Neutral Citation Number: [2021] EWHC 47 (Ch)

Case No: CR-2019-MAN-000019

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
INSOLVENCY AND COMPANIES LIST

Civil Justice Centre
Bridge Street
Manchester

Date: 13 January 2021

Before :

MR JUSTICE SNOWDEN

Vice-Chancellor of the County Palatine of Lancaster

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IN THE MATTER OF EURO ACCESSORIES LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2006

Between :

AIDAN MONAGHAN	**Petitioner**
- and –	
GERARD GILSENAN **EURO ACCESSORIES LIMITED**	**Respondents**

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David Uff (instructed by **Aughton Ainsworth**) for the **Petitioner**
Neil Berragan (instructed by **Slater Heelis**) for the **First Respondent**
The Company was not represented

Hearing date: 20 October 2020

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Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10.40 a.m. on Wednesday 13 January 2021.

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MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN :

Introduction

1. This petition under section 994 of the Companies Act 2006 (the "Act") concerns the interpretation of a provision in the articles of association of a private company giving the majority shareholder an option to acquire the shares of the minority shareholder on terms that the consideration payable for the sale shares shall be "for fair value".

2. The Petitioner ("Mr. Monaghan") contends that "fair value" in the relevant article means that he is entitled to be paid an amount for his 24.99% minority shareholding which is calculated *pro rata* to the value of the entire issued share capital of Euro Accessories Limited ("the Company"). The Respondent ("Mr. Gilsenan") says that "fair value" means the value of the shares on a sale between a willing buyer and a willing seller; that the shares to be sold represent a minority holding; and that the price should be discounted to reflect that fact.

Background

3. The Company was incorporated by Mr. Gilsenan on 15 December 2000. The principal business of the Company is the supply of "accessories" such as reinforcement spacers, tying systems for reinforcement and other items for use in relation to concrete.

4. Mr. Monaghan joined the Company in 2003 as a sales representative tasked with developing the Company's "precast business" which involved the supply of accessories to customers who manufacture pre-formed (pre-cast) concrete products in a factory.

5. Although there is some dispute between the parties as to relative success of the Company's business in the intervening years, on 22 February 2008 Mr. Gilsenan voluntarily transferred 24.99% of the then issued share capital of the Company to Mr. Monaghan. It seems clear from the pleadings that the transfer was prompted by a desire that Mr. Monaghan should be remunerated in a more tax efficient way for the services he provided to the Company.

6. In or around January 2010, the relationship between Mr. Monaghan and Mr. Gilsenan broke down and on 31 January 2010, Mr. Monaghan tendered his formal resignation from the Company by a letter in which he set out his reasons for deciding to leave the Company.

7. Thereafter, although there were negotiations and offers and counter-offers for the purchase of Mr Monaghan's shares by Mr Gilsenan, no agreement was reached. From the witness statements of both Mr. Monaghan and Mr. Gilsenan it seems that there was no disagreement over a sale in principle: the sticking point was the price. Mr. Monaghan put a value on his shares in the region of £350,000, but Mr. Gilsenan's final offer for the shares was £175,000, which was not accepted.

8. This impasse endured for a number of years. Mr. Gilsenan then decided to use his majority control of the Company to impose a solution. After warning Mr. Monaghan in correspondence of his intentions, he proposed three special resolutions that were circulated on 7 March 2016 and passed on 9 March 2016 under his sole signature.

One resolution had the effect of amending the Articles by inserting a number of new articles. New Article 3A provided for the shares in the Company to be designated as "A" and "B" Shares, and further special resolutions converted Mr. Gilsenan's shares into the "A" Shares and Mr. Monaghan's shares into the "B" Shares. New Article 6A then provided,

> "6A The B Shareholder may at anytime be required to transfer all their shares ("Sale Shares") to the A Shareholders ("Sale Option").
>
> 6A 1 The A Shareholder may only have the right to acquire the Sale Shares by giving written notice to the B Shareholder ("Option Notice") at any time before the transfer of the Sale Shares to the A Shareholder. The Option Notice shall specify
>
> (a) that the B Shareholder is required to transfer all his Shares pursuant to this Article 6A,
>
> (b) the consideration payable for the Sale Shares which shall be for fair value, and
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> (c) the proposed date of transfer ("Transfer Date") which shall be such date as the A Shareholder may specify.
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> 6A 2 On the Transfer Date the B Shareholder shall deliver a stock transfer form for the Sale Shares, together with the relevant Share Certificates (or a suitable indemnity for any lost Share Certificates) to the A Shareholder against payment of the amounts that are due for the Sale Shares pursuant to Article 6A 1(b).
>
> 6A 3 If any B Shareholder does not on the Transfer Date execute the stock transfer form in respect of the Sale Shares held by it, the defaulting B Shareholder shall be deemed to have irrevocably appointed any Director to be his agent and attorney to execute all necessary transfer(s) on his behalf, against receipt by the Company (on trust for such B Shareholder) of the consideration payable for the Sale Shares, to deliver such transfer(s) to the A Shareholder (or as they may direct) as the holder thereof. After the A Shareholder (or its nominee) has been registered as the holder, the validity of such proceedings shall not be questioned by any such person. Failure to produce a share certificate shall not impede the registration of the Sale Shares under this Article."

9. After Article 6A had been adopted, Mr. Gilsenan wrote to Mr. Monaghan on 26 April 2016 giving him notice that Mr. Gilsenan wished to exercise the option to acquire all of Mr. Monaghan's B shares. The notice specified 4 May 2016 as the Transfer Date and the consideration for the shares to be £175,000 (a cheque for which was tendered).

10. Mr. Monaghan did not sign and return the enclosed stock transfer form. Mr Gilsenan (as director) then executed the transfer form on 30 August 2016 and transferred Mr. Monaghan's B shares to himself pursuant to Article 6A.3.

11. Thereafter, and after the first cheque expired, Mr. Gilsenan sent two further cheques to Mr. Monaghan for £175,000 in January and August 2017. Neither were cashed by Mr. Monaghan.

The Petition

12. On 22 January 2019 Mr. Monaghan presented the Petition. As amended, the Petition set out the background to the relationship between the parties and its breakdown. It alleged that the relationship was based on mutual trust and confidence, and that the value of the business of the Company was largely attributable to the pre-cast business that Mr. Monaghan had built up. The Petition then alleged that Mr. Monaghan's resignation was prompted by a failure on the part of Mr. Gilsenan to honour an agreement for payment of a 40% profit share to Mr. Monaghan.

13. Importantly, however, the scope of the complaint of unfair prejudice in the Petition was strictly limited. After tracing the unsuccessful negotiations for sale and purchase of Mr. Monaghan's shares, the Amended Petition set out the special resolutions that had been passed and then stated as follows,

> "30. The amendments to the Articles gave [Mr. Gilsenan] the right to require [Mr. Monaghan] (by notice) to transfer all his shares to [Mr. Gilsenan] for "fair value" on a "transfer date" to be specified in the notice and which appointed [Mr. Gilsenan] as director to be [Mr. Monaghan]'s agent and attorney to execute all necessary transfers on his behalf.
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> 31. The resolution was duly passed and on 26 April 2016 [Mr. Gilsenan] gave notice to [Mr. Monaghan] requiring him to transfer all his shares to [Mr. Gilsenan] on 4 May 2016 ("the transfer date") for £175,000 expressed to be the fair value on the transfer date.
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> 32. [Mr. Gilsenan] as director executed the transfer form on 30 August 2016 and thereby enforced the transfer of [Mr. Monaghan]'s shareholding in the Company to himself.
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> 33. [Mr. Monaghan] contends that the expropriation of his shares was at less than fair value such that the affairs of the Company have been conducted in a manner which is unfairly prejudicial to his interests.
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> 34. For the avoidance of doubt, [Mr. Monaghan] does not challenge the right of the majority to approve the special resolution requiring him to transfer his shares for their fair value at the transfer date and the relief claimed is limited to the fair value of his shares at the transfer date."

14. The Amended Petition then set out, in paragraphs 37 and 38, the contention that Mr. Monaghan was "entitled" (by inference pursuant to Article 6A) to receive a value representing a pro rata proportion of the total value of the issued share capital of the Company. Somewhat confusingly, in the course of giving what were said to be "particulars" of that contention, the Amended Petition included the following, paragraphs 38(3)-(5),

> "Alternatively and insofar as "fair value" in this context is to be interpreted as connoting the application of any discount for a minority holding -
>
> (3) It is (without more) unfair that [Mr. Monaghan] as an unwilling seller should be bought out on a fictional basis applicable to a free election to sell his shares in accordance with the Articles.
>
> (4) It is also (without more) unfair that the majority [Mr. Gilsenan] which has expropriated [Mr. Monaghan's] shares … should immediately secure a windfall or reward in the form of the pro rata value of the shares at a discounted price.
>
> (5) Accordingly and insofar as "fair value" in this context is to be interpreted as connoting the application of a discount for a minority holding, the amendments to the Articles and the expropriation of [Mr. Monaghan's] shares is (without more) unfairly prejudicial to his interests."

15. The remaining sub-paragraphs of paragraph 38 included some allegations to the effect that even though Mr. Monaghan had no right to be involved in the management of the Company, it was nevertheless a quasi-partnership in which Mr. Monaghan was a "sleeping" partner, and there was a relationship of trust and confidence between him and Mr. Gilsenan.

16. Finally, at paragraph 39, the Petition set out an alternative claim to the effect that if it were permissible for Mr. Gilsenan to acquire Mr. Monaghan's shares on a discounted basis pursuant to Article 6A, the fact that Mr. Gilsenan would be acquiring the shares at a discounted price "whilst securing a benefit for himself in the form of the pro rata value of those shares" should be brought into account when determining "fair value" by fixing that value as "the median between the … discounted value of those shares in the hands of Mr. Monaghan and the pro rata value of the shares in the hands of Mr. Gilsenan."

17. Much of the background, including the assertion that the Company was a quasi-partnership and the reasons for the breakdown in relations between Mr. Gilsenan and Mr. Monaghan was disputed in the Points of Defence. Mr. Gilsenan responded to the pleading setting out the scope of the issues to be decided as follows,

> "39. …. [Mr. Monaghan]'s entitlement to be paid "fair value" for his shares only arose following the alteration of the Articles, and the service of a Transfer Notice. He was not entitled to any payment prior to 4 May 2016, the transfer date.

> It is admitted that offers were made voluntarily to purchase his shares, but they were refused by [Mr. Monaghan].
>
> 40. …. The Company was never a quasi-partnership. There was no relevant relationship of trust and confidence. [Mr. Monaghan] only became a shareholder on 22 February 2008, and he resigned from the Company in January 2010, terminating all relations with it, and subsequently competing against it. There were no relevant agreements or understandings which were capable of imposing any equitable constraints upon the legal rights of the respective parties.
>
> 41. In those circumstances, it is admitted and averred that [Mr. Monaghan] is entitled to be paid the "fair value" of his shareholding as at the transfer date of 4 May 2016 pursuant to the Articles. The only determination required from the Court (in the absence of agreement) is to establish the "fair value" in accordance with the Articles."

18. The Reply to that summary was as follows,

> "3.1 The court will be asked to determine the meaning of "fair value" in the Articles (as amended by the Special Resolution passed by the majority). For the avoidance of doubt, [Mr. Monaghan]'s primary contention is that the context requires an interpretation of "fair value" as meaning a value representing an equivalent proportion of the total shareholding.
>
> 3.2 That being [Mr. Monaghan]'s primary contention, [Mr. Monaghan] has elected not to join issue with the right of the majority to expropriate his shares.
>
> 3.3 lf the meaning of "fair value" is determined against [Mr. Monaghan], the court will be asked to determine whether the expropriation of the Petitioner's shares at a value which does not represent an equivalent proportion of the total shareholding is (without more) conduct unfairly prejudicial to his interests as a member.
>
> 3.4 Further or alternatively, and if the meaning of "fair value" is determined against [Mr. Monaghan], the court will be asked to determine whether the expropriation of [Mr. Monaghan]'s shares at a value which does not represent an equivalent proportion of the total shareholding is conduct unfairly prejudicial to his interests as a member. That is, upon the grounds of his constructive exclusion from an association which was based on mutual trust and confidence."

19. On the basis of those pleadings, and for reasons that I will explain, having heard argument on the question of interpretation of Article 6A, I indicated that I did not

need to hear any disputed evidence concerning the nature of the Company, the relations between the parties and the reasons for their breakdown.

20. I also did not need to hear any expert evidence on valuation, because the parties jointly instructed Sally Longworth, a Chartered Accountant with extensive forensic accountancy experience, to value the Company as at 4 May 2016 (the agreed transfer date) and to report on the appropriate discount to be applied if it was appropriate to value Mr. Monaghan's shares on a discounted basis to reflect a minority holding, assuming a sale in the open market on the transfer date.

21. Ms. Longworth's conclusion was that the Company was worth £2.18 million as at 4 May 2016, so that on a pro-rata basis Mr. Monaghan's 24.99% shareholding was worth £545,000. But if it were appropriate to apply a minority discount, Ms. Longworth was of the opinion that a 55% discount should be applied, resulting in a figure of £245,000.

The rival arguments

22. For Mr. Monaghan, Mr. Uff's primary contention was that Article 6A has to be construed in light of the fact that it confers "an unrestricted right in the majority to expropriate the shares of the minority at will". Mr. Uff submitted that because Article 6A gave the majority shareholder an unrestricted option to acquire the shares of the minority, exercisable without cause and at any time of the majority shareholder's choosing, no reasonable businessman would think that the shares could be acquired on the fictional basis that the minority shareholder would be a willing seller, and hence subject to the discount that might normally apply in such a situation. He contended that this required a meaning to be ascribed to Article 6A which would mitigate the consequences for the transferor of such an unfettered right of expropriation.

23. In the alternative, Mr. Uff suggested that the ordinary and natural meaning of the expression "fair value" is akin to the definition of "fair value" found in the 2013 edition of the International Valuation Standards published by the International Valuation Standards Council ("IVSC") which defined fair value as,

> "the estimated price for the transfer of an asset or liability between identified knowledgeable and willing parties that reflects the respective interests of those parties"

(the "2013 IVS Definition")

24. On the basis of that definition, which he contrasted with the meaning given by the IVSC to "market value", Mr. Uff submitted that to reflect the "respective interests of the parties", "fair value" in the Articles must mean a price that is the median point between the pro rata value and the discounted value of Mr. Monaghan's shares. He submitted that this was necessary to reflect the benefit obtained by Mr. Gilsenan as a result of acquiring total control of the Company. In support of this contention, Mr. Uff also relied on the approach taken by HHJ Pelling QC in Swain v Swains Plc [2015] EWHC 660 (Ch), an authority to which I will return.

25. Mr. Uff's final fallback position was that "fair value" actually meant "a value that is just and equitable in the circumstances of the case" – which he acknowledged would require a detailed investigation into the conduct of the respective parties to determine what value was "fair" or "just and equitable" as between them.

26. For Mr. Gilsenan, Mr. Berragan submitted that the natural reading of "fair value" in Article 6A is the fair value for the thing that is being bought and sold, and that once it is identified that the subject matter of the sale is a minority shareholding, it follows that a discount is appropriate to reflect the well-established disadvantages of a minority shareholding in a private company. He also submitted that once it was accepted that Article 6A had been validly adopted, there was nothing in the wording of that, or any other Article, or any other admissible factual background to justify any implied or equitable restriction on the ability of Mr. Gilsenan to exercise the option according to its terms, or to require him to pay anything more than a discounted basis for Mr. Monaghan's shares.

The Law

27. In Cosmetic Warriors Ltd v Gerrie [2017] EWCA Civ 324 at [19]-[20], Henderson LJ explained the general approach to interpretation of the articles of association of a company,

> "19. … The articles are a statutory contract between the members, and between each member and the company. They must therefore be construed in accordance with the ordinary principles that apply to the interpretation of any written contract. Those principles have been discussed and refined in many cases at the highest level, to which it is unnecessary to make detailed reference.
>
> 20. Like the judge, I find it helpful to refer to the approach endorsed by Lord Neuberger PSC in Arnold v Britton [2015] AC 1619 at [15] (omitting citations):
>
>> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", … And it does so by focusing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provision of [the contract], (iii) the overall purpose of the clause and the [contract], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.""

28. Although Henderson LJ referred to the application of the ordinary principles that apply to the interpretation of any written contract, there are, however, an number of obvious and important differences between a private contract and a company's articles of association which require some modification to these principles.

29. The first and most obvious is that the articles of association are generally not the product of a process of negotiation leading to a meeting of minds or consensus between all of the shareholders. There was certainly no such process or meeting of minds in the instant case because the terms of new Article 6A were not agreed between Mr. Gilsenan and Mr. Monaghan, but were introduced by Mr. Gilsenan using the procedure for amendment of the Company's articles provided for under the Companies Act 2006.

30. Secondly, the articles of association of a company are required to be registered as a public document at Companies House: see ss. 18(2) and 26(1) of the 2006 Act. Thus, unlike a private contract, the articles of association are not addressed to a specific counterparty or counterparties, but have to be understood by anybody who inspects the register at Companies House, either with a view to becoming a party to the statutory contract by buying shares, or simply to deal with the company.

31. These features have an important impact by way of limitation on the admissible background against which the articles of association can be construed. As Lord Hoffmann said in Attorney General of Belize v Belize Telecom Limited [2009] UKPC 10 at [36], after referring to the decision of the Court of Appeal in Bratton Seymour Service Co Ltd v Oxborough [1992] BCLC 693,

> "Because the articles are required to be registered, addressed to anyone who wishes to inspect them, the admissible background for the purposes of construction must be limited to what any reader would reasonably be supposed to know. It cannot include extrinsic facts which were known only to some of the people involved in the formation of the company."

32. So, in Belize Telecom itself, the Privy Council was able to imply a term into the articles of Belize Telecom Ltd that a director would vacate office when there was no longer any shareholder with a shareholding appropriate to authorise that director's appointment. Lord Hoffmann explained, at [37]

> "The implication as to the composition of the board is not based upon extrinsic evidence of which only a limited number of people would have known but upon the scheme of the articles themselves and, to a very limited extent, such background as was apparent from the memorandum of association and everyone in Belize would have known, namely that telecommunications had been a state monopoly and that the company was part of a scheme of privatisation."

33. In Cosmetic Warriors Ltd v Gerrie at first instance ([2015] EWHC 3718 (Ch)), applying the approach in Belize Telecom, the trial judge concluded that in addition to the articles themselves, third parties would have been able to ascertain, from the information in the annual returns at Companies House, (a) that the company in

question was a small company; (b) that it only ever had one class of share; (c) the number and identity of the shareholders when the Articles were created and at all times thereafter; and (d) that there had only ever been a small number of shareholders. That approach was endorsed by Henderson LJ in the Court of Appeal at [23].

34. The result is that the process of interpretation to arrive at the true meaning of a provision in a company's articles of association must concentrate on the natural and ordinary meaning of the words used, when viewed in light of the scheme and purpose of the articles in general, any extrinsic facts about the company or its membership that would reasonably be ascertainable by any reader of the company's constitution and public filings at Companies House, and commercial common sense.

Analysis

Admissible background

35. Applying these principles in the instant case, it would be apparent to any third party that the Company was a private company, that it had originally been wholly owned by Mr. Gilsenan, that Mr. Monaghan had become the company secretary in 2007 and a second shareholder in 2008, and that he had resigned as secretary in 2010. It would also be apparent that at the time that the relevant special resolutions were passed altering the share capital and adopting the new Article 6A, that the right to exercise the option under Article 6A was introduced by Mr. Gilsenan as the 75.01% shareholder in respect of the shares held by Mr. Monaghan as the 24.99% shareholder. The most that an astute and assiduous reader of the documents might deduce was that because Mr. Monaghan's signature did not appear on the copies of the special resolutions lodged at Companies House, he might not have agreed to the insertion of Article 6A and the redesignation of his shares.

36. Beyond that, I do not think that any other background material is admissible to assist in the construction of the articles. Specifically, I do not think that the background to the relationship between Mr. Gilsenan and Mr. Monaghan, or the circumstances surrounding the breakdown of that relationship leading to the adoption of Article 6A, would be apparent to any reader of the relevant materials on the public register.

The wording of Article 6A

37. I therefore turn to the terms of Article 6A, observing that there is nothing in the remainder of the articles that casts any light on its true meaning, and that it is obvious from the terms of Article 6A that its purpose is to give the majority shareholder an option to require the minority shareholder to sell his shares to him.

38. Article 6A 1(b) requires the majority shareholder exercising the option to specify,

> "the consideration payable for the Sale Shares which shall be for fair value."

39. It should be noted that what has to be "fair value" is the consideration payable *for the Sale Shares*, and that the focus is therefore is on the value of the identified *property* owned by the minority shareholder which is to be transferred under the option.

40. The focus on the property which is being bought and sold under Article 6A is consistent with the approach of the Privy Council in Shanda Games Ltd v Maso Capital Investments Ltd [2020] UKPC 2. The case concerned the meaning of "fair value" in section 238 of the Companies Law (2013 revision) of the Cayman Islands (the "Companies Law"). That provision, in essence, provides that where there has been a merger or consolidation under Part XVI of the Companies Law, a dissenting shareholder is entitled to give notice requiring payment of the "fair value" of his shares. The judge at first instance had held that "fair value" always means that the minority is entitled to the pro rata value of their shareholding, essentially because the purpose of the "fair value" standard in section 238 was to ensure that the dissenting minority was fully protected, and this could only be achieved by payment of a proportionate share in the value of the company as a whole.

41. The Privy Council held that this was wrong. Having first observed that there were other provisions of the Companies Law under which a minority shareholder could require a court to review or fix the value of his shares, but only at a discount to reflect the fact that shares were a minority holding, Lady Arden turned to what she termed the "general principle of the valuation of shares on sale". At [42], Lady Arden said:

> "In the opinion of the Board, it is a general principle of share valuation that (unless there is some indication to the contrary) the court should value the actual shareholding which the shareholder has to sell and not some hypothetical share. This is because in a merger, the offeror does not acquire control from any individual minority shareholder. Accordingly, in the absence of some indication to the contrary, or special circumstances, the minority shareholder's shares should be valued as a minority shareholding and not on a pro rata basis."

42. In support of that proposition, Lady Arden referred to Short v Treasury Commissioners [1948] 1 KB 116, affirmed [1948] AC 534. In Short, the Crown had exercised its right to acquire the entire share capital of Short Brothers (Rochester and Bedford) Ltd under the Defence (General) Regulations 1939. The legislation required the Crown to pay a price "not less than the value of those shares as between a willing buyer and a willing seller …" (Regulation 78(5)). The question was whether the Crown could acquire the individual minority tranches of the company's shares at a discount, even though in end effect it was acquiring the company's entire issued share capital. The Court held the individual shareholders were not entitled to the pro rata value of their shareholdings.

43. The Court of Appeal observed, at pages 122-123, that the individual minority shareholders were not entitled either to a pro rata share of the value of the undertaking of the company, or to any part of the value of the "control" that possessing the whole of the share capital would confer. The court observed,

> "Shareholders are not, in the eye of the law, part owners of the undertaking. The undertaking is something different from the totality of the share-holdings. The claimants recognized this difficulty, and in this court their main argument was, we think, addressed to an alternative statement of their case, that is, that the value of their shares must be calculated on the basis of an

> apportionment of the value of the totality of the shares in one hand, so as to comprehend the value of the complete control thereby conferred….”
>
> Prima facie, as it seems to us, and apart from any special words in the regulation, each shareholder is entitled to get, and to get only, the value of what he possesses; for that is all that he has to sell or transfer…. The claim of each [claimant] is to have added to the value appropriate to his individual parcel of shares, if being sold separately, a rateable proportion of the added or " control " value belonging to the totality of the shares—an item of value which he, as an individual, does not in fact possess … The difference represents his share of the extra value which a purchaser, it is said, is prepared to give if he can get hold of all the shares. We can ourselves see no reason in principle why the first claimant should receive more than the value of what he has. We observe that, if some third shareholder in fact held a controlling interest in the company's capital, the effect of the claimants' contention would appear to be to appropriate to their own holdings some part of the "control " value which the third shareholder might well allege was an item of value belonging to him. In any case the argument would, as it seems to us, involve necessarily the view that the claimants would be entitled, on the construction of the regulation, to be paid for something more than, and added to, the particular item of property which immediately before the appropriate date they in fact severally enjoyed.”

44. Having considered Short, Lady Arden continued in Shanda v Maso at [47]:

> “[Short] is relevant even though it stems from very different legislation because it establishes a general principle. That general principle is that where it is necessary to determine the amount that should be paid when a shareholding is compulsorily acquired pursuant to some statutory provision, the shareholder is only entitled to be paid for the share with which he is parting, namely a minority shareholding, and not for a proportionate part of the controlling stake which the acquirer thereby builds up, still less a pro rata part of the value of the company's net assets or business undertaking.”

45. Although these two decisions concern particular statutory provisions which are obviously different to the terms of Article 6A, what is relevant, and in my judgment significant, is the clear statement of general principle that unless there are indications to the contrary in the relevant instrument establishing the right of compulsory acquisition, the general principle of share valuation is that what must be given a “fair value” is what is being compulsorily transferred. This has the result that unless there is a contrary indication, the transferor cannot insist on being paid by the transferee for something to which his shares do not entitle him and that he does not own. He therefore cannot insist on payment for a proportionate part of the controlling stake

which the acquirer thereby builds up, or a pro rata part of the value of the company's net assets or business undertaking.

Mr. Monaghan's primary argument

46. As indicated above, Mr. Uff's primary submission was that because Article 6A provides for what Mr. Uff referred to as an "unrestricted right of expropriation" under which the majority shareholder could give notice at any time to acquire the shares of the minority shareholder, so that the minority shareholder would not be a "willing seller", Article 6A must be interpreted to require payment of a pro rata price for the minority shareholder's shares.

47. In my judgment, this argument essentially boils down to a simple question. Are the facts that the option in Article 6A is exercisable at any time and without limit of time by the majority shareholder, together with the fact that Mr. Monaghan did not agree to the insertion of Article 6A into the articles, sufficient "indication to the contrary" to take this case out of the general principle of valuation to which Lady Arden referred in Shanda v Maso?

48. In my view, they are not. Shanda v Maso and Short themselves were expropriation cases in which it was, respectively, for the proponents of the merger or the government to decide that the shares of the minority would be extinguished by the merger or compulsorily acquired. In each case the merger and the acquisition was decided upon without the agreement of the dissenting shareholders, who were unwilling participants and vendors. But that did not mean that a pro rata valuation had to be applied when determining the "fair value" of the dissenters' shares.

49. Nor, for the reasons that I have explained, could Mr. Uff rely on any of the wider background circumstances to the insertion of Article 6A into the articles of association in an attempt to support the contention that it would be commercially unfair if Mr. Monaghan were not to receive a pro rata price for his shares when the option was exercised. As I have explained, the ordinary reader of the articles of the Company would not be able to ascertain those facts from the limited material at Companies House.

Mr. Monaghan's alternative argument

50. I also reject Mr. Uff's alternative argument that the reference in Article 6A to "fair value" should be interpreted by reference to the 2013 IVS Definition as requiring the consideration payable for the shares to be transferred under the Option Notice to be the median between a fully discounted value and the pro rata value of the shares.

51. It will be recalled that the 2013 IVS Definition of "fair value" is,

> "the estimated price for the transfer of an asset or liability between identified knowledgeable and willing parties that reflects the respective interests of those parties"

52. That definition is to be contrasted with the IVSC's definition of "Market Value", namely,

> "… the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion."

53. The difference between the two definitions is explained in the IVSC's guide,

> "Fair value requires the assessment of the price that is fair between two identified parties taking into account the respective advantages or disadvantages that each will gain from the transaction. It is commonly applied in judicial contexts. In contrast, market value requires any advantages that would not be available to market participants generally to be disregarded.
>
> Fair value is a broader concept than market value. Although in many cases the price that is fair between two parties will equate to that obtainable in the market, there will be cases where the assessment of fair value will involve taking into account matters that have to be disregarded in the assessment of market value, such as any element of special value arising because of the combination of the interests."

54. Although the 2013 IVS Definition is one available definition of "fair value", there is no indication whatever in the words of Article 6A of any intention to incorporate that definition as opposed to any other definition. Moreover, if the matter was approached as a question of whether, absent an express cross-reference, the 2013 IVS Definition could be admitted into evidence as a piece of extrinsic evidence in accordance with the requirements outlined in Belize Telecom and Cosmetic Warriors, I do not think that it would be reasonable to suppose that any general reader of Article 6A would know of the 2013 IVS Definition so as to make the connection with it.

55. Both these points are reinforced by the fact that the 2013 IVS Definition has now been replaced by a new definition of "equitable value" in the 2017 edition of the International Valuation Standards (the "2017 IVS Definition"). Although the two definitions are in materially similar terms, according to the IVSC's Exposure Draft, the change in nomenclature was,

> "to avoid confusion between IFRS 13 and other definitions of "fair value" currently used in the market place."

56. The very fact that the IVSC identified the potential for confusion with other definitions of "fair value" that were in common use in the market place prior to 2017 illustrates the difficulties of supposing, without any express cross-reference, that the reader of Article 6A prior to 2017 would necessarily have concluded that "fair value" in the article meant the same as the 2013 IVS Definition rather than in any other available definition of "fair value". And after the change in nomenclature in 2017, the range of readers of Article 6A who might have made the connection between the expression "fair value" in that article and the replacement definition of "equitable value" in 2017 IVS Definition would be even more limited.

57. The decision in Swain v Swains plc [2015] EWHC 660 (Ch) upon which Mr. Uff also relied in relation to the 2013 IVS Definition is, in my judgment, plainly distinguishable. Swain was a case where three claimants alleged a breach of an option contract for the acquisition of their shares by the defendant trustees of a trust for the benefit of employees of the relevant company. The option specified that the price was to be “a fair value for each of the [transfer] shares” as certified by the auditors of the company.

58. The judge in Swain did not actually have to decide as a matter of construction that “fair value” in the option meant the same as in the 2013 IVS Definition. Rather, the expert witnesses instructed by each side agreed that this was the meaning to be attributed to “fair value” in the option agreement, and the judge simply proceeded on that basis to set aside the auditors’ certificate because they had valued the option shares on the basis of the net asset value of the company. The judge held that no reasonable valuer would have adopted that approach, because the company was a going concern and the net asset value was a manifest undervalue that preferred the interests of the purchaser at the expense of the vendor: see paragraph [102] of the judgment.

59. The judge then proceeded to resolve a number of other valuation issues and to award damages based upon his own determination of “fair value” in place of that certified by the auditors. On the question of discount, the experts agreed that there should be a discount to reflect the fact that the claimants each held a minority shareholding (see paragraph [129]): the issue between the experts was what level of discount was appropriate. The experts agreed that if taken individually, each of the claimants’ 18% holding of shares should be discounted from a pro rata figure by 67%. However, they disagreed on the facts as to whether the full extent of that discount should be applied, and the judge decided to reduce the discount to 60% to reflect the fact that by exercising the option over the three claimants’ shares together, the defendant trustees had acquired a controlling (about 55%) interest in the company.

60. In my view, Swain merely illustrates that expert valuers might agree to use the 2013 IVS Definition in the context of an option agreement providing for shares to be acquired at “fair value”, and that a judge might accept that this was an appropriate meaning to apply. However, there was no dispute between the parties over the meaning of the phrase when used in the option agreement. Hence I do not regard Swain as an authority on the meaning of “fair value” in a different context, and it certainly does not go so far as to hold that, wherever it appears in a contractual provision, “fair value” must have the meaning given by the 2013 IVS Definition.

61. Moreover, the result on the level of discount to be applied depended upon an analysis of the rival expert evidence in the case, and the small reduction in the applicable discount ordered by the judge does not support Mr. Uff’s contention that it would be appropriate to select a median value between a fully discounted value and a pro rata value for Mr. Monaghan’s shares. Indeed, it might be thought that given the subsequent analysis in Shanda v Maso, the claimants were somewhat fortunate that the judge was prepared to reduce the discount applicable to sale of their shares on the basis that, taken together, they were in effect able to transfer control of the company to the defendant trustees. Such logic would not apply in the instant case, because unlike in Swain, Mr. Gilsenan was already the 75.1% shareholder with substantial control of the Company, including the power to pass special resolutions, and as a

24.9% shareholder, Mr. Monaghan had no right of control to sell to Mr. Gilsenan equivalent to the sale of a total of 55% of the shares of the company to the defendant trustees in Swain.

62. The only obvious practical difference that the acquisition of the remaining 24.9% of shares might have made in the instant case would be to enable Mr. Gilsenan to deliver the entire shareholding of the Company to a third party buyer without Mr. Monaghan's consent. But given that a buyer of Mr. Gilsenan's shares would be able to exercise the option under Article 6A themselves, this would be unlikely to amount to a very significant difference in practice.

63. Moreover, in the absence of any suggestion that at the time of exercise of the option under Article 6A Mr. Gilsenan was planning to sell the entirety of the Company to a third party, I do not see the basis for the assertion in the Amended Petition that Mr. Gilsenan had, by the exercise of the option under Article 6A, "immediately secured a windfall or reward in the form of the pro rata value of the shares". Accordingly, the interesting question of whether, if Article 6A were to be operated immediately before a sale of the Company to a third party, the "fair value" of the Sale Shares ought to fixed on a non-discounted basis, does not arise for decision.

The "just and equitable" argument

64. The fact that Article 6A focusses on the value of the property (i.e. the Sale Shares) to be transferred also strongly suggests that the "fair value" of that property should be one that is capable of being determined by reference to some objective criteria concerning the shares themselves as at the date that the Option Notice is given. The language of Article 6A does not in any way suggest that when specifying the consideration payable, the transferee is required to exercise any subjective discretion, or in some way to take into account the personal relationship between himself and the transferor, either at the date of the giving of the notice, or over some undefined period prior to that date.

65. It follows that I also reject Mr. Uff's final fallback argument that Article 6A is to be interpreted as requiring the transferee to make some allowance for, or to undertake an inquiry into, the types of "equitable" factors that might justify a court granting relief to a petitioner under the unfair prejudice regime in sections 994 – 996 of the Companies Act 2006 or to make a winding up order on a petition on the just and equitable ground in section 112(1)(g) of the Insolvency Act 1986. There is nothing in the wording to suggest that Article 6A was designed to replicate contractually the jurisdiction which exists under those statutes. In my judgment it is commercially implausible that the article should be interpreted to mean that when specifying the consideration payable in an Option Notice, the majority shareholder is required to assess whether the nature of the Company and his own conduct in relation is of a type that would bring such equitable factors into play. There is, moreover, no mechanism provided to define and resolve the disputes that would inevitably arise.

66. I also do not see how reference to the unfair prejudice jurisdiction can assist Mr. Monaghan to contend for a pro rata valuation on the facts of this case. The jurisdiction which the court has under section 996(2)(e) of the Companies Act 2006 to order the respondent to purchase the shares of the petitioner is only available where there has been a finding of unfairly prejudicial conduct. Such a finding is not

generally available where the conduct of the majority is in accordance with the Company's articles of association, and is not available simply because the relationship between shareholders has broken down. In such cases, the petitioner must establish some unfairness based on established equitable principles: see O'Neill v Phillips [1999] 1 WLR 1092 at pages 1098H - 1099A, 1101F-1102B, and 1104C-H.

67. There is also no statutory requirement that any purchase of shares ordered under section 996(2)(e) must be on a non-discounted basis: see O'Neill v Phillips at page 1107D-E. The requirement in the authorities is simply that the order made must be fair in all the circumstances in order to provide a remedy that is proportionate to the unfair prejudice that has been suffered. In Strahan v Wilcock [2006] 2 BCLC 555 at [17], Arden LJ suggested, obiter, that where a company is not a quasi-partnership, a buy-out order is unlikely to be on a pro rata basis; and even in the case of unfair prejudice in relation to a true quasi-partnership, there is only a presumption that a buy-out order will be on a pro rata basis: see e.g. per Fancourt J in Re Edwardian Group Limited [2019] 1 BCLC 171 at [640] – [642].

68. There have, moreover, been cases in which a buy-out order has been made on a discounted basis where a petitioner who was a quasi-partner had left the company and had not petitioned on the basis of his exclusion, but had rejected offers to buy his shares and had then petitioned on the basis of some other wrongdoing by the majority: see e.g. Re DR Chemicals Limited [1989] BCLC 383 at 399.

69. As a matter of principle, if the terms of Article 6A would otherwise permit Mr. Gilsenan to give notice to acquire Mr. Monaghan's shares on a discounted basis, and neither the adoption of that article nor its operation are contested, I cannot see how the meaning of that article should somehow be altered because of events which occurred a considerable time earlier, of which no separate complaint is made, and which would be unknown to any reader of the articles of association at Companies House.

70. There are also obvious echoes of the facts in DR Chemicals in the instant case. Even if the Company was a quasi-partnership when Mr. Monaghan was employed by it (which would be most unusual given that he was never involved in management), Mr. Monaghan chose not to bring a petition to complain of his alleged constructive exclusion from the Company as long ago as 2010, and he also does not complain about the adoption or operation of Article 6A as such. As such I very much doubt that there would be a realistic basis for any buy-out order under section 996(2)(e) to be on a pro rata basis in any event.

Conclusion

71. For the reasons set out above, I will dismiss the Petition.

72. Mr. Gilsenan asks in his Points of Defence that I should make a declaration to the effect that a consideration of £245,000 would have represented the fair value of Mr. Monaghan's shares in the Company for the purposes of Article 6A. I am prepared to make such a declaration for the purposes of clarity. I am not, however, asked to make any order for payment of that sum against Mr. Gilsenan, who offered in his Points of Defence to pay that amount with interest to Mr. Monaghan and remains willing to do so.