Neutral Citation Number: [2022] EWHC 1104 (Ch)

Case No: CR-2021-000644

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
COMPANIES COURT

Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 12/05/2022

Before:

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

- -

Between :

(1) JULIET CATHERINE WHITE **(2) RUPERT BARRY KINGSTON** **(3) DELILAH COSMETICS LTD**	**Claimants**
- and - **HANNAH NICHOLSON**	**Defendant**

- -
- -

CHANTELLE STAYNINGS (instructed by **GORDONS SOLICITORS LIMITED**) for the **CLAIMANTS**
DOV OHRENSTEIN (instructed by **DC KAYE & CO**) for the **DEFENDANT**

Hearing dates: 3, 4 May 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on the National Archives. The date and time for hand-down is deemed to be 16:00 hrs on 12 May 2022.

Chief Insolvency and Companies Court Judge Briggs:

1. The Claimants seek specific performance of terms contained in a shareholder agreement dated 8 February 2017 (the "SHA") and an agreement made by deed and dated 15 May 2020 (the "Deed"). The relevant terms relate to the sale of the Defendant's 17,000 ordinary shares of £1.00 each and 27,000 preference shares of £1.00 each in the capital of Delilah Cosmetics Ltd (the "Company").

2. The claim for relief includes a declaration that the determination of the market price of the Defendant's shares contained in the written valuation report of Mr Julian Beressi of Kay Johnson Gee Chartered Accountants dated 27 August 2020 is final and binding on the Claimants and the Defendant as to the market price to be paid to the Defendant in respect of the shares under the provisions of the SHA.

Background in brief

3. The Company was founded by the Claimants Mr Kingston and Ms White and the Defendant Ms Nicholson. The Claimants are married to each other.

4. The Company is a retailer of cosmetics. Ms Nicholson was the managing director of the Company in the period 2014 to April 2020. On 8 May 2019 Ms Nicholson informed the Company that she wished to sell her shares and exit the Company. She did not leave until 27 April 2020 as negotiations ensued between the parties and dismissal proceedings were taken and concluded against Ms Nicholson.

5. Ms Nicholson naturally wished to sell her shares for the best price she could obtain. The Company wanted to pay a reasonable price. The SHA did not contain a method of valuation. Following correspondence, the parties entered into the Deed that was designed to provide an agreed mechanism for sale and purchase and bring finality to the parties who had been in disagreement for some time. Mr Kingston explains the background to the Deed in his written evidence. His evidence on the issue is not disputed:

> "In the letter dated 1 November 2019 from Kennedys …it was also asserted that their client had grounds for petitioning the Court for relief under s. 994 of the Companies Act 2006. However, the letter proposed the following:

a. That their client is provided with full financial information relating to the Company to include (but is not limited to) management accounts, bank account statements and current trading figures; and

b. In the absence of a Company accountant, an instruction in agreed terms is given to a recognised expert in company valuations, such expert to be agreed between the parties, or appointed by the Institute of Chartered Accountants in England and Wales.

Our solicitors responded to the above letter on 2 December 2019 confirming our agreement to the parties appointing an accountant to determine the market price of Ms Nicholson's shares in the Company in the event that she leaves the Company's employment. Further it was confirmed that we would provide their client with copies of all information and documents that are required by the accountant for the purpose of the valuation.

A letter was then received from Kennedys dated 14 January 2020 putting forward 3 alternative independent accountants to undertake the valuation of Ms Nicholson's shares (including Mr Julian Beressi of Kay Johnson Gee Chartered Accountants) and inviting us to choose one of these candidates (pages 134-135). In our solicitors' letter in reply of 22 January 2020 it was confirmed that we agreed to the joint instruction of Mr Julian Beressi and that our solicitors would provide a draft joint letter of instruction for their approval

On 13 February 2020 our solicitors sent to Kennedys for approval a draft letter of instruction to the valuer and a draft Deed relating thereto. The primary purposes of the draft Deed were to ensure that (a) the valuation of Ms Nicholson's shares in the Company would be final and binding on the parties in the

absence of manifest error or fraud; and (b) that Ms Nicholson would be unable to bring a claim against us for relief under section 994 of the Companies Act 2006.

Ms Nicholson's solicitors replied on 28 February 2020 stating their client cannot agree to the proposed Deed in circumstances where she had been denied sight of the full financial information relating to the Company prior to instruction of Mr Beressi. Our solicitors had already addressed this issue in their letter of 22 January 2020 as above. However, Kennedys now proposed that once Mr Beressi had confirmed what financial information he requires, the Company would then be required to provide that information to Mr Beressi and Kennedys within 7 days of that request.

Our solicitors' letter of 16 March 2020 confirmed "Our clients have nothing to hide regarding the company's financial information and to demonstrate this they have agreed to your provision for the expert to request further disclosure if required albeit this could add to the cost of the expert report".

Kennedys replied on 18 March 2020 commenting "Our client was not willing to agree to enter a Deed without the agreement of your client to disclose financial information relating to the Company prior to the completion of that report. We are grateful for the confirmation that your client is willing to provide that disclosure and allow representations to be made in respect of the same.""

6. There is no dispute that the Deed was entered into and now binds the Claimants and Defendant. Neither is it disputed that the Deed obliges Ms Nicholson to sell her shares to a person nominated by the board of the Company at the "current market price". The SHA provides that where an employee leaves the Company for "any reason" then "that shareholder agrees to sell" and the "market price" is valued at "the date of leaving". The Deed refers to a "determination of the current market price" that shall

be "final and binding" and expressly refers to the "Employees" clause that states that the market price shall be "at the date of leaving as determined by the Company's Accountants". As the date of leaving is known to be 27 April 2020 the determination date for the market price had been determined.

7. As regards the mechanics of the valuation, the Deed provides, by clause 1, that the valuer be Mr Julian Beressi of Kay Johnson Gee Chartered Accountants or a valuer of such other firm of Chartered Accountants as the parties may agree to jointly instruct. Mr Beressi was the agreed valuer. The Claimants and Defendant agreed by clause 3.1 that (where relevant):

> "The Determination will be final and binding on Party A and Party B (in the absence of *manifest error* or fraud) as to the market price to be paid to Party B in respect to her shares in the Company under the provisions of the Employees Clause if Party B leaves the employment of the Company for any reason." (emphasis added)

8. And by Clause 3.2 that:

> "For the purposes of the Determination, it is further agreed that there will be a valuation of [Ms Nicholson's] shares based on the assumption that Mr Large's loan has been converted into deferred stock and another on the assumption that Mr Large's loan is repayable on demand and if there is any difference between the two valuations then the mid-point will stand as the price to be paid to Party B under clause 3.1 aforesaid."

9. There were three relevant loans to the Company. The first was a loan by Mr Large. He is the father of Ms Nicholson. In 2014 he loaned the Company £30,000 (the "Large Loan"). The Deed provided that it was to be assumed that the Large Loan is repayable on demand. The loan has now been repaid. The second and third loans were made by Mr White, the father of the first Claimant. The first was for a sum of £250,000 in 2014 and the second for the sum of £52,030 (the "White Loans"). These loans were interest bearing. In 2017 the Company and Mr White entered into the "Venson

Agreement". At the heart of the Venson Agreement is a mechanism for repayment of the two loans.

Employment Tribunal

10. In paragraph 3 above I have mentioned dismissal proceedings brought against Ms Nicholson. The reason for dismissal is that she was alleged to have breached her fiduciary duties to the Company by secretly seeking to take personal advantage of a Company opportunity and in furtherance of this activity had attended a trade show in December 2019 when she gave the reason for her absence from work as due to ill health.

11. After her dismissal Ms Nicholson brought unfair dismissal proceedings in the Employment Tribunal. The case was heard remotely on 9 and 10 September 2021 where she appeared in person. Judge Shore found that Ms Nicholson was (i) bound by the SA (ii) under a duty not to act in conflict where her interests conflicted with those of the Company and (iii) under a duty not to disclose commercially sensitive information to third parties.

12. Judge Shore concluded that the dismissal was not unfair and made the following findings:

> "I find that the claimant must have considered whether Delilah could fulfil to opportunity and must have dismissed that idea. I make that finding because I find the claimant's evidence that she was talking to BATB about products that Delilah could not supply not to have been credible. I preferred the evidence of the respondent, which said that it could have fulfilled BATB's requirements. (sic)
>
> I find that the secrecy with which the claimant conducted her discussions with BATB is indicative of the fact that she must have known that she was doing something that she should not have done. I find that the claimant's failure to mention the purpose of the meeting with BATB on 14 March 2019 to have been a further breach and a further indication that she must

> have known that she was doing something that she should not have done.
>
> I find that in her email of 26 March 2019 to BATB [59J-59L], the claimant sets out with crystal clarity that her input into BATB's new product would be a personal appointment that was outside Delilah. She talks of a consultancy fee and commission. I also find that the claimant offered to put BATB in contact with manufacturers/suppliers that Delilah used. I find that to be a breach of her contract of employment with the respondent.
>
> It is relevant to my decision that the claimant's actions set out above occurred before she indicated that she wished to leave the respondent and sell her shares on 8 May 2019…" (sic)

13. I shall now turn to the valuation.

Shareholding valuation

14. The parties agreed to instruct Mr Beressi, a fellow of the Institute of Chartered Accountants and a member of the academy of experts, to produce a value of Ms Nicholson's shares. He produced his report on 27 August 2020. The joint instructions asked him to determine:

    i) The current market price of Ms Nicholson's shares in the Company;

    ii) The extent to which the price may be affected by (a) the Large Loan having been converted into deferred stock and (b) that it is repayable on demand.

15. His report records that he was furnished with financial information for "the historic accounting periods up to February 2020, available management accounts and related information since then, budget information to February 2021 plus descriptions of non-recurring or exceptional items in these periods".

16. In his introduction Mr Beressi explains:

> "I draw your attention to the fact that valuations are imprecise in nature and that a range of valuations may apply. The fair value is the price which might reasonably be achieved in a sale between a willing buyer and a willing seller, each of whom is deemed to be acting for self-interest and gain, and each of whom are equally well informed about the business and the market within which it operates. It should be noted that different purchases/investors will consider how risky the acquisition/investment will be for them and their particular circumstances, and therefore may arrive at a different valuation."

17. He noted that the shares allocated to Ms Nicholson comprised ordinary shares and preference shares representing 25% and 30% of the issued and allotted shares respectively: "both minority shareholdings".

18. The accounts for the year ending 2017 state that Mr White and Mr Large have *deferred stock* in the Company which is represented by the Large Loan and White Loans. Mr Beressi explains that there is disagreement between the parties as to the meaning of *deferred stock*. Mr Large has argued that the Large Loan was repayable on demand. As a matter of comment it would ordinarily be odd to distinguish between the two loans as they were both described in the same way in the accounts.

19. As regards the White Loans, having "reviewed" the Venson Agreement Mr Beressi opined:

> "[I] am of the opinion that this [*deferred stock*] is in fact an interest bearing loan which is only repaid on a sale or float of the company in priority to the share capital. On any sale, a premium is paid if the value exceeds £1m. Additionally, the loan attracts interest at 4% per annum over LIBOR on unsecured borrowings…This deferred stock is, in my opinion, incorrectly classified as being part of capital and reserves and should be shown as a liability. The reclassification is important because the inclusion as a loan results in the balance sheet

showing an insolvent position with a deficit of £126,000. I note that in the financial statements to 28 February 2017 the loan stock was included in long term creditors, this was changed in the following year to being part of the capital and reserves. The balance sheet, as at 28th February 2017, showed an insolvent position with liabilities exceeding assets by £196,388. Following the investment by Difra and the reclassification of the 'deferred stock' the balance sheet showed net assets of £381,500 as at February 2018. In my opinion, this should be £26,500."

20. After reaching the conclusion that the word *stock* referred to a convertible interest-bearing loan, the word *deferred* denoted crystallisation upon a future event and that the White Loans should be treated as a liability, Mr Beressi made reference to the three different methods of valuation: (i) earnings; (ii) net assets and (iii) dividends. His opinion that the enterprise valuation model is the correct method is not in dispute. Mr Beressi states [3.2]: "The Enterprise Valuation model has become more prominent and in calculating the value I have used earnings before interest, taxation, depreciation and amortisation as the basis of the valuation. From this total enterprise valuation for the Company, we then deduct net debt owed to funders to determine the equity or shareholder value."

21. In his valuation Mr Beressi took account of the following matters:

    i) the White Loans are to be treated as liabilities;

    ii) there had been no changes to the accounting practices by the Company since 2017 when a real time cost of sales accounting system was introduced;

    iii) the balance sheet shows cumulative losses up to the 28th February 2020 of £563,000;

    iv) dividends were in arrears of £21,000;

    v) Ms Nicholson's shares are to be treated as a minority shareholding;

vi) the return to a minority shareholder is either by dividend or disposal where the disposal is the entire shareholding of the Company;

vii) the sale of a 25% shareholding to a third party provides a "remote" prospect. The application of a 40-50% discount is appropriate to value a minority shareholding;

viii) removing exceptional and non-recurring costs to a level of maintainable earnings for the period 2018 (actual) to 2021 (forecast) is as follows: 2018 (£34,882); 2019 (£126,858); 2020 £93,753 and 2021 (forecast) £32,218;

ix) bad debts in 2020 were averaged with an element added back to the balance sheet. Legal fees relating to the current dispute were exceptional. The conference in 2018 had not reoccurred. The tax credit in 2018 is deducted as it is an adjustment after tax;

x) directors' remuneration were accepted as the market rate; and

xi) the appropriate multiplier to apply is 5.5.

22. In conclusion Mr Beressi stated that the enterprise value is £154,000. The enterprise value weighed against the debt level of £559,000 led to his opinion that the minority shareholding of the ordinary shares is no greater than £1.00. He considered that the preference shares were of the same value. There is no challenge to his valuation of the preference shares.

Challenges to Mr Beressi's expert report

23. The challenge to the Beressi valuation is that there are *manifest errors*. That is, there are errors in the valuation that are so obvious that there need be no extensive investigation. That does not mean that it is illegitimate to consider the material relied upon by Mr Beressi. Four errors (or classes of error) are said to fall into this category. First the White Loans should not have been treated as a liability. Secondly, the expert failed to take account of stock movements when relying on the forecasted results. Thirdly, the expert continued to rely on the forecast figures notwithstanding that the Company had produced updated results. Lastly, the forecast was for the calendar year of 2020 but used as if it was for the financial year to February 2021. This had an

unintended consequence in that there was double counting of the loss in February and January 2020.

Legal analysis of challenge

24. Kendall on Expert Determination (5th edition) explains [14.11]:

> "Expert determination clauses often provide that the decision is to be final and binding "in the absence of manifest error"… In the absence of words such as "in the absence of manifest error" a patently wrong decision is usually unchallengeable unless the expert has materially departed from his instructions or exceeded his jurisdiction. The inclusion of words such as "in the absence of manifest error" clearly widens the scope for challenge based on mistake beyond the circumstances referred to in Jones v Sherwood."

25. There have been a number of cases dealing with manifest error clauses including several recent decisions in the Court of Appeal. Kendall refers to Lord Lindley's succinct definition:

> "All errors are manifest when discovered; but such clauses are intended to be confined to oversights and blunders so obvious as to admit no difference of opinion."

26. One of the recent Court of Appeal decisions amended that definition to: "oversights and blunders so obvious and obviously capable of affecting the determination as to admit of no difference of opinion". The reason for the amendment is that it was argued that regardless of whether the error affected the outcome of the decision, the decision should be set aside if there was a manifest error: *Veba Oil Supply & Trading GmbH v Petrotrade Inc* [2002] 1 All ER 703. Simon Brown LJ explained the different challenges and why amendment to the formula was required [30-34]:

> "30. Although that conclusion is sufficient to dispose of the appeal, I would touch briefly on the alternative basis for decision relied upon by the Buyers, the reference in clause 10

to "manifest error". Morison J below went no further than to say that he was "inclined to the view that there was a manifest error here, due to the wrong test being used".

31. Morison J had previously considered the meaning of "manifest error" in Conoco (UK) Ltd v Phillips Petroleum (unreported, 19 August 1996) where, following dicta in earlier cases, he held that manifest error referred to: "oversights and blunders so obvious as to admit of no difference of opinion".

32. The question then arising is whether it is relevant to consider whether the error is one that affected the result. Considering that question in Conoco v Phillips, Morison J said this:

"… it seems to me that there is no room for any debate as to whether the oversight or blunder would or would not have made any material difference to the result. If it could be shown that there was a manifest error then in my judgment that would be an end of the case. If fraud was shown, I cannot accept that it would be open to debate as to whether the fraud did or did not affect the result; so also would manifest error."

33. I confess to some difficulty with this approach. Fraud, of course, would vitiate the determination irrespective of whether it affected the result: "Fraud or collusion unravels everything" (per Lord Denning in Campbell v Edwards). The exception for "manifest error", however, seems to me of a rather different character and to be designed essentially to fill the gap in the law created by the development to which I have already referred: the overthrow of the Dean v Prince principle of setting aside determinations for mistake. Nowadays, if parties wish to contract on the basis that they will not be held to mistakes made by the expert in the course of carrying out his instructions, they must needs include a term like this with regard to manifest

> error. But if they do, is it then really to be said that provided only the mistake is obvious, the determination will be avoided irrespective of whether it could affect the outcome? In this context I am inclined to think not. Take the very error committed in Frank H. Wright (Constructions) Limited v Frodoor, the erroneous inclusion of a 'not' in the report. I do not think that that ought properly to be regarded as a "manifest error". Rather I would extend the 'definition' of manifest errors as follows: "oversights and blunders so obvious and obviously capable of affecting the determination as to admit of no difference of opinion". (emphasis added).
>
> 34. If, of course, the error consists of a departure from instructions, then, assuming I am right in my earlier conclusion, it will never be necessary to ask whether in addition that error amounts to a "manifest error": it will vitiate the determination in any event. If, however, I am wrong in my earlier conclusion – if, in short, the Inspectors' use of the wrong test method here ought properly to be regarded as an immaterial departure from their instructions – I would not conclude that it nevertheless constituted a manifest error such as to entitle the Buyers to set aside the determination on that alternative basis."

27. If the issue concerns one of law the fact that the court may reach a different conclusion does not automatically lead to the conclusion that the error is manifest: *Walton Homes Ltd v Staffordshire County Council* [2013] EWCA Civ 542. The valuer had seen the Venson Agreement and made his conclusion in respect of it. The fact that the court may reach a different conclusion does not automatically lead to the conclusion that there is a "manifest error".

28. In the case cited in Kendall, *Jones v Sherwood* [1992] 1 WLR 277 the court found that if the decision is arguably wrong that is not sufficient to give rise to a manifest error and it is even insufficient if the decision is wrong, providing it was in accordance with the expert's instructions and does not contain any manifest error. The circumstances when a determination by an expert can be challenged are tightly

circumscribed (per Potter J in *Healds Foods Ltd v Hide Dairies Ltd* 112/94 and *Cadogan Petroleum Plc & ors v Tolley & ors* [2009] EWHC 3291 Ch at paragraph 31).

29. Mrs Justice Proudman said that the test of manifest error is an "exacting one": *Franbar Holdings Limited v Casualty Plys Limited* [2011] EWHC 1161.

30. When considering the matters that a court may take into account when determining whether there is a manifest error, I have been referred to *IG Index v Colley* [2013] EWHC 748 at [813] to [814] where the court held that it was not impermissible to consider extrinsic evidence.

Argument

i) *Treatment of the White Loans*

31. Ms Nicholson relies on the accounting standard FRS 102 to support her argument that the Venson Agreement, properly construed, does not give rise to a liability. It provides at section 22.3

> "Equity is the residual interest in the assets of an entity after deducting all its liabilities. Equity includes investments by the owners of the entity, plus additions to those investments earned through profitable operations and retained for use in the entity's operations, minus reductions to owners' investments as a result of unprofitable operations and distributions to owners."

32. Ms Nicholson seeks to rely on section 22.3A which provides:

> "A financial instrument, where the issuer does not have the unconditional right to avoid settling in cash or by delivery of another financial asset and where settlement is dependent on the occurrence or non-occurrence of uncertain future events beyond the control of the issuer and the holder, is a financial liability of the issuer."

33. The Venson Agreement contains a recital and an agreement clause:

"Whereas [Mr White] and the Company agree that the loan agreements dated 17 February 2014 in the sum of £250,000 plus outstanding interest and 26 November 2015 in the sum of £52,030 plus outstanding interest shall be cancelled from the date of this Agreement"

and

"It is agreed that [Mr White] has invested £325,000…to the Company upon the terms and conditions herein contained. The investment is unsecured and has no specific repayment date [The Investment]".

34. The Venson Agreement then provides:

"2. The Investment has been made for the purpose of buying stock and developing the business.

3. [The] Company will pay [Mr White] by way of interest on the Investment at a rate of 4% per annum over LIBOR on unsecured borrowings. The interest will be paid quarterly on…into a bank account nominated…

4. In the event that the Company is either sold or its shares floated on the stock market [in whole or in part] all parties to this Agreement will procure the purchase price realised for the Company will be paid into an escrow account in the Company's name on which the Founder Shareholders will be joint signatories. They undertake to pay out :-

a. any outstanding interest on the investment made to the Company

b. The investment made to the Company

c. a further sum to [Mr White] being the Premium determined in accordance with Schedule A annexed hereto

> d. The remainder of the dividend amongst the shareholders according to their respective holdings in the Company."

35. It is accepted that Mr White received interest payments pursuant to clause 3 of the Venson Agreement. That is he received interest for the unsecured £325,000 borrowing. In the report commissioned by Ms Nicholson, Mr Taylor inaccurately described the White Loans as not being "unsecured borrowings". He did not seek to explain how the White Loans were secured but reached the conclusion that the Venson Agreement intended the White Loans to be "equity". He failed to analyse what equity was acquired by Mr White.

36. Schedule A provided a formula for calculating the premium for a sale or floatation where the Company is valued above £1,000,000.

37. A sale or floatation was in the contemplation of the parties from at least 8 February 2017 when the SHA was executed. It provided:

> "It is the intention of the Directors that at some future date and subject to market conditions that the Company offers itself for sale or will seek a listing on the London Stock Market. When an offer to buy the Company is accepted by Shareholders holding not less than a cumulative total of seventy per cent of the Company's £1-00 Ordinary Shares and remaining Shareholders including Founder Shareholders agree that they will accept the offer and for the same terms."

38. Ms Nicholson argues that the Company had an unconditional right to withhold payment of the White Loans. If this is correct, there is no liability for accounting purposes. The argument is based on an interpretation of the Venson Agreement. First it is said that the Venson Agreement does not provide a mechanism for Mr White to demand the return of the money he advanced under the White Loans. If he cannot demand repayment the Company does not need to repay the money. It has a right to withhold payment. Ms Nicholson goes even further and says that the Company is precluded from repaying the advances in the absence of a sale or floatation.

39. However, there is nothing in the Venson Agreement that fetters its right to repay at any time.

40. Secondly Ms Nicholson argues that since Mr White may only recover the advances made by way of the White Loans if there is a sale or floatation, only the Company has the key to unlock the right to repayment: a sale or floatation is within the control of the Company.

ii) Errors in the use and application of forecast for 2021

41. Mr Taylor explains in his report that the valuation undertaken by Mr Beressi is in part based upon a forecast. The argument is that the forecast does not accord with the actual results produced at a later point in time:

> "The forecast profit for the year ended 28 February 2021 showed a loss for the year of £8,898. However, a review of the actual accounts produced and filed at Companies House on 30 November 2021 shows that the retained profits in fact rose by, £138,369, an improvement upon forecast of some £147,267."

42. In fact the adjusted earnings before interest, taxation, depreciation and amortisation (EBITDA) forecasted was £38,218 reducing the "improvement" to just over £100,000.

43. Criticism has been levelled at the Company for failing to provide Mr Beressi with current information. That criticism is to be seen in context. The letter of instruction was joint and sent to Mr Beressi on 4 June 2020. The letter stated that the Company will furnish such information:

> "as is requested by you and is available for the purpose of the valuation within 7 days of that request and provide copies to Ms Nicholson's solicitors. Within 14 days of receipt of the Company Financial Information, Ms Nicholson may make representations to you and the Company concerning the Company Financial Information provided and within 7 days thereafter the Company may make representations to you with

> regard to Ms Nicholson's said representations. If you are of the view that further disclosure is required from the Company in light of those representations, the Company shall provide that further disclosure within 7 days of that request."

44. On 15 June 2020, Ms Fricker (the Company's Financial Director) emailed the requested information and documents. On 18 June 2020, she e-mailed further documents. The 18 June e-mail is particularly relevant to the March 2020 information provided:

> "Reattach file with the documents including the full accounting extract from our Brightpearl system for March 2020. We do not usually do a commentary for this, just the sales commentary you already have but for March here is a brief commentary:
>
> <u>March full profit and loss account</u>
>
> Sales - as per March sales commentary - already sent Overheads
>
> UK field sales team converted to home-workers mid March with resultant savings in business mileage, travel and subsistence costs.
>
> Accruals input for directors salary (not paid in month due to cash situation)
>
> <u>March full balance sheet</u>
>
> Stock - we were about to have biggest product launch since inception of our ALIBI full coverage foundation in mid March. Therefore, we have the stock increased for this, but most pre-orders were cancelled/postponed due to timing. We also had the corresponding creditors for bringing Alibi to a finished product (fill, boxes, labels etc)"

45. On 15 July 2020, solicitors acting for Ms Nicholson e-mailed Mr Beressi with "our client's representations on the financial disclosure and position of [the Company]." Kennedy's reminded Mr Beressi that "the Company now has 7 days to provide any comments in reply before any further disclosure is requested by you and/or the final valuation is completed." The representations raised issues of non-disclosure by the Company: "on 15 June [the Company] forwarded limited financial data which did not include full management accounts for 1st QTR 2020-2021…"; issues concerning the movement of stock: "movement of stock between…1st and 2nd trading quarters of between £80,000-£100,000 which effectively reduced the first quarter profitability…"; aged creditor and overhead reductions among other things. Ms Nicholson contended to Mr Beressi that:

> "Using the operating costs but making no other changes to the forecast suggests an operating profit for 2020-21 financial year of between £200,000- £250,000 rather than a loss of £9,000."

46. No longer an employee of the Company Ms Nicholson obtained unauthorised access to the Brightpearl accounting system to provide the real-time accounting figures to Mr Beressi. On 23 July 2020, Kennedy's wrote on behalf of Ms Nicholson to Mr Beressi stating that it is "clear that the Company failed to provide full and accurate financial information to enable Mr Beressi to carry out his assessment…." A response came from Gordons solicitors, acting for the Claimants, who e-mailed Mr Beressi on 28 July 2020:

> "We would inform you that our clients will not be objecting to your client's use and reliance of the information obtained from the Brightpearl accounting system…for the sole purpose of the valuation of her shares."

47. Unsurprisingly, the Company was not pleased with the accusation. Gordons wrote to Mr Beressi on the same day stating that the Company had provided all the documents requested by Mr Beressi's office and:

> "It seems to us that it is for you to decide, as the expert, what further information and documents, if any, that you need in order to undertake the valuation and of course this is already

> provided for in clause 3.2 of the said Letter of Instruction where it states "If you are of the view that further disclosure is required from the Company in light of those representations, the Company shall provide that further disclosure within 7 days of that request". Could you please therefore let the parties know as soon as possible whether you need the Company to provide any further disclosure in light of Kennedys Law LLP's said email of 23 July."

48. On 5 August 2020 Gordons chased Mr Beressi to ascertain if further information was required from the Company.

49. Mr Beressi responded the next day indicating that he had received a considerable amount of further documentation:

> "Firstly I apologies for the delay in reverting back to you, unfortunately I am swamped at present but will look over the weekend at the valuation which is progressing. You will of course be aware as regards the volume of additional documentation provided which is not insubstantial."

50. The "additional documentation" was mostly provided by Ms Nicholson following her unauthorised access to Company records. On 17 August 2020 Mr Beressi made his position known:

> "I am just writing to advise that I have had the opportunity to substantially advance my share valuation report over the last few days.
>
> I am considering further the additional submissions made by both parties and it may be that I have a couple of questions in relation to the same however I do not anticipate that this will involve either party in providing much additional information if at all."

51. The process agreed between the parties had completed with Mr Beressi reaching the conclusion that he had sufficient documentation and information to provide a valuation of the shares to provide a market value in accordance with the SHA. In these circumstances any criticism that the Company failed to provide the expert with accurate and up to date information is unwarranted.

52. I mention here the movement of stock. The evidence of Ms Fricker is not contested. She says in her written evidence:

> "The Company has stock held in a number of locations. Our finished goods held in a UK warehouse, components (tubes, bottles etc) are held with suppliers and bulk make-up formulations are held at a number of manufacturers sites, which we draw down upon when we require finished products to be filled for sale. *For the year end at the end of February, and for each quarter end after, we obtain stock counts from all sites*, not just our UK warehouse for finished goods. *Correction journals are then made to inventory for the periods ending February, May, August and November to reconcile all stock*, not just finished good inventory to match stock counts obtained from all sites. *These corrections to stock will move the profit/loss in those periods as our system is a real-time accounting system and will account directly for any stock adjustments. This is not manipulation of accounts: it is the opposite. It is confirming that the inventory value held in the accounts matches third party inventory records* to ensure the inventory held in the balance sheet is accurate." (emphasis added)

53. As regards dealing with Mr Beressi Ms Fricker states:

> "The shareholders agreement states that the consideration shall be the market price at the date of leaving. The external valuer requested historical financial results to the end of February 2020, plus management account information for the period

> until submission on 12 June 2020 with forecast information for the remainder of the year. *Ms Nicholson alleges that we "shunted profit out of the year to show a breakeven and then shunted profit to June and July". This is not true. It is not clear to understand how Ms Nicholson deems this act took place*. However, it seems that in section 1G of statement 2, Ms *Nicholson claims that stock (of our new product launch ALIBI) 'will have had to been in the warehouse in February 2020, then moved to March 2020 to avoid being in the year-end figures'. This is incorrect*. *The invoice from our fillers is dated 18 March 2020* (can pop in evidence bundle if required) and received into our warehouse on the 19th March and *we started sales of Alibi on the 19 March 2020, just as we entered into the first lockdown meaning that many pre-orders of our new product launch were cancelled, leaving us with cash tied up in stock at the warehouse and suppliers to pay for the components, bulk liquid and filling adding to our creditor balance of amount owed.* Ms Nicholson had not been involved in the business since June of the prior year and would have no knowledge of when our fillers were bottling ALIBI, *she is falsely claiming that stock was moved from February to March, which is simply untrue.* Our accounts for the year ended 28 Feb 2020 showed a significant turnaround from a net loss of £161k for the year ended 28 February 2019 to a small profit of £4k. Year- end adjustments were made, where required, to ensure accurate financial reports are produced as per the legal obligation to do so for all limited companies. Profit was not moved as claimed by Ms Nicholson. Examples of year-end adjustments include a review of the debtors ledger with a corresponding update for any bad debt provision."

54. Given that there is no reason, and no reason has been proffered, to go behind Ms Fricker's witness statement, I accept her evidence. In any event, it is accepted by Ms

Nicholson that the movement of stock between the years' records may be modest given that the EBITDA is based on weighted averages of various years.

55. During submissions it was accepted that Ms Nicholson was correct to identify that Mr Beressi had confused the calendar year with the financial year which led to some confusion and double counting of the negative figures for January and February 2020. It is estimated that the failure led to a negative figure increasing by £18,644.71, a figure confirmed after closing.

Discussion

56. This is not a case where it is said that Mr Beressi acted outside his scope of authority. The Venson Agreement had been sent to him by agreement of the parties when he was invited to provide a valuation based on his interpretation of legal and factual matters. Mr Beressi found that the White Loans were to be treated as liabilities. As Peter Smith J said in *Walton Homes Ltd* [31] "this is not a review it is not an appeal and I have no power to construe the terms of the Agreement. The only issue for me is whether there is a manifest error…[43]. This means that Walton must establish not only that the reasoning is wrong but is *manifestly wrong*".

57. I find that there is nothing manifestly wrong with the decision of Mr Beressi to treat the White Loans as liabilities. The language of the Venson Agreement is confusing in that it uses terms such as "Investment", "indebtedness" and "unsecured borrowings" interchangeably to mean the White Loans. Properly understood the White Loans were an injection of capital into the Company for a specific purpose. To purchase stock and develop the Company.

58. The Venson Agreement expressly referred to a return on capital measured against the prevailing LIBOR rate and identified how the advances would be repaid if there was a sale or floatation. That did not mean that the advances made by Mr White were locked-in until a sale or floatation. It is strongly arguable that a *reasonable reader* would read the words "*In the event that* the Company is either sold or its shares floated on the stock market" as an altogether different provision to : "The investment is unsecured and has no specific repayment date". The "*in the event that*" sale or

floatation clause contemplated the possibility of a sale or floatation occuring. If that were to happen, it would be a trigger event for repayment of the principal and interest in an agreed waterfall priority.

59. The earlier clause: "The investment is unsecured and has no specific repayment date" committed the parties to no precise date for repayment. A *reasonable reader*, having regard to the background, would not understand this to mean that it would have been impossible to recover the White Loans unless there was a sale or floatation. In other words, "no specific repayment date" is not inconsistent with the parties either agreeing at a later stage to a repayment date or, as I shall consider, excluding an implied term that repayment be made on demand.

60. Lord Neuberger explained in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72 that:

> "... the notion that a term will be implied if a reasonable reader of the contract, knowing all its provisions and the surrounding circumstances, would understand it to be implied is quite acceptable, provided that (i) the reasonable reader is treated as reading the contract at the time it was made and (ii) he would consider the term to be so obvious as to go without saying or to be necessary for business efficacy."

61. I do not understand *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* to have reversed the Privy Council's decision in *Attorney General of Belize v Belize Telecom Ltd* [2009] 2 All E.R 117 but sought to distinguish the task of construction of contract with implication of term. At the same time Lord Neuberger acknowledged that there is an "overlap" between the tasks. Lord Hoffman explained that the *reasonable reader* would consider whether the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen.

62. In my judgment, a *reasonable reader* would not understand that the White Loans were locked-in for an indeterminate period, but that Mr White would be able to recover his loans on demand. Suppose the Company's financial position soared so that the White Loans could be repaid with comfort, as Ms Nicholson claims, and the

directors and shareholders decided that they did not wish to sell the business but to retain it and keep it in private hands. In these circumstances could it be said that Mr White would never recover the White Loans? The Venson Agreement does not expressly provide for what is to happen in these circumstances. It is into this gap that an implied term may be reasonably inserted. In my view it is not inconsistent with the terms of the Venson Agreement that the words "no specific repayment date" are qualified with "repayment to be made on demand". First the words "no specific…date" do not objectively mean "gift" or "repayment is to be made only in accordance with clause 4". Giving the words their ordinary meaning, it simply means that the repayment date is not a date set at the time the Venson Agreement was entered. The qualified words are capable of clear expression, necessary for practical internal coherence and would be obvious to the *reasonable reader* with the relevant background knowledge having regard to the express terms of the Venson Agreement and applying commercial common sense.

63. The relevant background knowledge mentioned is that the White Loans were advanced to the Company to assist with its business, but no gift was expressed or contemplated nor was a purchase of stock (shares) in the Company.

64. The point made by Mr Taylor is that the terms "deferred stock" and "investment" made it likely that Mr White was intending to purchase shares in the Company as a form of investment at a future date. There is nothing in the Venson Agreement that provides for an option to purchase shares. The terminology used in the Venson Agreement is unfortunate but not impenetrable. None of the terms referred to are defined. Late in the day Mr Taylor accepted, by an addendum to his report, that the reference to "deferred stock" does not mean shares. The term "investment" is likely to refer to his return on capital provided by the receipt of coupon payments. Although Mr Taylor says his view about "the classification of the investment provided under the Venson Agreement as equity rather than a liability remains unchanged" his statement is unsubstantiated. It is apparent from Mr Taylor's opinion that the terms "deferred stock" and "investment" used in the Venson Agreement led him astray. He has read the word "investment" as either taking some form of equity in the Company or as meaning a debt not repayable at the instance of Mr White without regard to the context. He gave no weight to the other terms used and failed to take account of the

background facts. The injection of capital was to provide cash flow to the Company to use as it required and was an unsecured loan.

65. Having provided some analysis in respect of the White Loans I remind myself that I do not need to decide the legal interpretation of the Venson Agreement at this hearing. It is sufficient, in my judgment, to explain why the treatment of the White Loans as a liability does not constitute a "*manifest error*". Even if there is merit in the argument that the White Loans were locked-in until sale or floatation so that they form an asset of the Company, the foregoing analysis demonstrates that the treatment of the White Loans as a liability was not an oversight or blunder so obvious as to admit *no difference of opinion*.

66. It was submitted that in any event, FRS 102 has been misunderstood by Ms Nicholson and her expert, Mr Taylor. The Venson Agreement obliges the Company to pay interest which represents a liability even if there is no intention to redeem the principal at any particular point in time. Mr Walton who has produced a report for the Company provides his view:

> "In simple terms, this effectively means that where a borrower has an obligation to part with cash or other assets in either complying with the terms of the financial instrument, such as paying the lender interest, or by way of redemption at some point in time in the future, the contract is, or contains, a financial liability. So whenever there is a contractual obligation on the part of the borrower to pay cash or settle an obligation by parting with another asset, a financial liability is recognised."

67. There may be some merit in this argument. The value of the analysis is perhaps to demonstrate that experts other than Mr Beressi have reached different conclusions on the issue. At its height, the argument deployed by Ms Nicholson can be no more than that Mr Beressi was arguably wrong. As the test of "*manifest error*" is exacting and the error is required to be so obvious as to admit no difference of opinion, it is insufficient if the point of concern is that it is *arguably wrong*.

68. In deference to the arguments advanced by counsel, I turn to the EBITDA challenges and the forecast calculations. I do so in a summary way. This is because the "exacting test" is two-staged: it requires (i) a *manifest error* to be established and (ii) the *manifest error* to cause a material difference to the result.

69. If there is a *manifest error* in the figures used for the forecast, where the treatment of the White Loans as a liability is not a *manifest error*, there will be no material difference to the valuation result if Ms Nicholson is correct in respect of her challenges to the EBTIDA calculations.

70. It is worth stating what is not in contention. First, the weighting (1,1,3,2), secondly, the multiplier (5.5) applied by Mr Beressi and thirdly Mr Beressi's conclusion that the Company's debts (including the White Loans) amounted to £559,000 is not challenged (other than the issue of the Venson Agreement I have dealt with above).

71. Under challenge is the forecast for 2021. I have mentioned that Mr Beressi applied the forecast for the financial year 1 March 2020 to 28 February 2021. The forecast was produced on a calendar year basis. Although this error was first raised in the skeleton argument of Ms Nicholson, the error has been acknowledged as amounting to an error so obvious not to admit of a difference of opinion. The error led to miscalculations for the period January and February 2020. I have mentioned above that this figure is £18,644.71.

72. It is said that the financial results for the year ending 28 February 2020 were affected by (i) non-recurring costs and (ii) stock movements. Mr Beressi made adjustment in his report for non-recurring costs. In respect of stock movements, although they may affect the gross profit margin Mr Beressi reported that if there had been stock movements, the gross profit margin was not materially affected. The unparticularised attacks do not demonstrate that Mr Beressi made a *manifest error*, and I have accepted, as it seems I must, the unchallenged evidence of Ms Fricker in relation to stock movements [72].

73. It is said that the forecast figures for March and April 2020 (I remind myself that the relevant date for calculating the value of the Company is 27 April 2020) should not have been used, since real-time figures were available. I was initially attracted to this

argument since a forecast is precisely that. Ms Nicholson has claimed that the figures she obtained from the Brightpearl accounting system is evidence of higher profits.

74. Ms Fricker has explained that the problem with using data from Brightpearl is that it is partly raw and requires adjustments. It will always show a higher figure if outgoings such as invoice discounting finance charges are not subtracted. As an example, the June 2020 results by BrightPearl showed an attractive profit headline of £82,535.69. I invited counsel to produce an agreed adjusted figure to understand if the Brightpearl system did provide the evidence as Ms Nicholson claimed. I received a note after the hearing (which was not agreed but not challenged):

> "[The] purported "profit" of £82,535.69 reduced to a post-adjustments figure of £8,861.53. In addition to various outgoings such as NI / factoring charges / pensions not being included in the 3 July 2020 printout, it also failed to include the stock adjustment which took place following stock counts after the month end, which significantly reduced the "profit" shown on BrightPearl."

75. Adjustments were made for items such as stock, directors' salaries and legal costs. The decrease between the headline profit of £82,535 and £8,861 is demonstrable. I conclude that the unadjusted figures provide an unreliable basis to calculate the enterprise value. Ms Fricker also explained that although the real-time data was available, the adjusted figures were not available at the time of the report. In these circumstances the use of a forecast for the financial year 2020/2021 was not an oversight or blunder so obvious as to admit no difference of opinion.

76. On the best case scenario, the difference between the filed accounts for the year ending 2021 and the forecast is £100,151. Mr Beressi explained in his report that the positive figure he found to exist followed two years of loss making, but "the EBITDA levels are showing profits". He went on to explain:

> "In calculating maintainable EBITDA, recognition of the *apparent volatility in the results with only one year profits*, means that recognition of losses must be made using a weighted average, biased towards the more recent reported

results and forecast produces a weighted average EBITDA of £28,000." (emphasis added)

77. There is no challenge to his methodology. His asymmetrical result of the enterprise value at £154,000 and of debt at £559,000 led him to conclude that the enterprise value was de minimis.

78. If the adjusted EBITDA figure had increased by £100,151 to £138,369 the enterprise value would also have increased (adopting the unchallenged weighting and multiplier) to £311,344 at its highest. Mr Talyor, providing an e-mail after the close of the hearing, thought a slightly higher figure should be used, but it makes little difference. I say at its highest as the "real-time" figures pulled from Brightpearl are not adjusted for deductions available to the Brightpearl accounting system. The adjustments, as we have seen from June 2020, have a downward effect on the base-line figure. Furthermore, the calculation is based upon the whole year and would have to be adjusted to take account of the valuation date: 27 April 2020.

79. Adopting Mr Beressi's methodology, the enterprise value is in any event, less than the debt level. The error, even if *manifest* would fail to make a material difference to the result.

80. If the mistaken double counting of the negative figure error is added back into the calculation (see paragraph 53 above) the enterprise value would remain insufficient to make a difference.

Conclusion

81. The parties agreed that a single expert would value the Company. They agreed the identity of the expert and timetable. They agreed to be bound by the findings of the expert, save where there was found to be a *manifest error* or fraud. Fraud is not alleged. The parties agreed that this hearing would be conducted without live evidence, each side commissioning a further expert to assist with the analysis.

82. Ms Nicholson has challenged Mr Beressi's report on the basis that he included a liability that was not a liability and thus made a *manifest error*. He made a further *manifest error* by relying on a forecast without a correction to reflect stock

movements, in circumstances where real-time data was available and he double counted a loss in January and February 2020.

83. The test of *manifest error* is two-staged and exacting. In respect of the White Loans a *reasonable reader* would not understand that the White Loans were locked-in for an indeterminate period, but that Mr White would be able to recover his loans on demand [62-67] Although it is unnecessary to determine this as a matter of law, there are strong arguments in favour of such an interpretation in respect of the Venson Agreement. The treatment of the White Loans as a liability cannot be characterised as an oversight or blunder so obvious as to admit no difference of opinion [67].

84. It was conceded that if Ms Nicholson failed to persuade the court that the White Loans were incorrectly characterised in the Mr Beressi's report, the challenges to the EBITDA would not make such a difference as to produce an enterprise value above the level of debt carried by the Company. The second part of the two-staged test could not be met.

85. The issue of double-counting was conceded at the hearing. This would have increased the enterprise value by the sum stated above [55]

86. The evidence of Ms Fricker and the answers to questions provided by Mr Beressi in respect of stock movements negates the argument that the forecast was *manifestly erroneous*.

87. Although initially attracted by the argument that the expert should have used actual data available rather than a forecast for the year 2020/2021, there were three obstacles or problems with doing so. First, the valuation date is 27 April 2020 so the effect would have been less than if the calculations had been to 28 February 2021. Secondly, Mr Beressi did not call for the Brightpearl information, preferring instead to rely on the forecast, and it is not said that he made an error of judgment in this respect. Thirdly, the Brightpearl accounting system produced data where only some deductions are made when reaching a bottom-line figure. The Financial Director gives evidence that adjustments are required on a manual basis to produce a net profit figure. This was best demonstrated by the figures produced for June 2020 where the headline profit produced by the Brightpearl system is £82,535, but this figure is dramatically reduced to £8,861 after manual adjustments. In these circumstances the

use of forecast figures was not an oversight or blunder so obvious as to admit no difference of opinion. In any event, the second stage of the test is not satisfied.

88. I shall make the declaration and order specific performance of the SHA.

89. I invite the parties to agree an order.