the Covid pandemic.

245. It also strikes the Court that, even at first blush, Mr Cottle's valuations, whether primary (US$ 39.8 million) or alternative (US$18.7 million), cause eyebrows to rise when it is considered that at the date of the Drag Notice most of the new funds injected into Ekar pursuant to the late 2019 and early 2020 primary share subscriptions had been exhausted, and that by the week ending 24 April 2020 Ekar's bank balance was down to AED1,377, 762, and the company was literally reaching rock bottom in available cash terms with a sum to hand which was expected to defray expenses for no more than another two weeks.

246. Thus it is difficult to gainsay the notion that to all intents and purposes Ekar was verging on insolvency as at April 27, 2020; by that date, the evidence is that Ekar management had estimated the funding requirement to be between US$6.6 million and US$9.8 million depending upon the assumptions made as to the severity of the pandemic, and that was merely to allow the Company to continue operating in survival mode, with no new cities launch and no monies to spend on technology development over the coming 12 months: it is a startling statistic that the

estimated funding requirement of US$9.8 million represented a figure higher than the total revenues earned by Ekar since it had started trading in 2016.

247. Mr Davie, retained by the Defendants, differed sharply from Mr Cottle and adopts a significantly different approach. He emphasises the significant difficulty of valuing an early stage company never yet in profit, and notes recognition by valuation authorities that in this context the results of DCF analysis are likely to be imprecise and will depend upon highly subjective judgments on the part of the valuer – which in this instance appears to have been what has happened, given Mr Cottle's reliance upon Ekar management's Series C projections.

248. Mr Davie's opinion is that in the early stage context it is preferable to rely on the value implied by transactions in shares the subject matter of the valuation where such data is available, adjusted as necessary for subsequent events.

249. Accordingly he estimated the equity value of Ekar by reference to the *actual* transactions in Ekar's shares shortly before the Covid-19 pandemic, including transactions between the parties to this dispute, adjusted for the onset of the pandemic: the Series B transactions in question were the first, the secondary sale of Ekar shares to Polymath SPV1 (D1) by Mr Bhusari (D4), the Binladins (C3-5), and AC Network (C1) in late October 2019, and latterly, in December 2019 and January 2020 by way of primary share subscription by AC Pool (C2) and Polymath SPV2 (D2) respectively.

250. Such reliance upon transaction '*comparables*' avoided what Mr Davie considered as a dangerous reliance in a DCF approach which was reliant upon explicit and highly objective assumptions about a business's future cash flows and the risk associated with those cash flows, and thus his conclusion that the actual transactions as in fact took place tend to provide better evidence of the value of Ekar than that which he considered the "inherently imprecise" DCF analysis.

251. Accordingly, and in stark contrast to Mr Cottle, Mr Davie estimated the value of Ekar as at the 2020 Valuation Date to have been in the range of nil to US$2.6 million, including the value of the Saudi operation, and on the assumption that Ekar would have avoided insolvency absent use of the Drag Notice, although if the shareholders had been unable to agree how to fund Ekar its value on entering insolvency would have been nil.

252. Mr Davie has explained the three steps he used to arrive at his suggested range thus: his starting point was with a pre-pandemic value of Ekar of US$17.2 million, which reflected the average of two figures: the average of US$20 million, the pre-money value at which, on the evidence of Mr Hussein, Polymath and AC Pool invested in Ekar under the Series B round shortly before the onset of the Covid-19 pandemic, and the figure of US$14.4 million, which represented the implied value of Ekar based on secondary transactions in its shares during Series B; second, he adjusted that figure of US17.2 million by 50% for the effect of the Covid pandemic based on movements in the share price of listed companies in the car sharing industry; and third, he further adjusted that figure to reflect the funding required for Ekar to survive the pandemic, so on the basis of Mr Mansour's proposal this would have been US$6 and under the Polymath proposal from Mr Hashemi this would have been US$10 million.

253. There is no avoiding this fundamental division of approach. Both experts gave clear evidence, although in the Court's view Mr Davie's evidence was considerably the more cogent and persuasive when placed against the '*rose-tinted*' approach adopted by Mr Cottle; in the circumstances of this case the Court neither accepts nor understands Mr Cottle's observation that "the only valuation approach that conceivably can be used for Ekar is a DCF valuation".

254. In the view of the Court the '*Davie approach*' represents the most realistic and relevant in circumstances of a start-up not yet in profit, and accepts that the valuation of Ekar as at end April 2020 should be based upon recently concluded transaction prices grounded in commercial reality, which, as even Mr Cottle accepted in evidence, was immune from the uncertainty of future earnings or future cash flows inherent within the DCF methodology.

255. In this context Mr Choo-Choy drew attention to valuation literature which was clear as to the utility of comparable transactions, citing the International Private Equity and Venture Capital Valuation Guidelines dated December 2018 and also the IVSC 'Perspectives Paper on Market Value' dated November 2021, which opined that it was "*imperative that the valuer carefully considers the relevant market evidence available" and "compares that appropriately to their subject asset, and makes the necessary adjustments to that comparable evidence to ensure that the subject asset is valued appropriately as at the valuation date*".

256. Mr Cottle accepted that this was relevant valuation theory, but in turn laid great emphasis upon the fact that this approach assumed that the transactions in question "*were between counterparties acting at arm's length and of their own commercial free will*" in order for the concluded prices to constitute evidence of market value, the IVSC definition of '*market value*' being to the effect that this concept "*presumes a price negotiated in an open and competitive market where the participants are acting freely*".

257. Mr Cottle was resistant to the thesis that the Series B comparables relied upon by Mr Davie actually represented instances wherein the participants were '*acting freely'*; this was his primary objection given his view that "*there are indications that the existing shareholders may not have been 'willing sellers' acting 'without compulsion"*.

258. This conclusion was expressly founded upon Mr Cottle's consideration of the evidence given on behalf of the Claimants by Mr Hussein, at the time of this dispute the Senior Associate within the investment team at Audacia Capital, the parent of the 1st and 2nd Claimants. In Mr Cottle's 2nd Report (at para 4.45) he considers Mr Hussein's witness evidence explaining the power dynamic existing between Polymath as buyer, most of the existing shareholders as sellers and the Company "*such that the existing shareholders…were effectively left with no choice but to accept what Polymath was prepared to pay*", and that "*as such there is significant doubt whether those shareholders…were truly 'willing sellers' acting without compulsion and whether the transactions were at 'arm's length'" and thus that the price implied by these transactions did not reflect market value*".

259. This followed an earlier passage in his 2nd Report (at para 4.37) where Mr Cottle states that there was nothing he had seen to suggest that the underlying performance of Exar over the period from April 2019 (when Polymath made its initial investment) to January 2020 (when it was granted the B2 shares) which would justify a downgrading in the valuation of Ekar from the implied valuation of USD25 million to an implied valuation of USD20 million arising from the investment in Series B2 shares, and thus that "on that basis, the price at which Polymath invested to secure the Series B2 shares in January 2020 should be viewed as no more than the price at which it was able to compel the company to accept as the price of securing much needed funds", and that as a result he did not regard it as being indicative of a lower value for Ekar; from this followed his broad conclusion (at para 4.41) that Mr Davie's reliance upon the secondary transactions in October 2019 and the investments made by AC Pool and Polymath in December 2019 and January 2020 was "inappropriate".

260. It is unusual to find an independent expert basing an opinion on the evidence given by one side only, and thus descending into the factual arena, and Mr Hussein's evidence that "commercial

15 November 2022 09:11 AM

calculations" played their part in the Series B transactions does not indicate, and the Court does not accept, that the Series B transactions should be treated as other than arm's length transactions between willing buyers and willing sellers where the parties had acted knowledgeably in the circumstances prevailing: transactions made at a price certain, and no doubt for prudent commercial reasons which recommended themselves to the sellers at the time does not, it seems to the Court, translate into '*compulsion*' or coercion serving to invalidate reliance upon such data when valuing Ekar at the relevant date.

261. In this context the Court has not overlooked Mr Hashemi's tough negotiating tactics, in particular his statement that he would cash out and exit the business or convert the April 2019 Polymath Convertible Loan at US$15 million if his proposals were not accepted: Polymath remained bound by the terms of the Convertible Loan Agreement which had been entered into on an arm's length basis, and the fact that Mr Hashemi was pushing hard in negotiations and driving a hard bargain does not amount to compulsion, and there is nothing to suggest that the Claimants were compelled to enter into the Series B transactions as opposed to viewing those transactions as suiting their commercial interests.

262. As Mr Cottle acknowledged in cross-examination, the Claimants had the option to refuse the terms on which Mr Hashemi was proposing to invest, and indeed had the option of continuing to look for other investors if they did not like the terms proposed by Mr Hashemi: it is common ground that Audacia Capital and the Binladin family investment group were substantial in their own right, and were in a position, should they so have so chosen, to provide further funding if other investors were unwilling to invest, and in fact if they did not like the terms proposed by Polymath in connection with the secondary sale in October 2019 and the primary share subscriptions in December 2019 and January 2020, it would have been open to them to buy out Polymath's interest in the Convertible Loan Agreement.

263. It follows from the foregoing that the 'compulsion argument' adopted by Mr Cottle from his reading of Mr Hussein's evidence strikes the Court as less than compelling and unpersuasive, and in the view of the Court does not undermine the reliance placed by Mr Davie upon the relatively contemporary Series B transactions as a starting point for his valuation analysis.

264. Mr Cottle also relies upon several subsidiary points.

265. He asserts that Mr Bhusari was experiencing "*liquidity issues*" at the time of the secondary sale of his shares to Polymath SPV1 in October 2019, although the facts are that AC Network also sold shares to Polymath SPV1 as part of the same transaction for the like price as Mr Bhusari, and it is unlikely that Mr Bhusari's personal issues would have impacted on the price agreed in those transactions: in any event this clearly was irrelevant to the primary share subscriptions by AC Pool and Polymath SPV2 in December 2019 and January 2020.

266. Mr Cottle's further observation that "*secondary transactions involving small shareholdings often attract a discount" is uncontroversial in isolation, but in the event could only apply to the secondary share sale in October 2019, and not to the primary share subscriptions by AC Pool and Polymath SPV2 in December 2019 and January 2020 respectively"*. Moreover, as Mr Choo-Choy submits, the secondary share sale in October 2019 was far from a sale of a small and uninfluential shareholding since it was a sale to Polymath SPV1 of 34.8% of Ekar, and conferred a blocking minority vote in respect of Reserved Matters, and in any event, the fact that a minority shareholding attracts a discount relative to a '*pro rata*' valuation of the entire share capital does not detract from the nature of a discounted price as a market price reflecting the reduced market value that a minority shareholding normally would attract in comparison to the sale of a majority shareholding.

15 November 2022 09:11 AM

267. The criticism of Mr Cottle about the absence of proper valuation of the Series B1 and B2 shares and the fact that their price in December 2019 and January 2020 was "*a negotiated discount against an informal valuation that was already out of date*" refers to the fact that Polymath had advanced a US$2 million Convertible Loan on the basis of an implied valuation of US$25 million, but then subsequently converted the loan into Series B2 shares at an implied valuation of US$20 million, and that because the implied valuation on conversion was US$5 million lower than when the Convertible Loan was entered into, this produced the conclusion that the subsequent valuation of US$20 million represented "*no more than the price …which [Polymath] was able to compel the Company to accept as the price of securing much needed funds*." The Court agrees with Mr Choo-Choy that this represents a new angle on the thesis that the Series B transactions were agreed by the Claimants under compulsion, which argument the Court has rejected.

268. Three other matters of significance have been raised by Mr Cottle regarding Mr Davie's analysis.

269. First, he contends for the use of the post-money transaction implied by the primary share transactions in December 2019 and January 2020 of US$30 million as opposed to the implicit pre-money valuation of US$20 million, given that focus upon a post-money valuation recognises that if a company is receiving a cash injection, it is able to deploy that cash and grow the business.

270. However, as Mr Choo-Choy points out, almost half of the monies received for the December 2019 and January 2020 share transactions had not resulted in any fresh cash injection into the Company: of AC Pool's investment of US$5.5 million only a net amount of US$3 million was injected into Ekar because US$2.5 million of the principal sum went to repay Audacia for its historic loans to Ekar, whilst of the investment of Polymath SPV2 of US$7million, the only '*fresh*' cash was US$3.5 million went into Ekar, the balance being to pay down Polymath's US$2 million convertible loan of US$2 million and some further Polymath loans totalling US$1.5 million – hence of the face value investments represented by these transactions, the actual investment of new cash into Ekar was but US$6.5 million.

271. Moreover, the Court accepts the contention that at least part of the 'new cash' injection would have gone to fund Ekar's losses rather than increase the value of the business, which by then clearly had begun to stall: the imminent onset of Covid aside, the performance of the business during 2019 had fallen substantially below what had been projected in the first quarter of 2019, both in terms of projected revenue growth (AED 50 million/approximately US$13.5 million) appearing in the Series B presentation) as against the audited revenue for 2019 of US$4.8 million), this loss in growth being mirrored in significant diminution of fleet size (2019 projection in the Series B presentation of 1,985 cars, as against an actual 2019 fleet size of 1,232 cars).

272. In addition to the substantial under-performance as against the Series B projections, the fact remains that there were shareholder rumblings about the performance of Ekar management and suggestions of financial mismanagement by Mr Mansour/ Audacia about Mr Hedberg, and by this stage Ekar had not secured ownership of the CSR operations in Saudi Arabia, anticipated to be Ekar's largest potential market.

273. Mr Cottle also suggests that in placing reliance on the Series B transactions, Mr Davie failed to give due account to the growth in Ekar in the two year period January 2018 to January 2020, and hence, since there had been a valuation of Ekar in early 2018 of US$25 million, it could not be the case that Ekar had diminished to the average figure of US$17.2 million propounded by Mr Davie to represent the early 2020 valuation.

274. To this Mr Choo-Choy points out that the figure of US$25 million had represented a rough and ready estimation of value during the Series B fundraising round, based on an assumption of a

15 November 2022 09:11 AM

fleet size of 500 cars with each being notionally worth US$50,000 in revenue terms, and that although Polymath had committed to its US$2 million Convertible Loan on the basis of an implied US$25 million valuation, after commercial negotiations between all parties this figure had been reduced to US$20 million.

275. Moreover, such expansion as had occurred in the Ekar fleet size and launch into the Saudi market had occurred by December 2019 and January 2020 when the primary share transactions had been concluded, in particular the Saudi operations had been launched in November 2019 and in Sharjah in December 2019, so that the 2019 revenue growth would have been apparent in the period November 2019 to January 2020, and hence these new business developments were already priced in to the US$20 million valuation under the primary AC Pool and Polymath SPV2 share transactions in December 2019 and January 2020 respectively.

276. In light of these factors, the Court does not consider these latter two arguments to be valid criticism of Mr Davie's methodology.

277. Mr Cottle's other bull point in his criticism of the Davie approach is in terms of alleged double-counting: he says that when Davie had proposed reducing the Ekar share value to take account of the shareholder funding required during Covid (whether of Mr Hashemi's US$10 million or Mr Mansour's alternative of US$6 million), to make an additional 50% reduction (a percentage he did not disputed) in estimated share value to reflect the effects of Covid, this was, in practical terms, to double-count the Covid effect.

278. In response Mr Choo-Choy quotes the very significant industry-wide reduction in share value due to Covid of large publicly quoted companies such as Hertz (72% fall) and Avis (57%), albeit both had retained ample liquidity to defray their ongoing cost base, so that there did not seem to be any question of those companies not have immediate access to sources of significant funding, whereas the dire financial straits in which Ekar found itself at the time it was confronting the Covid crisis made it essential that it should receive substantial funding, given that it was almost at rock-bottom in term of cash availability as at 27 April 2020.

279. In addition he pointed out that this was an odd stance for Mr Cottle to take in the circumstances given that his competing DCF valuation had posited that not only would an investor have to have been willing to pay US$39.8 million in order to buy out the existing shareholders, but in addition such investor would have been willing to put another US$31.8 million of funding into Ekar over the period May 2020 – September 2022, thereby contributing an overall total of US$71.6 million, which in turn meant that it was a practical certainty that a venture capital investor who was required to fund to this extent reasonable would expect that the funding requirement would be reflected in a lower share price as at the date of acquisition.

280. Looked at in the round, the Cottle and Davie approaches are chalk and cheese, and the Court has little doubt but the Davie approach to valuation of Ekar as at the 2020 valuation date is the much to be preferred, and proceeds on this basis.

281. Obviously there remain significant imponderables, and indeed at bottom such valuation represents an inherently unsatisfactory exercise given that it is not possible to conform to the norms of the International Valuation Standards Council, for example in terms of 'market value', which assumes a proper marketing period and a willing buyer and a willing buyer and willing seller negotiating at arm's length, when in this instance clearly there was neither: as Mr Mansour graphically expressed the situation in his evidence, Ekar faced a dire situation with Covid wreaking havoc, and Audacia "*wouldn't have been able to have someone who listens, let alone get to a stage where you can discuss it…*"

15 November 2022 09:11 AM

282. However, in common with the experts, ultimately the Court, has to do the best that it can on the evidence before it in an attempt to produce a sensible valuation figure for Ekar as at the date of breach, and after reflection has concluded that the notional figure to arrogate as representing the value of the entire share capital of Ekar as at 27 April 2020 is the sum of US$3 million, a figure which represents a slight premium over Mr Davie's postulate but which the Court views as not unreasonable for a first stage company which, whilst obviously enduring a highly difficult period during Covid, nevertheless retained considerable promise given appropriate management and funding.

283. The Court so holds.

Additional Expert Evidence: Valuation of the Claimants' Individual Shareholdings

284. Unfortunately this determination of shareholder value as at 27 April 2020 is not the end of the story.

285. When the directions as to the ambit of the expert valuation evidence were made, that which was overlooked was that as a practical necessity it was insufficient to arrive at simply a valuation for the entire share capital of Ekar, but that it remained necessary to value the individual parcels of shares held by the Claimants since, if and in so far as there were to be judgment on liability, judgment would need be rendered in terms of those individual claims.

286. It therefore follows that in light of this Judgment more analysis remains to be done, and Mr Cottle and Mr Davie will be required to consult further, and if possible to agree, upon the value of the shareholdings individually held by the Claimants as at the date of breach.

287. In turn this requires further guidance from the Court as to the treatment to be accorded to the valuation of minority shareholdings, and whether there should be a discount.

288. Mr Halpern says that in accordance with the fundamental principle of compensatory contractual damages there should be no discount on the basis that having expropriated the Claimants shares, the Defendants should not be able to take advantage of their own wrongdoing. He cites the situation of an unfair prejudice petition, so that where the Court makes an order for the majority to buy out the minority, the Court retains a discretion to ascertain the appropriate buy-out price without making any discount for the fact that the petitioner is a minority shareholder: *Re Bird Precision Bellows Ltd [1986] Ch 658*. Counsel recognises that this is a statutory power, but maintains that like considerations apply where the minority shareholder claimant asserts a claim for compensatory damages, which, so far as is possible, is to put the Claimants into the position they would have been in absent the contractual breach in question.

289. Mr Halpern further points out that it is noteworthy that the Drag Notice procedure does not make any provision for a discount for minority shareholdings, and in terms of the suggestion that the Claimants' shares carry no preference in a liquidation event, if the value of the shareholdings is assessed at a substantial value, there would be little prospect of and little value in having a liquidation event.

290. Mr Choo-Choy disagrees. At the outset he points to the concept of '*value*' of the share capital of Ekar as assessed by (and mutually agreed) by both experts as that of '*market value'*, that is, per the International Valuation Standards Council, Perspective Paper on Market Value, para 30.1, which is "*the estimated value for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm' length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion*".

291. He further submits that valuation of a majority shareholding absent a minority discount is a narrow principle applying to unfair prejudice claims in certain limited circumstances, where a common form of relief in successful such claims is an order by the Court that the complaining minority shareholder's shares should be purchased by the majority for a price based on the 'fair value' of the shares, and that in the context of such buy-out orders the application of a discount to reflect purchase of a minority shareholding "*is a general rule…unless the company is a quasi-partnership*", per the Privy Council in *Shanda Games Ltd v Maso Capital Investments Ltd [2020] UKPC 2*.

292. Accordingly, given that even in unfair prejudice claims application of a minority discount represents the general rule, and since in this Judgment this Court has held that Ekar should *not* be characterised as a 'quasi-partnership', this argument falls away, and the Court is unpersuaded that the circumstances warrant deviation from the general rule, and therefore holds that the shareholdings in question are to be valued as minority shareholdings and not simply on a numerical *pari passu* basis, and the experts are so directed.

293. Coincident with this Judgment, the Court therefore issues an Order requiring such further assessment to take place by the experts having regard to: (1) the Court's finding as to the market value of the entire share capital of Ekar; (2) the characteristics as to voting rights, size of shareholding, and preferential rights of distribution of surplus assets (as may be the case) of each Claimant's individual parcel of shares as at 27 April 2020.

294. If and in so far that it may be necessary, naturally the Court will entertain further submissions from Counsel if the values of the individual parcels of shares cannot be agreed.

Issued by:

Linda Fitz-Alan
Registrar, ADGM Courts
15 November 2022