Neutral Citation: [2021] EWHC 1988 (Ch)

Claim No: CR-2020-000937

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS
OF ENGLAND & WALES
INSOLVENCY AND COMPANIES COURT LIST

IN THE MATTER OF HOCHANDA LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Remote Hearing
13 July 2021

BEFORE:
I.C.C. Judge Jones

B E T W E E N :

JAMIE MARTIN

Petitioner

- and -
(1) HOCHANDA LIMITED
(2) PAUL WRIGHT
(3) VALERIE KAYE

Respondents

JUDGMENT
(Approved)

Mr Anthony Jones (instructed by **Phillips Solicitors**) for the **Petitioner**

Mr Matthew Bradley (instructed by **Gresham Legal**) for **Second and Third Respondents**

Hearing dates: 12 and 13 July 2021

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I.C.C. JUDGE JONES:

A) The Preliminary Issue

1. This judgment decides a preliminary issue ordered on 5 October 2020 in respect of an amended, unfair prejudice petition, originally presented on 7 February 2020. The issue, the parties agree, is one of fact only, to be decided on the basis of balance of probability. It is anticipated that determination of the issue will assist the parties by achieving the overriding objective, but that nevertheless it may not, subject to argument, dispose of the petition. The issue is:

> "Did the Respondents effectively prevent the Petitioner from selling his shares in [Hochanda Limited] in April 2018?"

B) The Company's Share Structure and Its Articles of Association

2. The petition sets out that the nominal share capital of the company, all of which appears to have been paid up or credited, as £1,861,849.67 divided into 96,184,967 shares of £0.00001935697 each. Mr Martin holds 10 million ordinary "A" shares, purchased by him in April 2015, and 2000 ordinary "C" shares purchased in August 2017. He has a million share options vested in his own name, each option being exercisable in exchange for an ordinary "C" share of £0.00001 in capital of the Company. Although he has a sizeable number of "C" shares, it's accepted by the parties for the purposes of value and for the purposes of this decision that the key class of shares is the "A" shares.

3. Bearing in mind that we are concerned with the question of the sale of shares, it is clearly important to look first at the company's Articles of Association. I will summarise my understanding of those articles. I wish to make clear, in case anybody thinks of using this summary for other purposes after the judgment is transcribed, should that occur, that because it's a summary, it is inevitably inaccurate, in the sense that it will leave out important details that would need to be followed. That will not matter for this judgment but it would matter if anyone was trying to exercise rights under the terms of the articles.

4. Subject to that important proviso and the fact that construction has not been the subject of argument:

a) Article 9(1) provides that "C" shares may be transferred at any time to any person subject to Article 10.4.3, which applies if the transferor is a "Relevant C Shareholder", the holder of at least 1 million shares in the issued share capital, which Mr Martin is. It introduces pro rata pre-emption provisions amongst the various classes of share.

b) Article 9(2) provides that "A", "B" and "D" shares may be transferred at any time to a "Permitted Transferee", which in summary refers to family and nominees. It is not relevant.

c) Article 10 provides pre-emption rights which apply whenever Article 9 does not if a shareholder of any of the issued share capital wishes to transfer or dispose of their interest. In essence but very much in summary (and to that extent inaccurate): the price will either be agreed between transferor and the directors or be subject to a transfer notice resulting in certification of the price by the Company's auditors/accountants whilst acting as experts. It will be at a fair value on a going concern basis, assuming a willing seller/purchaser without restrictions, but with an appropriate discount for a minority interest. Once valued the shares will be offered to those specified for the particular class of share and potentially to a third party nominated by the Company. The offer will be open for acceptance for 20 business days. If, as a result, there are no purchasers, the Company may purchase any unsold shares at the sale price. There is no apparent provision for the unsold shares if the Company does not do so but nothing has been raised or relied upon in this case as a result of that.

C) The Petitioner's Case

5. Mr Martin has not taken steps to implement the Articles of Association and his evidence during cross-examination is that he had not read the Articles before this case. He has, in effect, chosen to ignore them, and instead, contends that Mr Wright and Ms Kaye chose to take steps, as specified in correspondence written on their behalf by Mr Hart, which prevented him from selling his shares. It is to be noted they are not the only shareholders, either of the A or the C shares, but, as will appear, it won't in fact be necessary to turn to that fact for the purposes of my judgment.

6. It is his case that as a matter of general legal entitlement, and subject to any contra provisions in a relevant shareholders' agreement or other contract, a shareholder has the right to sell their shareholding as they see fit, for the highest price they can obtain. That

is set out in the skeleton argument of Mr Anthony Jones, who appears for the petitioning creditor. It is, of course, the case that a relevant shareholders' agreement includes the contract to be found within the Articles of Association. It is essential that they be read to address any rights concerning the transfer of shares. However, on the basis, as contended, that Mr Martin is a shareholder who has the right to sell his shareholding as he sees fit for the highest price, his contention is that the majority shareholders are not entitled to act in a manner which prevents the minority from exercising that right of sale. It is obvious that this contention needs to address Article 10 and, as will appear below, a fundamental problem that it does not.

7. Mr Anthony Jones in his skeleton argument explains that Mr Martin relies upon the approach of Mr Justice Hoffmann, as he then was, in Re A Company, (No 8699 of 1985), [1986] BCLC (382). In that case the learned and eminent judge was asked to consider whether it was arguable for the purpose of a strike-out application that the sale to the highest bidder had unfairly been prevented by this conduct. He said this, as set out in the skeleton argument:

> *"The question is, therefore, whether on the facts alleged in the petition it is fairly arguable that the board have done or omitted to do something which has unfairly prejudiced the petitioners by depriving them of the opportunity to sell their shares to the higher bidder or diminishing their chance of being able to do so. It seems to be at least arguable that the chairman's letter of 18 November had this effect. It must be at least ... be at least arguable (although difficult to adduce positive evidence in support) that the effect of the letter was to dissuade shareholders from accepting the rival offer and therefore to impair the petitioner's chances of selling their shares ..."*

8. It is, of course, to be remembered, however, that in the case of this preliminary issue, there is a provision which does not allow the opportunity to sell shares to a higher bidder, as proposed. There are pre-emption rights within Article 10 which will lead to the valuation and sale procedure that I have described.

D) Background

9. The background to the case can be found within a document entitled "Common ground and issues."

a. The First Respondent ("the Company") carried on, until the sale of its assets in July 2019, a business in the running of a television home shopping channel which was broadcast through various outlets. The Company was founded by the Petitioner and the Second and Third Respondents.

b. From its incorporation on 10 April 2015, the Petitioner served as Chief Executive Officer of the Company until September 2017, when he resigned and retained a minority shareholding in the Company (10,000,000 Ordinary A shares and 2,000 Ordinary C shares), together with 1,000,000 share options. Since its incorporation, the Second and Third Respondents have (together) been the majority shareholders of the Company. Since 11 December 2015, the Second and Third Respondents have also been directors of the Company.

c. In December 2018, the Petitioner became CEO of another company known as Ideal Shopping Direct Limited ("Ideal"). Following this appointment, and further to the Petitioner's conduct (the lawfulness of which is not in issue), a number of key suppliers of the Company terminated and/or did not renew their supply arrangements with the Company and instead diverted their business to a subsidiary of Ideal known as Create & Craft.

d. At a board meeting held on 17 June 2019, the board considered various possibilities in relation to the Company's financial difficulties and resolved to explore a possible sale of the Company to a third party known as TNUI Capital or a sale of the Company's assets to a new company owned by the Second and Third Respondents (Maxado Limited).

e. At a further board meeting held on 17 July 2019, the Company allotted 9,150,000 new shares to the Second and Third Respondents, and the board resolved to accept the offer of asset purchase made by Maxado Limited.

f. Following the sale on 22 July 2019, Maxado Limited was renamed Hochanda Global Limited ("HGL"), and HGL then carried on substantially the same business

as previously undertaken by the Company. In December 2019, the Respondents gifted shares in HGL to certain shareholders in the Company, not including the Petitioner.

E) The Statements of Case

10. I will look next at how the parties have pleaded the case. The amended petition pleads the case in the following way: Steps were taken to sell the shares shortly after Mr Martin left the company in or around December 2017, March and April 2018. In mid-April 2018, he appointed, which is the pertinent starting point for the facts, Mr Lloyd Thomas or Athene Capital as an agent to sell his shares. It is the premise of the case as pleaded that Mr Martin/Mr Lloyd Thomas would require information about the company in order to sell the shares and it is asserted that such information would need to be at least as detailed as that which was offered to potential investors in July 2017, when shares were offered by the company to the general public through the investment portal ShareIn Limited, with a substantial volume of information, including management accounts and key statistical data.

11. I pause there to observe, although for reasons which will become apparent this too need not feature for the purposes of my decision, Mr Martin did have all that information, at least at some stage, because he purchased some of the shares. It is rather puzzling, therefore, why he would assert within the petition that this was the sufficient information that was required, when he had had it. I think, from what I've heard during the hearing, that his answer is that he couldn't find the information on the relevant website when seeking to sell his shares and that the information must have been removed. The problem with that answer is that he accepted during cross-examination that he could have got the information from another source. This evidence resulted from Mr Bradley, counsel, asking him how it was that he was able to include the document setting out the information within his disclosure. This part of his statement of case cannot be sustainable when he has access to the very information he states he needed.

12. The petition proceeds with reliance upon the fact that on 25 April 2018 Mr Lloyd Thomas wrote by email to the Company's agent, Mr Adam Hart of LBC Partners, who was also a non-executive director of the company, as follows (as summarised in the Petition):

"(i) stating that the intended lower price limit for the sale of the Petitioner's shares was the price at which N&S Ventures had purchased shares in the Company; (ii) seeking confirmation that it 'was not the Company's or other major shareholder's (excluding [N&S Ventures]) intention to prevent, impede, pre-empt or insist on co-sale;' and (iii) seeking provision of management accounts [not to be given to Mr Martin] for the previous six months and permission 'to share these with prospective purchasers under [a Non-Disclosure Agreement]".

13. It is Mr Martin's pleaded case that the response on 25 April:

"imposed an excessive burden upon the Petition in his attempts to sell his shares, without reasonable justification, since the Petitioner was unable to: (i) present any potential purchasers with the option to commence negotiations for the purchase of shares additional to his own shareholding at a reasonable price for a bulk investment; (ii) present any potential purchasers with any comfort that any attempted purchase would not be frustrated by the Respondents; or (iii) present any potential purchasers with any of the information which would reasonably be expected by such purchasers".

The result being that he could not sell his shares because of:

"(i) their refusal to provide the Petitioner with up to date financial information that would be required by any purchaser before purchasing the Shares; and (ii) effectively putting a minimum price cap of 25 pence per share on the Petitioner's Shares which was above market value for the bulk size sale of the shareholding".

14. The Amended Points of Defence start with a summary of the case and include a denial that the petitioner was at any time prevented from selling his shares on the basis of the facts and matters set out at paragraph 25. It states that the allegations are without merit and that it's to be inferred that the reason why they are advanced is born of the petitioning creditor's knowledge that on any proper evaluation of his shares at a later date, they are

worthless. For reasons which will become apparent, I need not address that last proposition.

15. Turning to paragraph 25, it accepts that the company refused to provide management accounts but asserts from the contents of the relevant response email from Mr Hart, that this was *"for the time being"* and that it was clear that they may have been released once the identity of a prospective purchaser was known and cleared as being an appropriate person to receive them. It is also accepted that a 25p minimum price representing the most recent issue price was specified, but that this was done in the context of a share subscription price for any additional shares that any eventual purchaser may seek to purchase; not in respect of the sale of Mr Martin's shares. It is also pleaded that instead of preventing the sale, the 25 April 2018 response made clear that neither Mr Wright or Ms Kaye would rely upon their pre-emption rights and that neither they nor the company would seek to prevent or impede the petitioner's sale of his shares or insist on a co-sale.

16. The pleading also makes reference to issues over Mr Lloyd Thomas's appointment, but that appears to be subsumed within the defences identified. There is also pleaded, as I understand it, an alternative defence that Mr Martin did not have the right as a shareholder to receive management accounts or to inspect accounting records or to have financial information provided to him for use by a future purchaser. His right was limited to receiving the annual accounts and the directors' and auditors' reports. As a further alternative, it is denied that the financial information requested and refused for *"the time being"* was required to find a prospective purchaser. It's also denied that Mr Martin had no access to any financial information following his September 2017 resignation.

17. So looking at those issues from the pleading, it appears reasonably apparent that the key evidence to be looked at are the emails which I have mentioned briefly. And I will do that having addressed the witness evidence.

F) Witnesses

18. Mr Martin's evidence in his witness statement basically sets out support for the matters I have summarised by reference to the petition. The starting point in his evidence is that around the time of the intended sale, he thought the value of his Shares was around £2.75M based on the most recent (August 2017) round of funding, having sold shares at 25pence per share (11M shares x 25p = £2.75M) but that the value could have been higher *"due to the positive performance of the Company between the last round of funding and the time I took the decision to sell my shares"*. He anticipated that *"the most likely purchaser of the Shares would be an institutional city investor, family office, or High Net Worth individual"*.

19. He appointed Mr Lloyd Thomas as a specialist broker because of the specialist and niche market of the Company's business and to off-set any concerns that might arise from the fact that he as a former CEO was selling his shares. He also did so in the context of Mr Lloyd Thomas's previous and continuing involvement with the company. In summary, there had been a previous share issue to a company, which we've called "N&S". Mr Lloyd Thomas was chosen by that company to be what is known as "the board observer" on their behalf, attending board meetings in order to ensure their interest was protected. That meant from Mr Martin's perspective that Mr Lloyd Thomas would have gained the trust and respect of Mr Wright and Ms Kaye whilst acting in the board observer role. He was an ideal candidate to be chosen as broker, not only in his own interests but also in the interests of the company. In addition, it meant there would be no risk of the misuse of any information the company handed over to him. It was in any event, to be noted that Mr Thomas was willing to enter into a non-disclosure agreement to protect confidentiality.

20. Mr Martin gives evidence in his witness statement that Mr Thomas told him that he thought that his 10 per cent shareholding would sell easily to an institutional investor specialising in bulk investments because of the strong trajectory of the company. That trajectory is explained by reference to the company accounts, and by reference to the improvements in turnover in particular. He then states that as a result of those discussions, in or around March/April 2018, he agreed with Mr Lloyd Thomas that in the event of a successful sale of the shares, Athene Capital would be paid a fee of 5 percent of the gross sale price which was anticipated to be more than £100,000.

21. Mr Martin then turns to the emails I have mentioned. It is unnecessary to repeat their content here but it is worth me quoting from the paragraph which explains his response to the 25 April 2018 email which was received in response from Mr Hart to Mr Lloyd Thomas's email. He says this, which is plainly relevant to his case for the purposes of answering the question before me:

> *"Mr Hart's reply came as a great disappointment to me, as I took it to mean that the respondents were entirely unwilling to allow me to sell the shares. I knew the respondents very well and it was clear to me that if they were prepared to block Mr Thomas's involvement, who they trusted, on my behalf, there was no prospect whatsoever that they would let me sell the shares."*

22. Mr Martin explains that he decided, as result of the email from Mr Hart, and those discussions with Mr Lloyd Thomas that followed, that he would:

> *"take no further steps to market the shares, as to do so would be a futile exercise and result in a further rebuff".*

23. I pause there to observe that all this is being done according to Mr Martin's evidence during cross-examination without reference to the Articles of Association, and, therefore, without him considering invoking Article 10.

24. I should also mention, because it is important, but will be apparent from the emails to which I'll refer in further detail, that as stated within the witness statement, one of the effects of the email from Mr Hart was that it caused Mr Lloyd Thomas to decide that he could or would not act for Mr Martin in the sale. That is explained in an email of 27 April 2018, from Mr Lloyd Thomas to Mr Hart to which I will refer. Mr Martin, in his witness statement, states that he has asked Mr Lloyd Thomas for a witness statement but that he has not responded.

25. Mr Wright's witness statement insofar as it sets out evidence of his state of mind when hearing of Mr Martin's wish to sell via the 25 April email from Mr Lloyd Thomas may or may not be relevant in the light of the fact that the Company's position is set out in Mr Hart's emailed response. Obviously, that will be addressed below, so far as it's

necessary to do so. However, the evidence, in summary, is that he did not oppose the concept of Mr Martin selling his shares but he did not want him to sell them to "just anyone". He wanted to be able to ensure the prospective purchaser could be vetted and that the purchase for any future shares would be reasonable. He did not want to share the latest financial data with Mr Martin because it was commercially sensitive and because he thought Mr Martin might become involved with a competitor. He also says he didn't really know Mr Lloyd Thomas and the sale should be handled neutrally and professionally by Mr Hart.

26. Mr Hart, in his witness statement, addresses the circumstances in which his 25 April email was drafted. He refers to a preceding telephone conversation with Mr Lloyd Thomas but says that he doubts anything turns on it because he anticipates that nothing really was said that was not covered by the emails. He suggests that Mr Wright and Ms Kaye viewed the proposed sale as an opportunity. A new investor acquiring Mr Martin's shares in the company might also potentially wish to subscribe for more shares in the company for its benefit. He states that Mr Wright and Ms Kaye would much rather have had Mr Martin out of the business than in, as he was no longer an employee or director of the company, having left the business in that capacity under the terms of a settlement agreement, and in circumstances where it was thought that Mr Martin would soon begin a competing business.

27. A large amount of cross-examination was taken up with questions concerning the parties' state of mind and intentions in March and April 2017. Generally, I did not find it helpful. and, therefore, I am not going to seek to repeat or summarise the matters said except to the extent that any such reference is required in context of the judgment below. This matter essentially turns on (a), the Articles of Association and (b), the contents of the above-mentioned emails. I will say, however, that I am satisfied that each of the three witnesses intended to assist the court when giving their evidence. The answers were clear and I have no criticism of them with regard to their approach before the court; That doesn't mean I necessarily accept their evidence, but it certainly means I do not make any adverse finding of character against any of them. Probably the person whose evidence was most important in the context of submissions is Mr Wright. I should say, therefore, that he came over extremely well as a witness. He seems to be a very competent gentleman. He seems to have no side to his character. He answered the

questions very clearly. I have to say, that insofar as it was suggested to him, either during cross examination or later, through submissions, that he had different motives to the ones that he expressed in evidence, I don't accept that to be the case.

G) The Emails

28. I will now turn to the emails and summarise the position as I find them. This is, as I have said, most important because they are the contemporaneous documents. It does seem to me that in circumstances where people have discussed matters before emails are written, and I have in mind here specifically, the email of Mr Hart, and then the emails in their draft form have been approved by the person with whom there's been discussion, it really is not fair to refer back to the discussions and try to approach the case on the basis that the parties are bound by those discussions rather than the contents of the emails. It seems to me that what they have written is what they have agreed and, subject to its inaccuracy being established, that is the content which they are bound by. Again, however, I do not consider for reasons which will become apparent that this case turns on that.

29. The first email to which I refer was sent 20 April 2018. It is straightforward. Mr Martin informed Mr Hart that he was going to appoint Mr Lloyd Thomas to market his shares. He asked Mr Hart to supply such information as Mr Lloyd Thomas needed to do so, once the appointment was made. He signed off as director of IPTV Brands Limited, care of Bidmedia Broadcasting, but nothing turns on that.

30. On 25 April 2018, Mr Lloyd Thomas emailed Mr Hart following a discussion the day before. It is written in the context of Mr Martin having asked his *business "to investigate whether it can assist in selling some or all of his shares"*. I now set out what he stated, in summary.

    (1) Whilst Mr Martin wanted to sell part of his shares at a high price, any prospective purchaser may wish to purchase all of them and at a price as low as the subscription agreement price paid in 2017.

(2) He needed confirmation that the company or its other shareholders would not oppose any sale (using the words *"prevent, impede, pre-empt or insist on co-sale"*) before committing to an appointment by Mr Martin on a success fee basis.

(3) He asked to see the last 6-months' management accounts, to be able to share them with prospective purchasers under the terms of a non-disclosure agreement, but on specific terms that they would not be provided to Mr Martin.

If one pauses there, and if one does bear in mind the Articles, it is to be observed that a response could have been, "No, if Mr Martin wishes the shares to be sold, he must take the steps required by article 10." That would have been in accordance with the members' contract and no objection could have been taken.

31. Mr Hart's response the same day was written upon the instructions and with the approval of Mr Wright. Mr Hart does not like the concept of them being instructions, as he explained during cross-examination. I can understand that because he was not actually acting in a retained capacity and saw himself as assisting in his capacity as a non-executive director. However, the reality is that his response passed on the decision of Mr Wright. There is little evidence of the views of Ms Kaye, but there is no doubt that Mr Wright had discussed the matter in the most general terms with Ms Kaye and I have little cause or, indeed, no cause to believe that this letter was written without her approval, even if that approval was limited to the concept that she would accept what Mr Wright approved.

32. The email may be summarised as follows:

(1) It states that the confirmation which was sought was given. This expressly included the statement that Mr Wright and Ms Kaye would not invoke their preemption rights and that it was assumed Mr Lloyd Thomas would obtain similar confirmation from the other "A" shareholder whom we have called "N&S".

Pausing there, I note that Mr Hart, during the course of his cross-examination, and specifically when answering my questions, said that he had no recollection of

considering the Articles of Association, and that indeed, he did not appreciate their content. I wonder if that is right bearing in mind the express reference to the pre-emption rights and whether his memory has faded in the light of the expiry of time. However, whether that is so or not, the important point about this particular paragraph of the letter is that it also makes clear that the confirmation is not irrevocable. The willingness to assist the sale is expressly stated to depend upon the identity of any possible purchaser. It is explained that the concerns are that the value of their shareholdings and the reputation of the company should not be adversely affected by the purchase of a significant minority stake. It is then stated that management accounts would not be provided for *"the time being"*. In addition, there was a requirement that Mr Lloyd Thomas must undertake not to use any information available to N&S pursuant to the non-disclosure agreement entered into between the company and N&S, unless of course, such information was publicly available.

(2) The email then provided that Mr Wright was open to considering any purchaser having the opportunity to subscribe for additional shares, providing the price was not less than 25p a share, that being the most recent issue price. It is stated that the board believed that the continuing progress of the company's trading presented a good case for a higher price.

It is quite clear that this reference to 25p. relates to any additional shares that a purchaser of Mr Martin's shares might wish to seek to purchase. It does not apply to Mr Martin's sale of his shares. It is also clear that it is not a condition that a purchaser found for Mr Martin, must want to purchase additional shares. The whole concept is expressed in terms of an opportunity. Mr Martin's case to the contrary is unsustainable.

(3) The email ends that whilst this response may not be as helpful as Mr Lloyd Thomas may have wished, assistance might be provided with board approval if the identity of a potential purchaser is disclosed.

33. This email response has been treated in the Petition as though it is one which lays down an unacceptable, excessive burden in the face of Mr Martin's general legal entitlement, to sell his shareholding as he sees fit, for the highest price they can obtain. That is

misconceived and is a proposition which can only be presented if the Articles of Association are ignored.

34. In the context of the Articles, it seems to me quite obvious that this response is a decision "for the time being", not to require the pre-emption rights to be exercised but instead to allow Mr Martin to proceed without their implementation but on specified terms. It is, therefore, an alternative method of selling the shares which is proposed voluntarily upon those terms; a method in addition to the rights and obligations that exist under Article 10. Therefore, any view of the effect of the contents of this letter must be considered in that context for the purpose of determining the preliminary issue. Far from being a response preventing sale, it is a response which opens up a new avenue of opportunity as a gift because there was nothing which required Mr Wright or Ms Kaye to make this proposal. They could have simply said "no" on the basis that Article 10 must be invoked in accordance with the members' contract. Instead they provide an alternative.

35. On 27 April 2018, Mr Lloyd Thomas replied. His email to Mr Hart and copied to Mr Martin, informed them that he would not be able to act in respect of the sale of the shares. The reasons he gave result from the previous email from Mr Hart. They are stated to be: first, his inability to provide necessary information to his contacts; second, having his contacts do the work and be prevented from investing on terms the buyer and seller agree; and third, that he only acts accordingly, occasionally as a favour. There has been debate as to his reasoning and as to the construction of this letter but the reality is that all one needs to be concerned with is the fact that he decided not to continue in the role that was anticipated.

36. Again, however, this needs to be appreciated in the context of article 10. This reaction simply has to be looked at on the basis that if his services are a key condition for this alternative method of selling the shares, and if his absence means that that the alternative method cannot be pursued, all that has happened is that the alternative method presented without obligation by Mr Wright and Ms Kaye, is no longer available. Clearly, that feature is relevant to the decision that needs to be made on the preliminary issue.

37. This needs to be borne in mind when one considers the 7 submissions of Mr Jones. I have reduced them to 2 topics of submission but 7 are incorporated within that summary. I note I did not need to hear from Mr Bradley.

H) The Submissions for Mr Martin

38. Mr Jones's starting point is that the company/Mr Wright and Ms Kaye, had no legitimate or reasonable concern which they were able to raise concerning the approach of Mr Lloyd Thomas whilst acting for Mr Martin. That there could be no genuine view that there was a risk of him receiving and misusing any financial or other information.

39. I am sure that probably was the case, as a matter of fact. I have no cause to doubt Mr Lloyd Thomas's position and good faith. But this submission assumes there was something which required Mr Wright and Ms Kaye to assess Mr Lloyd Thomas in the context of his role and, if he passed muster, to accept that he should receive the information he requested. The reason for that assumption is unexplained. The key point, and the real point is that there was no right whatsoever for Mr Lloyd Thomas to receive financial information as agent for Mr Martin in the sale of his shares except to the extent that the information was in the public domain or otherwise available to members. He was appointed or to be appointed (if matters not which) within the context of Mr Martin requiring their voluntary assistance. The conditions laid down in Mr Hart's email arise in the context of their voluntary "offer" of an alternative method of sale.

40. The second submission is that the potential share purchaser was likely to be an experienced investor, potentially private equity, and that their minimum requirements would be that they would receive financial information upfront in some detail, before being able to express interest in the purchase of the shares. The submission leads to the conclusion, as presented, that the absence of such information prevented Mr Martin from being able to find a potential purchaser. It is also said that this is bound up in the fact that questions would be raised in circumstances of a sale by him as the former CEO. People would be concerned not only of that fact, but of that fact within the context of the absence of information.

41. I am afraid that this part of the submission is simply surmise. There is absolutely no reason why, potentially, interested purchasers shouldn't first have had a general description of business and with the advantage of the public accounts, then sign a non-disclosure agreement. This isn't a case where expert evidence has been presented to opine otherwise. All sorts of forms of method of finding purchasers were, to use a colloquial term "up for grabs." The submission is without foundation and also ignores the statement of case in the Amended Petition and the fundamental problem that exists for that case that the information required was available (as addressed above at paragraphs 10-11 above). It is also subject to the key point at paragraph 40 above.

42. The next submission moves on to the motivations of the respondents, specifically of Mr Wright, in the context of the conditions that were laid down in the email from Mr Hart. What is being submitted is that, in truth, Mr Wright and Ms Kaye were motivated by their desire to avoid a sale. That the evidence from Mr Wright to the contrary is not to be believed. That the ideal was to have Mr Martin's interests tied up with the company. That that would ensure that his wings were clipped. It would make it difficult for him to buy or run a competing company. As a minority shareholder, it would mean that he was tied in to the performance of the company and had an interest in ensuring that it wasn't affected by any other business which might be a potential competitor.

43. Again, I'm afraid that this form of submission has to come within the context of speculation. There really is no factual evidence to justify these speculative suspicions. I simply cannot accept the matters that are relied upon in submissions by Mr Jones as being established by the evidence. I am quite satisfied, as I have said, from having heard Mr Wright, that his motivations were as stated. Namely, that he was happy for this sale to proceed and for Mr Martin to cease to be a member but he wanted to ensure that he would have some control over who the purchaser would be, in that he would be able to ensure that it would not be a purchaser of a substantial minority interest that might harm his interests or those of the companies. I also accept, as he stated, that he would not be particularly troubled if Mr Martin remained a member of the company, but I think it's reasonably clear that he would much have preferred Mr Martin to no longer be so. However, the real point is that those submissions do not actually address the key point.

I) The Key Point and Decision

44. The key point, as I've previously expressed, is that Article 10 contains pre-emption rights. As a matter of contractual right, Mr Wright and Ms Kaye could have responded to the 25 April email from Mr Lloyd Thomas by simply saying: "No, we do not agree to co-operate with a sale of your shares in any other way than by exercise of the rights under article 10. Which we appreciate is binding upon all members."

45. Instead, whether knowing of those rights or otherwise, they decided to state that they were willing to agree to Mr Martin proceeding in an alternative way which he would otherwise have no right to do. They agreed to that on the basis of particular conditions. For example, with regard to the financial information that would be provided. But they cannot be criticised for doing that, in circumstances where what they were doing was making a voluntary offer of an additional method of sale. They could not be said to be preventing a sale by providing an alternative method voluntarily.

46. None of this constituted any form of contract and insofar as some equitable estoppel or perhaps waiver might arise, that has not been suggested to have occurred and it is obvious from the correspondence that it did not occur. It was far too early in the day and Mr Lloyd Thomas and Mr Martin each decided not to proceed.

47. In those circumstances, if one asks oneself the question, did the respondents effectively prevent the petitioner from selling his shares in Hochanda Limited in April 2018, the simple answer is that what Mr Wright and Ms Kaye, did, was to provide a new voluntary alternative method of enabling the petitioner to sell his shares, in the event that Mr Martin would be willing to accept the conditions laid down. That, therefore, means that the answer to the question is clearly "no".

48. To my mind, that answers the issue, full stop, and I cannot see any way round that as a conclusion. I raised this with counsel at the end of the evidence and Mr Bradley courteously explained that I had in fact set out what he was going to submit during the course of his submissions, if asked. Mr Anthony Jones sought to argue that I can't reach that conclusion because the parties did not have the existence of Article 10 in their minds at the time. That is analogous to trying to argue that a party who has established a breach

of contract on the wrong grounds cannot rely upon the correct grounds which existed at the time. We all know as a matter of law, that they are able to do so because the breach occurred. In this case Mr Wright and Ms Kaye can rely upon the fact that the alternative route was a voluntary offering because that is what it was.

49. To try and construe the emails that I have explained as anything other than an additional route in a voluntary offer, is really impossible. I therefore cannot accept that proposition. It is unnecessary to remember, therefore, that the letter in answer from Mr Hart specifically addressed pre-emption rights and should be construed accordingly. The decision of "no" stands in answer to this preliminary issue.

J) Other Matters

50. I should also say with regard to the pleaded case that there is an awful lot missing in any event, even if Article 10 hadn't existed. In regard to the contention that the response of 25 April imposed an excessive burden upon the petitioner in his attempts to sell his shares, there is absolutely no evidence that Mr Martin was unable to present any potential purchasers with the option to commence negotiations for the purchase of shares. He gave no factual illustration of any attempts to find and of failing to find those purchasers. There is no evidence of anyone being asked about the possible purchase of the shares, and responding that there was insufficient information or, for example: "Well unless you can give us the management accounts now, we will not be able to reach any view as to whether or not we are interested in purchasing."

51. It seems to me that this in itself would have been a nail in the coffin of this particular preliminary issue for the petitioning creditor, but it also draws attention to another fundamentally strange point. Namely, that there was no response from Mr Martin to Mr Hart's email. There was nothing in response saying, "Well, look, the difficulty I have if you take this approach is X, Y and Z and this needs to be resolved." Alternatively along the lines of needing a new approach because Mr Lloyd Thomas had withdrawn. There was no opportunity given to Mr Wright and Ms Kaye to consider their position in the light of actual facts. Of course, that may well be attributable to the position that there were no such facts.

52. In addition, there was no attempt, which is quite extraordinary, to try and persuade Mr Lloyd Thomas to change his mind. Clearly, Mr Lloyd Thomas was concerned about the concept of a no sale, no fee arrangement in the circumstances of Mr Hart's letter but it was surely incumbent upon Mr Martin to discuss with him, for example, alternative form of consideration. Even if that consideration was for a limited period on a time basis. This was raised by Mr Bradley during the course of cross-examination with Mr Martin and the response was that he just simply did not consider it with Mr Lloyd Thomas.

53. I cannot see how, in the light of that, and other points I've just made, Mr Martin can blame Mr Wright and Ms Kaye for the fact that he was unable to sell his shares. The answer to the question whether they effectively prevented him from selling his shares in April 2018, is also "no" because he prevented himself by not taking any reasonable steps to try to do so. He had a commitment from Mr Wright and Ms Kaye that they would not object at this stage and their reservation and potential withdrawal from this commitment would depend upon the identity of the purchaser. That possible withdrawal had not even been tested by trying to find a purchaser. Nor did he seek to sell them through the mechanism which existed, Article 10. There is nothing in the letter from Mr Hart which can be read as preventing him from taking that route. He has not read the Articles and he chose to ignore the Article 10 route. He was, therefore, the cause of him being unable to sell the shares, assuming they could have been sold in the first place.

K) Conclusion

54. Those, as I mentioned, are simply additional points, and they would have featured within a judgment in more detail, had they been critical to the decision. For the reasons I've given, they are not. In all the circumstances that I have set out, my answer to the preliminary issue is clear, the answer is "no".

Order Accordingly

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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