

Neutral Citation Number: [2024] EWHC 1532 (Ch)

Case No: CR-2024-MAN-000288; CR-2024-MAN-000289

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

IN THE MATTER OF JUSAN TECHNOLOGIES LIMITED AND IN THE MATTER OF THE COMPANIES ACT 2006

Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Thursday, 20 June 2024

Before:

MR JUSTICE FANCOURT Vice-Chancellor of the County Palatine of Lancaster

Between:

UCONINVEST LLC

Petitioner

- and -

(1) JYSAN HOLDING LLC
(2) MASUDAL RONY WAHID
(3) LORD DAVID CHARLES EVANS OF
WATFORD
(4) CHRISTIAN MARTIN BOERNER
(5) JUSAN TECHNOLOGIES LIMITED

Respondents

Paul Chaisty KC, Stephen Connolly and Jodie Wildridge (instructed by Glenville Walker LLP) for the Claimant

Tony Singla KC and Tom Pascoe (instructed by Willkie Farr & Gallagher) for the Respondents

Hearing dates: 24, 26 April 2024

APPROVED JUDGMENT

(draft provided 12 June 2024)

This judgment was handed down remotely via hearing at 10.00 am on 20 June 2024 by circulation to the parties or their representatives and by release to the National Archives.

The Vice-Chancellor:

I. Introduction

- 1. On 29 February 2024, I heard an application by the Petitioner without notice to any of the Respondents and in private for urgent freezing injunctive relief against the First Respondent ("Jysan") and the Fifth Respondent ("the Company"). On the same day, the Petitioner issued its petition under s.994 Companies Act 2006 for relief against all five Respondents on the basis that they had conducted the affairs of the Company in ways that were unfairly prejudicial to the interests of the Petitioner, by then the sole minority shareholder of the Company, owning about 2.3% of its shares.
- 2. The Second, Third and Fourth Respondents became the directors of the Company on various dates between June and August 2022. At one time, a company controlled by the Second Respondent, Magellan Investment Holdings, Inc ("Magellan") was also a minority shareholder. Jysan is the 97.7% majority shareholder. The shares in Jysan are owned by a Nevada non-profit organisation.
- 3. Despite various concerns about the story being advanced in the evidence of Mr Yerbol Orynbayev (who controls the Petitioner), I did grant temporary freezing relief up to US\$27 million against the Company in relation to two identified bank accounts and other assets within the United Kingdom, and against Jysan in relation to an identified bank account in Pittsburgh, Pennsylvania, and any other assets that Jysan held on behalf of the Company. No interim relief was sought against the Second, Third or Fourth Respondents.
- 4. I also granted permission for the Petition and other documents to be served on Jysan out of the jurisdiction and by way of substituted service on all Respondents. The other Respondents were served in the UK as of right but there was a significant risk that the proceedings so served might not otherwise come to their attention with the urgency that was needed.
- 5. The Company and Jysan promptly applied for the ancillary disclosure order made against them as part of the freezing injunction to be stayed, on the basis that the Company had identified a bank account in Bangladesh in which about US\$19 million stood to its credit, which was frozen by the injunction, and that it would pay just over US\$8 million into court, without prejudice to its right to challenge the injunction at a return date. I refused that application and the Company and Jysan gave the disclosure that had been ordered. This demonstrated that no funds any longer stood to the credit of Jysan's bank account in Pittsburgh and that before the injunction was granted very substantial sums had also been removed or attempted to be removed from the Bangladesh bank account.
- 6. The without notice application was advanced by the Petitioner on the basis of the following principal allegations against the Respondents, which are the main allegations in the Petition and remained the main allegations for the purposes of the return date hearing:
 - i) Three companies owned and controlled by the Second Respondent were wrongly (in view of the conflict of interest and breaches of his fiduciary duties) awarded contracts or given loans worth US\$6 million and £1.2 million by the Company, which were not objectively justifiable and amounted to an unlawful distribution of

- the Company's cash assets for the Second Respondent's benefit (**R2 Company Benefits**).
- ii) Each of the Second, Third and Fourth Respondents were paid huge salaries and bonuses by the Company that were not objectively justifiable and which represent further unlawful distributions of the cash assets of the Company by its directors for their own benefit (**Director Remuneration**).
- iii) The Second Respondent was paid benefits at or about the end of December 2023, characterised as a severance payment of US\$12million and a payment in lieu of share options in the sum of \$35million, which were unlawful and unjustifiable distributions of the cash settlement reached with the Government of Kazakhstan ("GOK") (R2 Post-Settlement Disbursements).
- iv) The Company sold its Kazakhstan-based assets (principally shares in subsidiary companies) to a Mr Yessenov, who was negotiating with the Second, Third and Fourth Respondents on behalf of GOK, which were worth in the region of US\$1.6 billion, for only US\$75 million. This sale was not justified by the desire of the Company to settle litigation by GOK against it, and it was a breach of the statutory duties of the Second, Third and Fourth Respondents, wrongly supported by Jysan, and therefore was a fraud on the Petitioner as a minority shareholder (**Wrongful Settlement**).
- v) The Petitioner was wrongly locked into the Company at the time when its Kazakhstan assets and the Second Respondent's own minority shareholding (held by Magellan) were sold to GOK and Mr Yessenov, contrary to an agreement made by the Petitioner with the Second Respondent and the Company that his shares would be treated in the same way as Magellan's shares in the event of a sale (**Petitioner Lock-In**).
- 7. The allegations are thus to the effect, broadly stated, that the Company, acting by its directors and at the direction or with the support of its majority shareholder, extracted from the Company its valuable assets at a significant undervalue and for the benefit (direct in the cases of the Second, Third and Fourth Respondents and indirect and unclear in the case of Jysan) of the First to Fourth Respondents, without treating the Petitioner equally or fairly, such as to amount to a fraud on the Petitioner as a minority shareholder.
- 8. On the basis of the evidence before me at the without notice hearing, I was satisfied that there was a good arguable case on each of these allegations. Not without some hesitation, I was persuaded that there was a good arguable case that the assets that had been extracted were of a value that made the Petitioner's minority shareholding worth about US\$26 million and that there remained a real risk of dissipation to defeat a judgment. That figure was the *pro rata* value of the shareholding, without any discount for its being a small, minority holding, because it was said by Mr Orynbayev that the purpose of the incorporators of the Company included a possible IPO at an early stage, such that it was possible that the Petitioner would obtain in due course the full value of its shares.
- 9. On 8 March 2024, the Petitioner issued its application to continue the freezing injunction from the return date.

- 10. On 20 March 2024, the Respondents, all of whom are represented together in these proceedings, applied to set aside the freezing injunction granted against the Company and Jysan, and set aside service out on Jysan, on the basis that there had been serious failures of full and frank disclosure by the Petitioner at the without notice hearing. There is also an argument that it was wrong in principle to grant a freezing injunction against Jysan itself. No argument was advanced by the Respondents at the return date to the effect that there was no good arguable case on any of the principal complaints relied upon by the Petitioner, or that there was no serious risk of dissipation of assets by the Company or Jysan, or indeed that it was not for any other reason just and convenient to refuse injunctive relief. The Respondents relied only in this regard on absence of full and frank disclosure.
- 11. The Respondents' application notice also sought orders (1) to stay the proceedings against the Company and Jysan pursuant to s.9 Arbitration Act 1996 in favour of an LCIA arbitration, on the basis of an arbitration agreement binding the Petitioner that encompassed the principal complaints; and (2) to stay the proceedings against the Second, Third and Fourth Respondents on a discretionary case management basis, given that the allegations against them are the same as the allegations against the Company and Jysan and that all of the Respondents have agreed to submit to a single LCIA arbitration with the Petitioner to determine the matters of complaint in the Petition in a single forum.
- 12. If successful, the s.9 stay application would necessarily result in the discharge of the freezing injunction in any event. Accordingly, the Petitioner issued in response an application for the re-grant of injunctive relief against those Respondents, in the event that the freezing injunction was set aside on the basis of non-disclosure of material matters, and for a new injunction in the same terms pursuant to s.44 of the Arbitration Act 1996, if necessary, in support of the arbitration.
- 13. Those, and an application for the full hearing to be held in private, were the issues that came before me at the end of April. I heard full submissions from both sides on whether the return date hearing and the applications for stays should be heard in private and decided that they should be, up until the point where I decided, if it was the case, that the proceedings should not be stayed under s.9 Arbitration Act 1986. I give some fuller reasons for that decision at the end of this judgment. However, as a result of the decision that I now reach on other issues, this judgment will be handed down in public.
- 14. It is convenient to deal with the matters that arise on these applications in the following order:
 - i) A summary of the relevant evidence of Mr Orynbayev that was sworn in support of the without notice application for a freezing injunction (paras 15-43);
 - ii) Whether the Petitioner is bound by an arbitration agreement, as alleged by the Respondents (paras 44 78);
 - iii) Whether the matters in issue in the Petition or any of them are within the scope of any arbitration agreement that binds the Petitioner (paras 79 97);
 - iv) Whether the proceedings or any part of them should be stayed (paras 98 103);

- v) Whether the freezing injunction and service out on Jysan should be set aside, either in consequence of a stay of the proceedings or by reason of a failure of fair presentation at the without notice hearing (paras 104 150);
- vi) Whether the freezing injunction should be continued or a new injunction granted, either in the exercise of the court's inherent jurisdiction or in support of a reference to arbitration (paras 151 163); and
- vii) Reasons for hearing the applications in private (paras 164 173).

II. The evidence at the without prejudice hearing

- 15. I granted without notice injunctive relief to the Petitioner on the basis of the evidence in the First Affidavit of Mr Orynbayev, sworn on 27 February 2024, and further evidence given to me orally at the hearing by Counsel, on instructions, which was later confirmed and filed in the form of the Second Affidavit of Mr Orynbayev sworn on 1 March 2024. There was also a witness statement made by Michael Smeaton, a solicitor of Glenville Walker, the Petitioner's solicitors, dated 28 February 2024, in support of the application to serve Jysan out of the jurisdiction and for alternative methods of service on the Second to Fifth Respondents.
- 16. Mr Orynbayev was previously the deputy prime minister of Kazakhstan, until 2015, and the Company and Jysan had been established in 2020 to operate endowment funds in the USA for Nazarbayev University and other educational establishments in Kazakhstan, which he had been involved in establishing. For this purpose, a non-profit organisation was incorporated in Nevada, New Generation Foundation Inc. ("NGF"). NGF incorporated the Company in England, as a vehicle for a future IPO to raise funds for NGF, and Jysan in Nevada to be its holding company.
- 17. The endowment funds had previously acquired a company, First Heartland Securities JSC, a Kazakh brokerage company, as a vehicle for the funds' investments, which became owned by Pioneer Capital Invest ("PCI"). First Heartland Securities acquired some distressed banking assets with the support of and funding from GOK, and it injected further capital and established a new, consolidated bank, First Heartland Jusan Bank ("the Bank"), which swiftly became profitable. First Heartland Securities was the majority shareholder of the Bank, which represented about 90% of its total assets.
- 18. PCI then transferred the shares in First Heartland Securities (and so control of the Bank) to the Company, together with substantial cash. The Company's filed accounts as at 31 December 2020 showed that it had net assets of US\$1.6 billion. These assets were therefore controlled by NGF.
- 19. Mr Orynbayev explained that he was awarded on 1 April 2021 an option to acquire 12,255,099 ordinary shares in the Company and shares in First Heartland Securities as a reward for his role in setting up the endowment funds and creating the valuable assets held by the Company. The option, which was exercised, gave him 4.6% of the shares in the Company. He was not required to enter into a shareholders' agreement, as did Jysan and the other minority shareholder, known as QAZ42, shortly afterwards on 6 April 2021 ("the SHA"). Mr Orynbayev exhibited a copy of what he said was an amended and

- restated shareholder agreement dated December 2022 (made between Jysan, QAZ42 and the Company), which refers to the original SHA. (The earlier version, made between PCI, Jysan, OAZ42 and the Company was not exhibited.)
- 20. Mr Orynbayev's shares were then re-acquired by the Company on 14 May 2022. This was done, he explained, on the understanding that once a settlement with GOK had been achieved, the shares would be re-transferred to him.
- 21. The dispute with GOK had arisen because in early 2022 a new regime led by a new President had taken control of Kazakhstan and was hostile to NGF retaining the Kazakhstan-based assets, including First Heartland Securities. Mr Orynbayev explained that the campaign against NGF included threats, unjustified criminal and civil investigations, blocking of dividends, attempts to force NGF to hand over assets to agents of GOK, and pressure on third parties to file claims against NGF, Jysan and the Company. The Bank had been targeted in Kazakhstan, as a result of which transfers between NGF, Jysan, the Company, First Heartland Securities and the Bank were blocked and any commercial transactions with the Bank were delayed. Unjustified demands were made for early repayment of loans.
- 22. Mr Orynbayev described in some detail the steps allegedly taken by or on behalf of GOK or its President to threaten NGF and obstruct the business activities of its companies, demand money in settlement, block the payment of dividends and freeze assets of the companies. Civil proceedings in Kazakhstan led to a worldwide freezing order being made against the Company in Kazakhstan on 15 February 2023. Jysan and the Company responded by issuing on 16 February 2023 a claim against GOK in Nevada for racketeering.
- 23. As part of the attempt to deal with this, Mr Orynbayev and a Kazakh co-director of the Company were replaced as directors of the Company in August 2022. Between June and August 2022, the Second, Third and Fourth Respondents were appointed as directors, for the purpose of better relations and effective negotiations with GOK.
- 24. Mr Orynbayev said nothing about the terms on which he was removed, or remained involved with the Company thereafter, but he did say that in about November 2022 the Second Respondent told him that he was not being remunerated for this work as a director of the Company and so was going to resign.
- 25. Mr Orynbayev said that he now knows that to be false (without stating when he discovered it to be false) but at the time he was concerned about the impact that the loss of the Second Respondent would have on the value of his shares, so he offered half his entitlement to shares in the Company to the Second Respondent, on conditions that the Second Respondent stayed as director, would continue to seek to negotiate a settlement with GOK, and that in the event of a settlement his retained shares would be dealt with in the same way as the shares that he was going to transfer to the Second Respondent. Mr Orynbayev said that he was not happy at having to give away such assets, but felt that he had no choice if there was to be an effective resolution. He said that the Second Respondent agreed to these terms.
- 26. Mr Orynbayev then requested the re-transfer of his shares, which the Company agreed by a sale and purchase agreement made with the Petitioner as Mr Orynbayev's nominee

dated 29 December 2022 (which he exhibited). This sale and purchase agreement contains an arbitration agreement, at clause 14.

27. Para 72 of Mr Orynbayev's First Affidavit states:

"At the time of the return of my shares to the Applicant, it was contemplated that the [Petitioner] would become a party to the Shareholders Agreement (see paragraph 43 above) by entering into a Deed of Adherence with all of the existing shareholders (JH and QAZ42) and with [the Company]. I got as far as signing a draft of the Deed of Adherence on behalf of the [Petitioner] (73 to 78) and providing that to [the Company] in escrow pending its execution by all of the shareholders and [the Company]. However the draft Deed of Adherence was never in fact completed as QAZ42 refused to engage with the [Petitioner] becoming a party to the Shareholders Agreement by refusing to sign the same. Consequently, whilst there is a partially signed Deed of Adherence, it was never completed or brought into effect and, insofar as [the Company] continued to hold it, they do so in escrow for the [Petitioner]."

- 28. The version of the draft Deed of Adherence exhibited is dated 29 December 2022, and is in the form of the draft annexed to the SHA, made between the Company, the Petitioner and the continuing shareholders named in its schedule, namely Jysan and QAZ42. The draft contains an arbitration agreement. It is executed as a deed by the Company and Jysan and signed as a deed by Mr Orynbayev on behalf of the Petitioner, but not signed on behalf of QAZ42. Mr Aidos Bekturganov signed the document on behalf of Jysan and also witnessed the signature of Mr Orynbayev. There are three different duplicate signature pages on which different directors or parties' representatives have signed. Nothing is said by Mr Orynbayev about the basis on which it is alleged to have been delivered by the Petitioner as an escrow, nor is any detail about QAZ42's refusal to sign provided, nor any reference to its ceasing to be a shareholder of the Company in 2023.
- 29. Mr Orynbayev then explained that he agreed on 23 January 2023 to sell at par half the Petitioner's shares in the Company to Magellan, a nominee of the Second Respondent, and he exhibited the sale and purchase agreement (which also contains an arbitration agreement at clause 15).
- 30. Mr Orynbayev then turned to the matters of complaint, starting with the R2 Company Benefits allegations. One of these is an unsecured loan agreement with an entity called RJI (Middle East) for US\$3 million at 5% simple interest. Mr Orynbayev says that it was not a legitimate loan but an unauthorised and unlawful distribution of cash assets for the benefit of the Second Respondent, which has not been repaid.
- 31. The next is a letter of engagement for the provision of strategic advisory services made with an entity called RJI (USA) for a total fee of US\$3 million, about which the same allegations are made, and it is pointed out that the agreement contains no KPIs or tangible deliverables. The third is a letter of engagement for the provision of strategic communication, reputation management and other services by RJI Capital (UK) Limited for a fee of £1.2 million, about which the same allegations are made as for the RJI (USA) agreement. Mr Orynbayev does not say how he knows about these matters, which all postdate his office as a director of the Company.

- 32. The next matter is the Director Remuneration allegations, in relation to the years ending 31 December 2022 and 31 December 2023. Mr Orynbayev says that his knowledge of these matters derives from documents provided to him by a Mr Serge Kane, who is a general partner of a subsidiary of the Company that manages telecoms and other assets on its behalf. The sums and bonuses identified (in aggregate, US\$6 million to the Second Respondent and US\$4 million for each of the Third and Fourth Respondents) are said to be plainly and obviously excessive for non-executive directors, and a malign motive is suggested for the improper payments.
- 33. Mr Orynbayev then turns to what (in financial terms, at least) is the main allegation, the Wrongful Settlement. He says that: arbitration submissions were made by Mr Yessenov acting for GOK and the Company; the submissions of GOK were totally without merit; the reference to arbitration was no more than a platform "in order to achieve a settlement that would be confidential, which had been agreed 'behind the scenes' and which was intended to escape the need for any proper valuation of [the Company]'s assets being undertaken."
- 34. Mr Orynbayev says that terms of settlement were agreed between Mr Yessenov and the Second Respondent, and that on 28 April 2023 the board of the Company met and resolved to settle. Mr Orynbayev says that he does not know the terms of the settlement but has seen the minutes of the meeting, which record that the Company's asset value and ability to do business had been substantially impacted by GOK's actions and that the Second Respondent had an interest in the proposed settlement because he had agreed with Mr Yessenov to sell Magellan's shareholding to him. The assets to be sold to Mr Yessenov included nearly 99.5% of the shares in First Heartland Securities and the other Kazakhstan-based assets of the Company.
- 35. Although Mr Orynbayev says that these assets were sold for \$75 million, he explains that "[m]y awareness of these aspects of the settlement has arisen from the documents which were provided to me by [Mr Kane] and from messages sent to me by [the Second Repsondent] via Signal...". Documents exhibited to the First Affidavit include 4 pages of messages, to which reference was not made at the without notice hearing. These are hard to make sense of, but the messages appear to include the offer from Mr Yessenov to buy the Kazakh assets for \$75 million, on the basis that the Company and its parent companies would keep their cash assets, and other disconnected messages in which the Second Respondent apparently reassures Mr Orynbayev about the proposed settlement and Mr Orynbayev seeks clarification about the effect of the terms, relating both to his shareholding and the transferee of the Kazakhstan assets. None of this was explained at the without notice hearing.
- 36. There is also a lengthy document exhibited (not referred to at the without notice hearing) which appears to be a closing agenda for "Project London", dated 31 July 2023. This relates to the completion of the settlement agreement.
- 37. Mr Orynbayev alleges a wholesale dissipation of the Company's assets at a very substantial undervalue, which was a fraud against the Company, whose effect would be to deprive the educational establishments in Kazakhstan of US\$1.6 billion. Other than to point in this way to the effect of the extraction of value on the principal beneficiary of the Company's shares, Mr Orynbayev does not say that he objected to the transaction because the Kazakhstan-based assets would not go to, or be held for the direct benefit of, the establishments themselves, rather than to Mr Yessenov on behalf of the GOK. What

he objects to is the massive undervalue at which the assets were dissipated (which assertion was repeated on several occasion), and by implication that this was done secretly by the Respondents:

"The fraud which has been perpetrated against [the Company] has been orchestrated by [the Second Respondent], acting in cahoots with [Mr Yessenov] (on behalf of the GOK) and with the assistance of the other directors of [the Company]."

- 38. Mr Orynbayev then draws attention to the closing bonuses paid to those directors: US\$3.2 million for the Second Respondent and US\$1 million for each of the Third and Fourth Respondents, which are alleged to be further unauthorised and unlawful distributions, and "part of the fraud which has been perpetrated against [the Company] by its directors, acting in cahoots with one another for their own personal gain" (para 107).
- 39. In answering matters alleged against him by the Respondents' solicitors on 1 September 2023, Mr Orynbayev says that:
 - "... the proceedings and settlement that followed are founded on falsehoods and fraud of which I have had no part of and no responsibility for".

The impression is clearly given by the First Affidavit that the settlement took place without any knowledge of the terms or participation on the part of Mr Orynbayev.

- 40. Mr Orynbayev then turns to the R2 Post-Settlement Disbursements: substantial payments by the Company to the Second Respondent pursuant to a deed of termination of his employment by the Company dated 17 August 2023, comprising US\$12 million as a termination payment and US\$35 million as a payment in lieu of options. It refers to an employment contract of the Second Respondent dated 22 November 2022 and an option payment contract of the same date. Mr Orynbayev contends that those documents were false and are "latter day creations" to justify the payment of excessive sums on termination of employment. Mr Orynbayev says that he was "wholly unaware of US\$12 Million Termination Payment being agreed by [the Company] and it is inconsistent with what [the Second Repsondent] told me in persuading me to transfer one half of my shares in [the Company] to him".
- 41. This document was apparently provided to Mr Orynbayev by Mr Ilyas Seitayev. Mr Orynbayev says that he was first made aware of it by someone (later identified as Mr Kane) on about 30 August 2023, when he was shown it on a laptop and told about the additional bonus payments too, but that he did not have the documents in his possession until 11 February 2024, when Mr Kane sent them to him.
- 42. On the final allegation, the Petitioner Lock-In, about failure to honour the agreement to sell the Petitioner's shares on the same basis as Magellan's shares, Mr Orynbayev says very little other than that the Second Respondent has preferred his own interests and caused the Company to block any attempt by the Petitioner to sell its shares by imposing "draconian and unwarranted conditions upon it giving approval to any such sale transfer on sale" (para 114). No more detail is provided.
- 43. The full and frank disclosure section of Mr Orynbayev's First Affidavit runs to three short paragraphs. He draws attention only to the fact that the draft Deed of Adherence

would give rise to an argument about whether there was an arbitration agreement. He then says:

"I can confirm to the court that I believe, through this affidavit and its exhibit and the petition and its exhibit, that the applicant has given the court full and frank disclosure and fair presentation in relation to the case against the respondents and the matters relied upon in support of the relief that the applicant seeks."

III Is the Petitioner bound by an arbitration agreement?

- 44. There are five different arbitration agreements in play, which are potentially relevant to the Respondents' applications for a stay:
 - i) in the SHA (April 2021) and (if genuine) the December 2022 restatement of it;
 - ii) in the sale and purchase agreement made between the Company and the Petitioner dated 29 December 2022;
 - iii) in the sale and purchase agreement made between the Petitioner and Magellan dated 26 January 2023;
 - iv) in the Deed of Adherence dated 29 December 2022 ("the First Deed"), which Mr Orynbayev asserts was only delivered in escrow;
 - v) in a further Deed of Adherence dated 26 January 2023 ("the Second Deed"), which was not disclosed by the Petitioner on the without notice application.
- 45. The arbitration agreements in the sale and purchase agreements, which there is no dispute that the Petitioner signed and by which it is bound, are in the following form:
 - "15.2 The parties agree that if any claim, dispute or difference of whatever nature arises under or in connection with this agreement (including a claim, dispute or difference regarding its existence, termination or validity or any non-contractual obligations arising out of or in connection with this agreement) ... the parties shall use all reasonable endeavours to resolve the matter amicably.
 - 15.3 All disputes which are unresolved pursuant to clause 15.2 and which a party wishes to have resolved shall be referred upon the application of any party to, and finally settled by, arbitration in accordance with the London Court of International Arbitration ("LCIA") Rules".
- 46. The arbitration agreements in the SHA and the First Deed and the Second Deed are in the following form:

"Each party irrevocably agrees that any dispute or claim including non-contractual disputes or claims arising out of or in connection with this [Agreement][deed], including any question regarding its subject matter, existence, validity or termination, shall be referred to and finally resolved by arbitration under the rules of the London Court of International Arbitration..."

- 47. The Petitioner did not sign the SHA (and Mr Orynbayev did not sign it personally, despite being a shareholder from April 2021 until May 2022) but Mr Orynbayev did sign the First Deed (which he calls the draft deed of adherence) on behalf of the Petitioner. This was on the same day as the sale and purchase agreement for him to reacquire (through the Petitioner) his shares in the Company. The question here is whether the Respondents (who assert the existence of an arbitration agreement by the Petitioner) are right to say that the draft Deed as signed on behalf of the Petitioner took effect from 29 December 2022 to bind the Petitioner, i.e. that it was not delivered by the Petitioner to the Company conditionally and remains an escrow, as Mr Orynbayev contends.
- 48. The argument that the First Deed was signed and provided in escrow was advanced in the First Affidavit of Mr Orynbayev, apparently solely on the basis that the draft Deed was not signed by QAZ42, as it was required to be. No other facts amounting to delivery as an escrow are alluded to in his First and Second Affidavits. It was at least arguable, at the without notice stage of the proceedings, that the draft Deed would not have effect as contemplated by its terms until all parties had executed and delivered it.
- 49. The draft Deed says that it is entered into under the terms of the shareholders agreement made between the Company and the Continuing Shareholders. That is a reference to clause 12.3 of the SHA, which states:

"Except as expressly provided in the Articles or this Agreement, the parties shall procure that no transfer of shares shall be registered by the Board unless the transferee of such shares has executed *and delivered* a Deed of Adherence."

Similarly, clause 13 provides that:

"The parties shall procure that the Company shall not issue any shares or other equity securities ... to any person, unless that person is a party to this Agreement or has executed *and delivered* a Deed of Adherence." (*emphasis added in both clauses*)

The Deed of Adherence is the form in schedule 1 to the SHA, to be made between the transferor (if any), the new shareholder and the continuing shareholders. The First Deed as executed by the Petitioner is in the required form, and treats the Company as the transferor. Jysan and QAZ42 are identified in its schedule as the continuing shareholders.

50. The First Deed states at clause 1 that the Effective Date means the date of the Deed. Clause 2 reads:

"The New Shareholder confirms that it has been supplied with a copy of the Shareholders' Agreement. The New Shareholder and each of the Continuing Shareholders undertake with each other that, from the Effective Date, the New Shareholder shall assume all of the rights of the Transferor under the Shareholders' Agreement and shall observe, perform and be bound by the provisions of the Shareholders' Agreement that contain obligations on the Transferor as though the New Shareholder was an original party to the Shareholders' Agreement.

Clause 4 reads:

"This deed may be executed in any number of counterparts, each of which when executed and delivered shall constitute a duplicate original, but all the counterparts shall together constitute the one agreement."

The First Deed provides, before the signature block: "This document has been executed as a deed and is delivered and takes effect on the date stated at the beginning of it." That was in fact untrue: the First Deed was dated before it had been sent to Mr Orynbayev for his signature.

- 51. The evidence on behalf of the Respondents takes the issue one step further. Mr Bekturganov, who made three affidavits on behalf of the Respondents, refers to the Second Deed that the Petitioner appears to have executed at the time of the Magellan sale and purchase agreement, dated 26 January 2023. The Petitioner is the Transferor and Magellan is the New Shareholder. The Continuing Shareholders are identified as Jysan, QAZ42 and the Petitioner. It is otherwise in the same terms, *mutatis mutandis*, as the First Deed of Adherence. There is a single signature page and all parties except for QAZ42 have executed it.
- 52. Mr Bekturganov asserts that in registering the Petitioner's shares, the Company proceeded on the understanding that the Petitioner had become a party to the SHA (without identifying who acted in that way on that understanding), and notes that at no point did the Petitioner state that this was incorrect and that the shares should not be registered.
- 53. Mr Orynbayev returns to the issue of the First Deed in his Third Affidavit, sworn on 5 April 2024 in response to Mr Bekturganov's evidence. He says that he was told that the Petitioner and all the existing shareholders would need to enter into a deed of adherence, and that the need for all shareholders including QAZ42 to be party to the deed was discussed and advice was taken by the Company from Cohen & Gresser.
- 54. As the emails exhibited show, advice from Cohen & Gresser was taken as to whether the previous re-purchase of Mr Orynbayev's shares in May 2022 could be undone, or rescinded, for convenience. Cohen & Gresser advised that a simple sale agreement would be needed and that they would look into whether such a purchase "could be dated earlier in the year, and 'completed' now". That led to a question about whether a resolution to sell the shares to the Petitioner would require the consent of QAZ42, as a reserved matter under the Shareholder Agreement, with Mr Orynbayev commenting that it was not a reserved matter and therefore QAZ42 could not block it.
- 55. In that context, Cohen & Gresser advised Mr Orynbayev, Mr Seitayev and the Second Respondent by email as follows:

"I agree that selling these shares to Yerbol (or somehow reversing the earlier transaction) is not a reserved matter.

We will need Director approval (easy).

Yerbol (or his SPV) and then Ron will have to enter into the Shareholder's Agreement (SHA – if not, the Board is not supposed to approve the new shareholder). JH and G42 are parties to the SHA so this requires their signatures.

Ron: do we need to completely avoid G42?"

Whatever response, if any, there was to that question was not put in evidence by the Petitioner.

- 56. Mr Orynbayev says that in reliance on that advice he signed the First Deed and returned it to the Company "in escrow on the basis that it would only come into effect as and when it had been signed by the other shareholders, namely JH and QAZ42". As for the contemporaneous documents, these show that the Company sent the draft Deed to QAZ42 on 30 December 2022 and to Mr Orynbayev and Mr Bekturganov with the sale and purchase agreement for their signatures on 3 January 2023. The documents were returned signed on the same day by Mr Orynbayev, with nothing stated about any conditions on the deeds taking effect. He merely said: "Here I attached [sic] the SPA and the Deed of Adherence."
- 57. QAZ42 evidently did not sign and return the documents sent to it by the Company, as by email dated 27 January 2023 the Company emailed various personnel at the QAZ42 group company, G42, explaining why the shares were being sold at par to Mr Orynbayev and asking for their approval by signing the documents:

"Please note that this matter does not fall into a category of the shareholder reserved matters as it does not affect the rights of the existing shareholders. These documents need to be signed for the good order and completeness."

- 58. Mr Orynbayev accepted that he had not produced the Second Deed at the without notice hearing and apologised for the oversight. He said that at the time when he signed it on behalf of the Petitioner, he did not know that QAZ42 had not signed the First Deed.
- 59. I accept that for a deed to be delivered in escrow and not as an effective deed it is not necessary for express words to be used, and that conditional effect can be inferred from all the circumstances. At the same time, the subjective views of those who execute the document are irrelevant, so it does not assist Mr Orynbayev to say that he believed that he was executing the First Deed and providing it to the Company in escrow. The relevant law is agreed to be accurately summarised by Morton LJ in Thompson v McCullough [1947] KB 447 at 452-3:

"The question whether a document is delivered as an escrow or as a deed is in general one of fact, and I think that the following passage from Norton on Deeds (2nd ed.), at p. 20 accurately states the law: 'Whether the document was delivered as an escrow or as a deed is a question of what the parties intended, and that intention may appear either from their statements or the circumstances." The learned author then quotes the following observation of Parke B. in Bowder v Burdekin (1843) 11 M&W 128, 147: 'You are to look at all the facts attending the execution, to all that took place at the time, and to the result of the transaction; and therefore, though it is in form an absolute delivery, if it can reasonably be inferred that it was delivered not to take effect as a deed till a certain condition was performed, it will nevertheless operate as an escrow.' The author goes on: 'Thus the delivery of a transfer of mortgage was held to be an escrow until the mortgage money had been paid and of a conveyance until the purchase money had been paid The circumstances relied upon to show delivery as an escrow must be prior to or contemporaneous with, not subsequent to, the delivery Evidence is, of course, admissible as to what were the circumstances attending the delivery and the question is in general one of fact for the jury."

- 60. Absent some material statement, conduct or circumstances at the time of execution, the argument for the executed First Deed not having effect seems to me to depend on whether, as a multilateral contract to be made by deed, it was implicitly conditional on all parties executing it. The nature of the contract required by the Shareholder Agreement, though called a deed of adherence, is a novation of mutual agreements between shareholders and the Company itself, as clause 2 of the draft Deed makes clear. The New Shareholder undertakes to be bound to the other parties and obtains the benefit of those parties' agreements with it, as if the New Shareholder was an original party to the shareholder agreement. That is why the Company and the Continuing Shareholders are required to be parties to the deed. I therefore reject Mr Singla's first argument that the deed is taken to be effective as against each party when they individually execute the document. The novation required the agreement of all: it is one contract between all the shareholders and the Company, not a series of separate contracts, as the First Deed expressly states. Further, nothing can be read into the fact that the First Deed is dated and stated to have effect from that date, as it was not executed on that date.
- 61. The relevant parties could, of course, agree that the First Deed would become effective as between themselves, regardless of the position with QAZ42, and the question is whether they did so, expressly or by implication, or are estopped from denying that they did.
- 62. In this respect, Mr Singla contended that the execution by the same parties (and Magellan) of the Second Deed, and the subsequent registration of the Petitioner as a shareholder, make it absolutely clear that all these parties (regardless of QAZ42) were treating themselves as mutually bound by the terms of the Shareholder Agreement. By signing, he said, the Petitioner acknowledged not just that it was a shareholder but that Magellan was to assume all its rights under the SHA. Without the First Deed being effective, the Petitioner had no rights under the SHA. Mr Singla submitted that, regardless of whether the Second Deed (which was not executed by QAZ42) was a binding contract, the fact that the Petitioner executed it as a Continuing Shareholder meant that it (and the other parties who signed the Second Deed) was accepting that it had effectively adhered to the Shareholder Agreement by the First Deed.
- 63. Further, the Respondents submitted, if the Petitioner had not adhered to the SHA, it should not have been registered as a shareholder at all, by virtue of article 12(2) of the Company's Articles of Association:

"If, in relation to a transfer of a share, the transferee is not a party to any shareholders' agreement or similar document in force between some or all of the shareholders and the Company, then the directors shall, unless otherwise permitted by the prior consent of all the holders of the A Ordinary Shares at the relevant time: (a) require the transferee of such share to deliver to the Company a deed agreeing to be bound by the terms of any shareholders' agreement ...; and (b) decline to register the transfer of such share unless and until the transferee has done so and delivered the same to the directors at the Company's registered office."

- What this article contemplates is arguably slightly different from the draft deed annexed to the shareholders' agreement, because a unilateral deed of undertaking will suffice.
- 64. If necessary, the Respondents argue that the Petitioner is now estopped by representation or by convention from denying that it is a shareholder that has agreed the terms of the First Deed (and so is bound by the terms of the SHA), or alternatively that there is a contractual estoppel arising out of the Second Deed (though this latter argument cannot work if the Second Deed does not have effect because of the lack of signature by QAZ42.)
- 65. There does seem to me to be an uncomfortable tension between the case that the Petitioner seeks to advance in its Petition, namely that as a minority shareholder of the Company it has been treated unfairly prejudicially and the value of its shares significantly reduced, and its denial that it has done that which is required for it to be registered as a shareholder. The argument that the Petitioner is not bound by the SHA, despite representing itself to be a continuing shareholder with the benefit of the SHA by executing the Second Deed, gives one pause for careful thought, especially as, by August 2023, QAZ42 had ceased to be a shareholder of the Company.
- 66. Mr Chaisty relied on the fact of legal advice as to the need for QAZ42 to be a party being relayed to the relevant signatories, but that does not in my view take the matter much further than the requirement that is implicit from the terms and nature of the contract in the First Deed. It is true that, by late December 2022, the Company and the other shareholders realised that there was potentially an issue about whether QAZ42 would consent or sign, but they were advised that that was required. However, Cohen & Gresser were not suggesting any new condition to which the recipients agreed, merely commenting on the effect of the SHA. Further, there is nothing in the contemporaneous documents to support the rather vague assertion by Mr Orynbayev that he delivered the deed as an escrow: he expressly did no such thing, and what he thought he was doing (if true) is irrelevant.
- 67. Further, Mr Chaisty argued that the Respondents were in effect asking for a summary disposal of the question of whether, despite the absence of QAZ42's signature, the Petitioner was bound, and that they cannot invite the Court to conduct a mini trial on limited evidence.
- 68. Mr Chaisty was scornful of the Respondents' attempts to rely on an unpleaded estoppel on a summary determination of this kind. No proper evidence as to reliance and detriment had been put forward by the Respondents, or even a pleaded case; only a bare assertion by Mr Bekturganov, who does not explain the basis for his assertion. If the Respondents are seeking to rely on detrimental reliance there needs to be evidence about what the relevant persons on behalf of the Respondents thought and what they did in reliance on it. Mr Chaisty submitted that the Respondents had taken on the challenge, on their application, of satisfying the court on a balance of probabilities that the Petitioner had made a binding arbitration agreement, and that they could not, without pleading the facts of reliance and detriment and adducing some relevant evidence in those regards (which they have not done), expect to succeed on that basis.
- 69. Mr Chaisty also stressed Mr Orynbayev's evidence that he did not realise, when executing the Second Deed, that QAZ42 had not signed the First Deed. However, that does not take the Petitioner very far, as it shows that Mr Orynbayev, on behalf of the Petitioner, was willing to assume that the Petitioner was a continuing shareholder but was

mistaken in doing so. That mistake would not prevent a representation being made, or the understanding being communicated "across the line". Further, the fact that Mr Orynbayev did not feel the need to enquire whether the First Deed had come into effect strongly suggests that he either had no issue about an escrow in mind, contrary to what he now says, or that if he did, regardless of whether QAZ42 had signed or the Petitioner had been registered as a shareholder, he wished it to be treated as a Continuing Shareholder and a party to the SHA.

- 70. What matters in the final analysis, however, is whether the relevant parties have by their conduct agreed that the First Deed would become effective as between them, notwithstanding the lack of execution by QAZ42, and whether in the alternative the Petitioner is estopped from denying that the First Deed was effective or that it is bound by the terms of the SHA. If the Respondents can establish neither of these matters, the executed First Deed remains ineffective, because QAZ42 has not executed it.
- 71. The registration of the Petitioner as a shareholder on or before 7 March 2023 means that it should first have agreed to be bound by the terms of the SHA (including the arbitration clause), unless the A shareholders (i.e. Jysan) had waived that requirement. But the registration (which is an act of the Company) does not mean that the Petitioner did make a binding agreement to be bound. The non-binding status of the executed First Deed could have been overlooked by the Company, or the need for adherence could have been waived by Jysan, which appointed the directors who approved the registration. Neither does the registration of the Petitioner of itself mean that it is estopped from asserting that it is not bound by the terms of the First Deed (or the Second Deed). Although that might leave the Petitioner's status as a shareholder precarious and vulnerable to challenge, as Mr Chaisty accepted, that would be a different issue for another day, as he put it.
- 72. The execution and provision to the Company of the Second Deed is the Respondents' strongest point. By signing it, Mr Orynbayev, on behalf of the Petitioner, undoubtedly represented (and communicated) that it was his understanding that the Petitioner was bound by and had the benefit of the terms of the SHA. Whether the Petitioner had by then been registered as a shareholder is a matter in dispute that cannot be resolved at this time. Jysan, Magellan and the Company also executed the Second Deed, so it can be said that they too made a similar representation, though there is no evidence that a copy of the Second Deed executed by those persons was provided to the Petitioner.
- 73. However, the Second Deed did not have effect for the same reason that the First Deed did not have effect, unless the parties other than QAZ42 subsequently agreed that it would have effect as between them. It cannot therefore amount to an agreement between them, either express or by conduct, that the First Deed would have effect. Neither can it be relied upon as a contractual estoppel, for the same reason.
- 74. Whether the representation made in the Second Deed by the Petitioner prevents it from asserting now that it is not bound by the terms of the First Deed or the SHA depends on whether the version of the document that was executed by the Petitioner was acted upon by the Company and Jysan to their detriment, in reliance on the fact that the Petitioner had signed up to the contents. Detrimental reliance is a central requirement of estoppel by representation and, similarly, estoppel by convention. In *Tinkler v Revenue and Customs Commissioners* [2021] UKSC 39; [2022] AC 886, Lord Burrows (with whom the other Justices agreed) cited with approval the following passage in the judgment of

Briggs J in *Revenue and Customs Commissioners v Benchdollar Ltd* [2009] EWHC 1310; [2010] 1 All ER 174 at [52]:

- "(i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them. (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it. (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter. (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties. (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."
- 75. What is necessary, therefore, is that it must have been the statement made by the Petitioner that was relied upon by the Company and Jysan, not their own understanding of the position; and it is not sufficient if all three parties made the same assumption. There must therefore be credible evidence that someone on behalf of the Company and Jysan adverted to the fact that the Petitioner had signed the Second Deed and made the representation in question, and that they relied upon the fact of the representation in either executing the Deed themselves or taking some other step in relation to their dealings with the Petitioner, and in either case that they suffered detriment as a result, or that the Petitioner was benefited. (The mere signing of the Second Deed would not itself amount to detriment or benefit until it had legal effect.) While it is possible that an evidential case of reliance and detriment or benefit might be made out, there is no evidence to support it before me. I cannot simply assume that the evidence exists; nor has the basis on which the Company and Jysan allege reliance been clearly set out, or even identified in submissions.
- 76. In my judgment, accordingly, the Respondents cannot establish from the facts relied upon that the First Deed had some effect notwithstanding the absence of execution by QAZ42, or that the Petitioner is now estopped from stating that it did not agree to be bound by the terms of the SHA.
- 77. In reaching that conclusion, I have considered whether an obvious answer which was not raised in argument is that there came a time, in October 2023, when QAZ42 ceased to be a shareholder. At that point, it can be said that QAZ42 would no longer have been expected to execute the First Deed or Second Deed. If the condition on either Deed taking effect was simply that all current shareholders should execute and deliver it then there would be a strongly arguable case that both Deeds took effect in October 2023. However, the condition was not that: in each case, it was that the parties identified in the deed should execute and deliver it, one of whom was QAZ42. That condition did not automatically fall away simply because QAZ42 ceased to be a shareholder. While the parties might readily have agreed in October 2023 that the Deeds would be effective without QAZ42's execution of them, there is no evidence that they did so.

78. It follows that I conclude that although the Petitioner is bound by the arbitration agreements in the sale and purchase agreements, the Respondents have not proved that it is bound by the arbitration agreements in the SHA, the First Deed or the Second Deed.

IV Are the matters in issue in the Petition within the scope of the arbitration agreement?

- 79. The sale and purchase agreements for the sale of shares by the Company to the Petitioner (dated 29 December 2022) and by the Petitioner to Magellan (dated 26 January 2023) both include an agreement (see [45] above) that any dispute arising under or in connection with the sale of the shares, or any non-contractual claim arising under or in connection with it, is to be referred to arbitration, if not amicably resolved.
- 80. The SHA and the First Deed and Second Deed include an agreement to similar effect (see [46] above), using the words "arising out of or in connection with" those agreements, though without provision requiring first an attempt at amicable resolution.
- 81. It is not in dispute that matters in issue in a petition presented under s.994 of the Companies Act 1996 can be "matter[s] which under the agreement is to be referred to arbitration" for the purpose of s.9 of the Arbitration Act 1996. The agreements extend to non-contractual disputes. The right approach under s.9, when identifying whether any matters are to be referred, was explained by Lord Hodge DPSC in *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding)* [2023] UKSC 32 ("*Privinvest*") as involving a two-stage process:

"First, the court must determine what the matters are which the parties have raised or foreseeably will raise in the court proceedings, and, secondly, the court must determine in relation to each such matter whether it falls within the scope of the arbitration agreement." [72]

- 82. As Lord Hodge further explained, the first stage involves looking at the substance of the dispute between the parties, not limited to the exact way in which the matter is pleaded, but taking account of foreseeable defences. A "matter" falling within the section is "a substantial issue that is legally relevant to a claim or a defence or a foreseeable defence, in the legal proceedings, and is susceptible to be determined by an arbitrator as a discrete dispute", not an issue that is peripheral or tangential or a "mere issue or question that might fall for decision" [75] The court must also have regard to the context in which the matter arises in the legal proceedings.
- 83. There is no real dispute between the parties about what the substantial issues are that are relevant to the petition and its likely defence. The Petitioner has sought to identify six principal issues, which are in substance the same as the five issues that I summarised at [6] above, save that the Petitioner has divided the Petitioner Lock-In issue as two issues rather than one, the first being the alleged initial misleading of Mr Orynbayev by the Second Respondent about his lack of remuneration that led to the *pari passu* understanding, and the second being the failure to honour it by obstructing the transfer of the Petitioner's shares at the time of the settlement with GOK. These are in my view better regarded as two aspects of the same broad issue: the allegations made and the relief claimed by the Petitioners are of unfairly prejudicial conduct that prejudiced the

Petitioner, justifying an order for the purchase of the Petitioner's shares at their presettlement value: there is no separate claim for misrepresentation upon or before the sale of the shares to Magellan.

- 84. The Respondents suggest that there are in reality only four issues, because they treat my issue (iii) (R2 Post-Settlement Benefits) as an aspect of (ii) (Director Remuneration). I consider that they are properly to be treated as distinct, not just chronologically or because the post-settlement benefits were alleged dissipations of the settlement proceeds, but because issue (iii) comes with an allegation of creating false documents to give the appearance that the benefits in question were agreed before the settlement (i.e. actual fraud), which is not the case with the other allegedly excessive payments (breaches of fiduciary duty).
- 85. Having identified the five matters in issue in the proceedings, the second stage of the *Privinvest* exercise is to consider whether any of them fall within the scope of the arbitration agreements.
- 86. As regards the sale and purchase agreements, these were relied upon by the Respondents only to a limited extent. First, to support the submission that the overall commercial context is one in which the parties contemplated that all disputes between them would be referred to LCIA arbitration, and that the arbitration agreements should therefore be given wide effect (in accordance with the dicta of Lord Hoffmann in *Fiona Trust & Holdings Corp v Privalov* [2007] Bus LR 1719 at [13] that rational businessmen are to be presumed to have intended that all disputes arising from their relationship to be decided by the same tribunal). Second, in the case of the Company/Petitioner sale and purchase agreement, as an additional reason to grant the stay sought under the SHA.
- 87. There is, however, no identified matter in issue in the Petition that arises under or in connection with the 29 December 2022 sale and purchase agreement, save in the very broadest (and too generalised) sense that the Petition is based on the Petitioner's ownership of shares in the Company, which it previously purchased. None of the particular matters in dispute otherwise relates to or arise out of the sale and purchase agreement. There are questions of whether the First Deed came into effect and whether the Petitioner should have been registered as a shareholder, but those are not the relevant matters in the Petition that the parties have identified for these purposes.
- 88. The Respondents did not seek to rely on the Company/Petitioner sale and purchase agreement or the Petitioner/Magellan sale and purchase agreement as the basis of an argument that the "Petitioner Lock-In" matter was a dispute in connection with either agreement. The reason may have been that the Respondents did not treat the alleged misrepresentation of the Second Respondent as being one of the substantial matters in issue.
- 89. Accordingly, none of the relevant matters that arise for the court's determination on the Petition falls within the scope of either of the sale and purchase agreements.
- 90. As for the arbitration agreements in the SHA and the First Deed and Second Deed, I have held that the Petitioner was not a party to these and accordingly the second stage of the *Privinvest* exercise does not arise.

- 91. In case that issue goes any further, I will indicate that had the Petitioner been bound by the SHA and its arbitration agreement as a result of the First Deed or the Second Deed, I would have held that only the "Wrongful Settlement" matter was within the scope of the arbitration agreement. The SHA is not concerned with the discharge of the Company's directors' fiduciary and statutory duties, or with the use of its majority vote, if needed, by a majority shareholder. It contains some very basic provisions relating to the appointment of directors and the operation of the Company, which are really only complementary to the Articles of the Company, and some terms intended to be favourable to QAZ42, as an investor in the Company. It provides no right for a shareholder to sell its shares on any particular basis; only restrictions on doing so that are aligned with the Articles.
- 92. The only clauses of the SHA to which my attention was particularly drawn are clause 3, which requires the parties to the agreement to use reasonable endeavours to promote and develop the "Business of the Company's Group", which is defined as being to provide various types of financial services and telecommunications and e-commerce business; and clause 9.2, which states:

"The Company, the Existing Shareholder and Jysan Holding (as the case may be) shall ensure that any transfer, sale or disposal of any shares in First Heartland Securities JSC, Jysan Ventures LLP and any other material subsidiary of the Company's Group (the "Disposal") shall be carried out on an arm's length basis."

This clause is disapplied in the case of an IPO or employee incentive arrangements.

- 93. The shares in First Heartland Securities JSC were part of the Kazakhstan-based assets that were sold by the Company to GOK, allegedly for a massive undervalue. The matter of whether this sale was at an undervalue and a fraud on the minority, approved by Jysan, is readily capable of being seen as a dispute arising under or in connection with this obligation on the part of the Company and Jysan, and I would therefore have granted a stay of the "Wrongful Settlement" issue in favour of arbitration, had the Petitioner been bound by the arbitration agreement in the SHA.
- 94. I would have done so in favour of the Company even though there is an unresolved question as to whether Jysan itself ever executed a deed of adherence to the SHA and therefore has the benefit of the arbitration agreement in it. It agreed to make such a deed, by clause 14 of the SHA (and it was only a party to the SHA for this limited purpose):
 - "14.1 Jysan Holding undertakes to QAZ42 that it shall, as a condition to it being registered as the legal owner of the PCI Shares, execute a Deed of Adherence.
 - 14.2 If and when Jysan Holding enters into a Deed of Adherence as a party to this Agreement, it shall have the same obligations as PCI would have, and shall be entitled to enforce this Agreement as if Jysan Holding was defined in this Agreement as PCI."
- 95. The odd position is therefore reached that the Petitioner produced and relied on a restated version of the SHA dated December 2022, which appears to have been signed on behalf of Jysan by one Rustem Khamzin, its manager, but the Respondents dispute the validity

of that document, explaining that Mr Khamzin was not the manager at that time. They assert that the original April 2021 version of the SHA is the only operative version. On being requested by the Petitioner a few days before the argument on this point at the hearing to produce a copy of Jysan's deed of adherence, the Respondents did not do so, explaining that they have not had time to search for it. They have not attempted to provide the deed of adherence executed by Jysan since the conclusion of the hearing, as I indicated they could do if they wished to clarify the position.

- 96. The other four matters in issue are, however, discrete allegations of breach of fiduciary duty, unlawful distributions of cash, and fraud, and the separate allegation of unfair treatment and lock-in of the Petitioner's shareholding. These are remote from the content of the SHA and cannot fairly be described as matters arising in connection with the SHA. The Petitioner Lock-In allegation is in relation to an agreement reached outside the SHA and before the Petitioner purchased its shares. There is nothing in the SHA that will relate to the question of whether the R2 Company Benefits, Directors Remuneration and R2 Post-Settlement Disbursements were proper exercises of the powers of one or more directors, or duly authorised by the board, acquiesced in by Mr Orynbayev, or alternatively were breaches of fiduciary duty.
- 97. Even giving a generous interpretation to the words of the arbitration agreement, presuming that the parties would not have intended some matters of dispute arising in connection with the SHA to fall within the arbitration agreement but other related matters to fall outside it, it is not possible to bring these four matters within the words of the agreement. The Second, Third and Fourth Respondents, against whom the allegations of wrongdoing are principally made (despite the Petitioner at one stage contending that Jysan bore primary responsibility) are not parties to the SHA: they are directors, not shareholders. The Petitioner does not rely in any way on the content of the SHA (or the sale and purchase agreements) for its case. Nor is it obvious how the Respondents will rely on anything in the SHA in their defence of the five matters alleged, other than clause 9.2 in relation to the disposal of the shares in First Heartland Securities.

V. Should the proceedings or any part of them be stayed?

- 98. In view of the conclusions that I have reached about the existence and scope of any binding arbitration agreements, there will be no stay of these proceedings pursuant to s.9 of the Arbitration Act 1996, or on a case management basis.
- 99. On the same hypothesis that I addressed the scope of the SHA arbitration agreement (see [91] above), I will indicate that had I stayed the "Wrongful Settlement" matter against the Company pursuant to s.9, I would not have granted a case management stay of any part of the proceedings against any other Respondent.
- 100. As for the other allegations of wrongdoing, that is to say the R2 Company Benefits, Director Remuneration, R2 Post-settlement Disbursements and Petitioner Lock-in, they are quite distinct from the Wrongful Settlement allegation. There is no difficulty in principle with the Wrongful Settlement allegation being tried separately from the others. Indeed, it might not have been necessary to try both sets of proceedings separately, and a case management discretion would have had to be exercised both by an arbitrator and by the judge in that regard.

- 101. As for the Wrongful Settlement allegation, the question would have been whether to stay the same claim against the other Respondents, including the Second Respondent, the director of the Company who was negotiating with GOK, and Jysan, which ultimately controls the Company. It is the Company and Jysan who were the principal targets in terms of the relief sought.
- 102. The choice would have been either to stay the Wrongful Settlement allegations against the First to Fourth Respondents, so that they could voluntarily participate in an arbitration on that matter alongside the Company, or to refuse a stay so that the Wrongful Settlement allegations could proceed against the main alleged wrongdoers in court.
- 103. I would on balance have chosen the former option, on condition that the arbitration on that matter proceeded promptly, with all the Respondents represented and taking part in it. It makes greater sense for the Wrongful Settlement issue to be dealt with in one tribunal, with all the parties before it, than to have two separate sets of proceedings, where certain parties are missing. It might be important for the Company itself to be bound by the decision and amenable to an order for appropriate relief. The arbitration of the Wrongful Settlement need not have held up the trial of the other four matters. In the event that the arbitration did not proceed without delay, as envisaged, the case management stay could be lifted and the Wrongful Settlement matter be proceeded with in court against the First to Fourth Respondents.

VI. Should the freezing injunction against the Company and Jysan be set aside?

- 104. I turn then to the question of whether the freezing inunction should be set aside for failure of fair presentation by the Petitioner at the without notice hearing.
- 105. I will indicate at the outset that it should be set aside, because of an incomplete and misleading presentation of the facts of this case by Mr Orynbayev in his First Affidavit. As my judgment on the without notice application (which can now be published) indicates, I was concerned that there was so little by way of full and frank disclosure made by the Petitioner, given that the matters alleged in the Petition obviously had a considerable back story.
- 106. It was evident in the light of the full evidence at the return date that Mr Orynbayev had presented a slanted and partial account of the dealings between him and the Respondents, in particular the Second Respondent, and had not revealed his own involvement in some of the matters about which the Petitioner complains. While some of the failures of disclosure can be accepted to be inadvertent (such as the omission to exhibit or refer to the Second Deed, for which Mr Orynbayev apologised in his Third Affidavit), other matters cannot be explained on the basis of mistake, and Mr Orynbayev did not attempt to do so. Instead, he sought to justify the omissions on the basis that there was reason to regard them as immaterial or, in a few cases, he was uncertain whether he had seen certain documents, and that properly understood the matters to which he had not referred would not have altered the outcome.
- 107. Even if Mr Orynbayev's view of these issues can be accepted (which it cannot at this stage), who is ultimately right about them is beside the point. The Petitioner had a duty to draw potentially adverse material and facts that the Respondents might have sought to

- rely on were they represented to the court's attention, whether or not Mr Orynbayev considers that ultimately they will hold no sway.
- 108. In this regard, I do not criticise the way that the application was presented by Counsel on the Petitioner's behalf. Mr Chaisty made clear at the without notice hearing that he had disclosed to the court everything potentially adverse that Mr Orynbayev had told the Petitioner's legal team. As Mr Singla wryly observed, the note of the without prejudice hearing records Mr Chaisty, in answer to my question, confirming that he could only tell the court what his client had told him, and that he had done so.
- 109. I explain below the main points of real concern about the fairness of the presentation, without, I hope, falling into the trap of conducting a mini-trial of the allegations of failure to disclose and the explanations provided at considerable length in the evidence (see per Males J in *National Bank Trust v Yurov* [2016] EWHC 1913 (Comm) at [19]).

The relevant law

- 110. The law on the obligation of full and frank disclosure, or "fair presentation" as it is now often called, and what happens when it is not made, is clear. The original comprehensive statement of the principles was in the judgments of Ralph Gibson, Balcombe and Slade LJJ in *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350, at 1356-7, 1358 and 1359. I can take the up-to-date position from a more recent and comprehensive review of the relevant principles by Carr J in *Tugushev v Orlov* [2019] EWHC 2031 (Comm) at [7], which was cited with approval by the Court of Appeal in *Derma Med Ltd v Ally* [2024] EWCA Civ 175 at [29]:
 - "i) The duty of an applicant for a without notice injunction is to make full and accurate disclosure of all material facts and to draw the court's attention to significant factual, legal and procedural aspects of the case;
 - ii) It is a high duty and of the first importance to ensure the integrity of the court's process. It is the necessary corollary of the court being prepared to depart from the principle that it will hear both sides before reaching a decision, a basic principle of fairness. Derogation from that principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. The court must be able to rely on the party who appears alone to present the argument in a way which is not merely designed to promote its own interests but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make:
 - iii) Full disclosure must be linked with fair presentation. The judge must be able to have complete confidence in the thoroughness and objectivity of those presenting the case for the applicant. Thus, for example, it is not sufficient merely to exhibit numerous documents;
 - iv) An applicant must make proper enquiries before making the application. He must investigate the cause of action asserted and the facts relied on before identifying and addressing any likely defences. The duty to disclose extends to matters of which the applicant would have been aware had reasonable enquiries been made. The urgency of a particular case may make it necessary

for evidence to be in a less tidy or complete form than is desirable. But no amount of urgency or practical difficulty can justify a failure to identify the relevant cause of action and principal facts to be relied on;

- v) Material facts are those which it is material for the judge to know in dealing with the application as made. The duty requires an applicant to make the court aware of the issues likely to arise and the possible difficulties in the claim, but need not extend to a detailed analysis of every possible point which may arise. It extends to matters of intention and for example to disclosure of related proceedings in another jurisdiction;
- vi) Where facts are material in the broad sense, there will be degrees of relevance and a due sense of proportion must be kept. Sensible limits have to be drawn, particularly in more complex and heavy commercial cases where the opportunity to raise arguments about non-disclosure will be all the greater. The question is not whether the evidence in support could have been improved (or one to be approached with the benefit of hindsight). The primary question is whether in all the circumstances its effect was such as to mislead the court in any material respect;
- vii) A defendant must identify clearly the alleged failures, rather than adopt a scatter gun approach. A dispute about full and frank disclosure should not be allowed to turn into a mini-trial of the merits;
- viii) In general terms it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself;
- ix) If material non-disclosure is established, the court will be astute to ensure that a claimant who obtains injunctive relief without full disclosure is deprived of any advantage he may thereby have derived;
- x) Whether or not the non-disclosure was innocent is an important consideration, but not necessarily decisive. Immediate discharge (without renewal) is likely to be the court's starting point, at least when the failure is substantial or deliberate. It has been said on more than one occasion that it will only be in exceptional circumstances in cases of deliberate non-disclosure or misrepresentation that an order would not be discharged;
- xi) The court will discharge the order even if the order would still have been made had the relevant matter(s) been brought to its attention at the without notice hearing. This is a penal approach and intentionally so, by way of deterrent to ensure that applicants in future abide by their duties;
- xii) The court nevertheless has a discretion to continue the injunction (or impose a fresh injunction) despite a failure to disclose. Although the

discretion should be exercised sparingly, the overriding consideration will always be the interests of justice. Such consideration will include examination of i) the importance of the facts not disclosed to the issues before the judge ii) the need to encourage proper compliance with the duty of full and frank disclosure and to deter non-compliance iii) whether or not and to what extent the failure was culpable iv) the injustice to a claimant which may occur if an order is discharged leaving a defendant free to dissipate assets, although a strong case on the merits will never be a good excuse for a failure to disclose material facts;

- xiii) The interests of justice may sometimes require that a freezing order be continued and that a failure of disclosure can be marked in some other way, for example by a suitable costs order. The court thus has at its disposal a range of options in the event of non-disclosure.'
- 111. Males LJ emphasised at [30] that the overriding consideration, when deciding whether to continue an injunction or grant a fresh injunction despite a failure of disclosure, is the interests of justice; and the need to maintain a due sense of proportion in complex cases, where full and fair disclosure may be more challenging.
- 112. As Carr J observed at point ii), the duty of full and frank disclosure is the necessary corollary of the court not hearing from the other side. Applications for without notice freezing orders, whether domestic or worldwide, are now a routine part of the business of the Chancery Division and the Commercial Court. It is easy therefore to regard them as "normal", but any hearing where only one side of the case is heard should be regarded as exceptional. Further, freezing orders that are broad in their reach are capable of having very serious consequences for a respondent. The price of obtaining such relief without notice to the respondent is a heavy responsibility to ensure that the matter is fairly presented to the court, not slanted or partial, and that the points that the respondent would wish to make were they present, so far as able to be anticipated, are fairly put before the court for consideration. That is particularly so when serious allegations are made against the absent parties.

The Wrongful Settlement allegation

- 113. Contrary to the impression given at the without notice presentation that the sale of the Kazakhstan-based assets by the Company to GOK was engineered by the Second Respondent in secret (in the context of a private arbitration) with the support of Jysan, after Mr Orynbayev had ceased to be involved with the Company, Mr Orynbayev in fact had become a consultant to the Company's parent company, Jysan, from 1 September 2022. He remained involved with the Company's affairs and attended several meetings between September and December 2022 relating to settlement negotiations, was copied into emails relating to them, some of which attached proposed settlement terms, and was in discussion with the Second Respondent to some extent in relation to the proposed settlement of GOK's claims, right up until shortly before the terms were agreed in April 2023.
- 114. In the course of those discussions, a draft proposal was prepared by the Second Respondent to send to GOK for it to acquire the shares in First Heartland Securities, said to represent 93% of the Company's assets and be worth US\$1.5 billion, for US\$150 million. The draft was sent to Mr Orynbayev and the Company's solicitors for comments;

Mr Orynbayev replied on 24 January 2023: "Looks good for me". Mr Orynbayev was then aware of a different offer from Mr Yessenov of US\$75 million.

115. About a month after heads of terms for settlement at US\$75 million were signed, Mr Orynbayev sent an email to the Second Respondent with an attachment entitled "Who saved JTL.docx". This document had been created by Mr Orynbayev, and in it he praised the Second Defendant for fighting GOK and saving the NGF group. It states:

"With their help on April 17, the [Term Sheet] was approved by NGF and [the Second Respondent] could proceed with the talks to finish the settlement.

The real guy who fought with the GOK and its affiliates and saved the Group was [the Second Respondent] ... [the Second Respondent] worked hard and made [the Company] and [Jysan] operational in Spring and Summer of 2022 by appointing new directors such as [the Third and Fourth Respondents] with great credentials and other operating officers. Under his leadership [the Company] adopted corporate strategies and policies including anticorruption. By fall of 2022 [the Company] was in good shape and fully operational.

[The Second Respondent] saved the Group two times after [the Company] was dead twice, first, and second, when GPO arrested all shares of FHS and Jusan Bank and other Group's assets in Kazakhstan by filing a claim against the GOK in Nevada. This claim forced the GOK to come up with the new proposal and settle with the Group."

Other documents exhibited by Mr Bekturganov show that Mr Orynbayev was involved in the preparation of the racketeering proceedings in Nevada, which were a response to the worldwide freezing injunction obtained by the Prosecutor General of Kazakhstan. In the arbitration, GOK and the Company were each represented by very distinguished and experienced commercial KCs.

- 116. Further, Mr Orynbayev had been sent by the Second Respondent on 15 November 2022 a time when he was closely involved in negotiations with GOK a message from the Chairman of the Board of NGF headed "JT [the Company] and JH [Jysan] have no authority to conclude a deal for NGF", and it explained that any transaction in settlement with GOK or related entities had no validity without formal board approval of NGF to all deal terms. NGF had an independent board of three very senior corporate officers of apparently high standing in the US and Kazakhstan.
- 117. Mr Orynbayev had engaged with the Second Respondent about the terms of an offer that were (as to consideration) virtually identical to those that the Company approved in April 2023. Mr Yessenov's initial offer to buy all the Kazakhstan-based assets of the Company for US\$75 million was sent to Mr Orynbayev on about 7 March 2023. His response was that he wanted the assets to go to Nazarbayev University, not Mr Yessenov; not that the low amount of money offered would be a fraud on the shareholders of the Company because the assets were worth very many times that sum.
- 118. This material, taken together, casts a very different light from that given in the without notice presentation on two centrally important questions relating to the sale of the Company's assets for \$75 million:

- a) Was the sale an arm's length negotiation for the sale of distressed assets at a price properly approved by the ultimate parent company, in circumstances in which the Company had to settle for what it could reasonably get; or was it, as pleaded in the Petition, a fraudulent dissipation of hugely valuable assets at a massive undervalue carried out secretively in breach of the fiduciary duties of the Second, Third and Fourth Respondents?
- b) Was the value of the assets at the time of the settlement in the region of \$75 million, or possibly \$150 million, or was it \$1.5 billion or about £1 billion, as variously alleged in the Petition.
- 119. These questions were directly relevant to an assessment of whether the Petitioner had a good arguable case of fraud in relation to this complaint, and if so the value of the claim and accordingly the appropriate amount of any freezing order. The \$900m valuation prepared for Mr Yessenov and made available to (and relied upon by) Mr Orynbayev in August 2023 could be seen in that context as a valuation of First Heartland Securities in the hands of GOK, as opposed to in the hands of the Company subject to enforcement and restrictions imposed by GOK.
- 120. Mr Orynbayev prepared a Third Affidavit sworn on 5 April 2024 in response to Mr Bekturganov's Second Affidvait. In it he seeks to explain or justify most of the matters about which Mr Bekturganov gave evidence. I have read it carefully and considered what is said. It addresses the evidence produced by Mr Bekturganov at some length, and it is unnecessary to deal with every detail and explanation. Some of the explanations are at least superficially credible; others, rather less so. But what this second attempt to tell Mr Orynbayev's story amounts to (in substance) is something much closer to the affidavit containing a full and frank account of events that should have been provided as his First Afffidavit.
- 121. So, for example, Mr Orynbayev states that:
 - i) he was retained as a consultant after ceasing to be a director of the Company;
 - ii) he was involved in negotiations, but only to a limited extent;
 - iii) he was aware of the offer of \$150 million and did approve it in principle, but maintains that that did not amount to an endorsement of the settlement that was eventually agreed;
 - iv) he did not know the final terms of settlement, but was aware of an offer of \$75 million, and had been told on 14 April 2023 by the Second Respondent that terms had been negotiated, but did not ask what they were and assumed that they safeguarded the assets of the Company for the educational establishments;
 - v) he then heard in late April 2023 that the Second Respondent had agreed to sell the assets to Mr Yessenov for a modest sum, and the only matter that he then raised with the Second Respondent was that the First Heartland Securities shares should go to Nazarbayev University, not to Mr Yessenov.
- 122. Mr Orynbayev does not dispute that he knew that the settlement would have to be (and was in fact) approved by NGF, but he attacks instead the good faith of the directors of

- NGF. (It is fair to record that the documents containing 4 pages of text messages exchanged between Mr Orynbayev and the Second Respondent in March and April 2023 were part of an exhibit to his First Affidavit, but without the explanation now given they were not comprehensible, and they were not referred to in the without notice presentation.)
- 123. Mr Orynbayev's main argument, as regards the settlement, is that the settlement that he had approved, unlike the settlement that was concluded, provided for the assets of the Company to be ring-fenced for the benefit of the educational establishments in Kazakhstan, rather than for Mr Orynbayev, and that this was the fundamentally important point about what was wrong with the final settlement:
 - "At this time I had no reason not to trust [the Second Respondent] and I was reassured that he and I were on the same side against a common enemy and that we were both committed to ensuring that the assets of [the Company] did not go to [Mr Yessenov] and remained available to continue to fund NU and NIS. For me, that was the key point and, in the context of what was to become of assets to a value of US\$1.6 billion, questions of the level of any cash consideration were very much a secondary consideration." [para 50]
- 124. This is a remarkable assertion. It is remarkable because nowhere in the First Affidavit or in the without notice presentation was it stated that Mr Orynbayev's main objection to the sale of the Kazakhstan-based assets of the Company was that they went to GOK (acting by Mr Yessenov) and were not ring-fenced for the benefit of the educational establishments. The only point that was made was that they had been sold unnecessarily at a massive undervalue as a fraud on the minority shareholder, viz the Petitioner. Nowhere was it asserted that the interests of the beneficiaries of the parent company of the majority shareholder had been prejudicially affected.
- 125. The complaint about failure to ring-fence the Company's assets for the benefit of NGF's beneficiaries and the complaint of fraudulent sale at a massive undervalue are obviously two very different things, with different consequences for a minority shareholder. Indeed, it is not easy to understand the logic of Mr Orynbayev's explanation: GOK or Mr Yessenov would not pay even as little as \$75 million for valuable assets held by the Company for the ultimate benefit of the educational establishments in Kazakhstan if, on purchase, the assets were to be ring-fenced for the benefit of the same establishments. If, on the other hand, the assets were to be ring-fenced in that way, it is hard to see what value they had for the Petitioner. What did form part of the offer from GOK was that the consideration paid and the cash assets of the Company could remain held by it and be applied for those purposes, which is a different thing.
- 126. Whatever is the truth of the matter is irrelevant, however, and I make no finding about it. The fact that at trial there may (or may not) be a case for saying that the undisclosed material was insignificant is also irrelevant. What is material is that the gist of the matters that I have summarised in [115] to [123] above should have been disclosed by Mr Orynbayev in his First Affidvait, even if he then sought to explain them in the way that he has done in his Third Affidavit.
- 127. I do not accept Mr Orynbayev's comment, in relation to these matters, that it is unclear why he should have disclosed them. They were very material to the determination of the

application for a freezing injunction based on the sale to GOK of assets of the Company, most especially to the value of the claim. They were also relevant to the issue of delay in applying for relief based on the Wrongful Settlement. It is in my view indicative of a partial or incomplete account having been given by Mr Orynbayev to his lawyers, as omission of these matters from the story cannot have been accidental, in the way that the Second Deed might have been overlooked.

128. These matters on their own, relating to the Wrongful Settlement, are in my view sufficiently serious to require the Court to discharge the freezing injunction. Whether they would have resulted in a different outcome of the without notice application is not the relevant test, but it is quite likely that they would have. The case and valuation based on selling \$1.5 billion of assets at a massive undervalue looks much less credible than it did before, on the basis of the evidence that is now before me, and I am not persuaded that I would have valued the claim in the same way had the full picture of the Wrongful Settlement been given. The better evidence of value of the assets would have been \$150 million, or, alternatively, the value of the Petitioner's shareholding was at best the US\$10-15 million said to have been paid for Magellan's shares, or what was offered by Safin Handels GmbH ("Safin Vienna") for the Petitioner's holding, namely US\$8.4 million.

The R2 Company Benefits allegation

- 129. Turning briefly to the other matters in the Petition, the evidence now available appears to show that Mr Orynbayev, in his capacity as consultant to the Company or Jysan, or both, approved the loan documentation and arranged the loan of \$3 million to RJI (Middle East). The Petitioner's case was that this loan agreement was not a *bona fide* transaction and was an unauthorised and unlawful distribution of cash assets on extremely generous terms for the benefit of a director of the Company.
- 130. Mr Orynbayev now says that he performed only a limited administrative role in connection with it (however, it is evident that he did comment on the appropriateness of certain terms of the loan); that he did not negotiate the loan; and that it did not occur to him to tell the Court the full circumstances, none of which are relevant to the complaints made in the Petition. He says that it would not have assisted the Court or taken matters any further if he had mentioned his involvement.
- 131. This too is a surprising comment and I disagree with it. Mr Orynbayev's involvement to any extent is obviously relevant to the question of whether the loan was made in good faith and was authorised, even if Mr Orynbayev himself did not have power to bind the Company. If, at the time, Mr Orynbayev was aware of the loan proposal and did not object to it but indeed facilitated it, it is less likely to be a loan agreement made in bad faith, dishonestly, or on excessively generous terms.
- 132. As regards the Strategic Advice Agreement with RJI (USA) Capital Corp made on 26 January 2023 and the Communication Advice Agreement made with RJI (UK) on 25 January 2023, the allegation in the Petition is that these were not *bona fide*, were unauthorised and unlawful, and that there was no commercial need or justification for them. The implication is accordingly that they were effected by the Second Respondent

- using the Company's employees and misusing his position as a director of the Company to benefit himself.
- 133. However, Mr Orynbayev did not disclose that he had been copied into an email from the Company's legal counsel, Ms Mehrabi, to its three directors, the Second, Third and Fourth Respondents, dated 27 January 2023, which attached the letters of engagement, a board resolution approving both of the letters, a strategic communications proposal and two invoices. The minutes showed that the Second Respondent had declared his interest at the board and was recused from voting. The proposal was a detailed 12-slide Powerpoint presentation. In fact, at about the same time, according to Mr Bekturganov, Mr Orynbayev was negotiating a strategic advisory services agreement between himself and the Company, under which he was to be paid US\$2 million per year for 3 years (though in the event this was never signed). Mr Orynbayev does not deny this in his Third Affidavit.
- 134. Mr Orynbayev says that it may well be correct that he was copied into the email, though he cannot now recall receiving it or reading it, and he was not asked to comment or advise on its contents. It is an obvious inference that Mr Orynbayev was copied into this email because he was a consultant to the Company who was looking to enter into a similar agreement. Whether Mr Orynbayev can recall receiving it or not is beside the point (though it is very hard to believe that he could not remember that he was negotiating a similar agreement). The obligation to give full and frank disclosure requires appropriate searches for relevant material to be made; it does not depend on the active recollection of the deponent.
- 135. The fact that the RJI agreements were being dealt with openly by the board and copied to the Company's consultant makes it more difficult to argue that they were in bad faith, unauthorised, and amounted to a breach of duty on the part of the Second Respondent. Disclosure of these facts would in my view have had some bearing on whether relief should be granted based on these allegations.

The R2 Post-Settlement Disbursements allegation

- 136. The Deed of Termination dated 17 August 2023 made between the Company and the Second Respondent provided for a payment of US\$12 million on termination of his employment, at the end of 2023, and for a payment of US\$35 million in lieu of share options. Mr Orynbayev was shown it shortly afterwards in a London hotel. He said in his First Affidavit (consistently with para 60(i) of the Petition) that he was "wholly unaware" of the \$12 million payment being agreed by the Company. He also says that it was inconsistent with what the Second Respondent had told him in 2022 about his lack of remuneration, and that "in cahoots with his fellow directors" the Second Respondent saw both payments as a convenient way of illegitimately removing money from the Company's settlement proceeds of US\$75 million. In his Second Affidavit, Mr Orynbayev says that he was first made aware that the payments were to be made at the end of August 2023.
- 137. It may be right that Mr Orynbayev was unaware until August 2023 or even February 2024 that the Company had formally resolved to agree the payments (after all, the Deed is only dated 17 August 2023), but it is now evident that he was aware from much earlier of a proposal by the Company that the Second Respondent should be paid a sum of \$12 million on termination.

138. On 21 November 2022, Mr Orynbayev was sent by Mr Seitayev of the Company a presentation showing the potential KPI and termination bonuses payable to each director. These were of up to \$3.2 million for each of 2022 and 2023 for the Second Respondent, if KPI targets were fully achieved, and lesser but still substantial bonuses for the Third and Fourth Respondents. The final page of the presentation was headed "Termination bonuses" and specifies US\$12 million for the Second Respondent and US\$1 million each of the Third and Fourth Respondents. The email says (in translation):

"Yerbol Turmakhanovich, The presentation has been slightly corrected, please take a look. If ok, I will send it to Ron"

Mr Orynbayev's reply, on the same day, is "ok". ("Ron" is agreed to be the Second Respondent.)

- 139. Mr Orynbayev denies in his Third Affidavit that he thereby agreed the compensation of \$12 million for the Second Respondent. He asserts that "context is important". He accepts that he prepared an earlier version of the KPI document, but says that this did not have bonuses in it. The bonus figures were then provided by the Second Respondent and inserted as "preliminary example figures for discussion purposes" on Mr Orynbayev's instructions to the Company's employees. The anticipated presentation of the metrics for KPIs did not take place, and Mr Orynbayev does not know what was presented to the board of the Company for approval. He says that by using the expression "ok" he was not approving the figures in the KPI presentation, and that he had no authority to approve the presentation.
- 140. The fact, as now appears, that Mr Orynbayev was aware that the Second Defendant had proposed his US\$12 million termination payment, and payments for other directors and staff similarly, and that he had given instructions for these figures to be included in a presentation and approved the final version of the presentation document on 21 November 2022, was of some relevance to a consideration of whether an entitlement to such payment existed prior to the settlement of the dispute with GOK, or was, as the Petitioner contends, merely a dishonest means of dissipating the proceeds of that settlement. Even if what Mr Orynbayev explains in his Third Affidavit is correct, the undisputed facts should have been disclosed, with his explanation of them. In this instance, it is not clear to me that, if disclosed and explained in this way, the facts would have had an impact on my decision at the without notice hearing; but they should still have been disclosed, so that the Court had as complete a picture as the Petitioner could give in relation to the alleged extractions of \$12 million.
- 141. This failing has no direct bearing on the \$35 million option payment, however.

The Petitioner Lock-In allegation

142. It is clear that Mr Orynbayev only presented an incomplete and partial account of these allegations. The impression is given, by an extremely short account in his First Affidavit (which only repeats what is in the Petition), that the Petitioner was simply excluded from the deal that was done between the Company and Magellan on one side and Mr Yessenov on behalf of GOK on the other. The allegations in the Petition are that the Petitioner was left out; that it tried to sell its shares to Safin Vienna; but that the Company (acting by

the Second Respondent) declined to register the transfer save on "the most draconian and prejudicial terms". Effectively, therefore, it blocked the sale.

- 143. A document that was in the exhibit to the First Affidavit but was not referred to or explained at the without notice hearing, is a signing and closing agenda for "Project London", which was the settlement with GOK. This contains a complex series of steps and some commentary on them, on p.11 of which, at item 8(b), is "Entry into SPAs in relation to the acquisition by [Mr Yessenov] of shares in [the Company] from YTO (SPA with YTO)", in relation to which "drafts of an SPA between YTO's entity and Austrian Co and SPA between Austrian Co and Mr Yessenov are under consideration of the parties and to be done post Settlement Closing". This is a clear (and undisputed) reference to an intended agreement by Safin Vienna to acquire the Petitioner's shares (YTO is Mr Orynbayev) and sell them on to Mr Yessenov. In the agenda there is also provision for the sale of Magellan's shares to Mr Yessenov. There is also item 8(d), a step described as "Entry into SPAs in relation to the acquisition by [Mr Yessenov] of shares in FHS from YTO]", which implies that Mr Orynbayev was going to sell his shareholding in First Heartland Securities to Mr Yessenov at the same time.
- 144. A sale and purchase agreement between the Petitioner and Safin Vienna was signed on 28 June 2023, pursuant to which Safin Vienna agreed to buy the Petitioner's shares for US\$8.4 million. Mr Orynbayev emailed this to the Second Respondent and Cohen & Gresser for approval of the transaction, in response to which a form of waiver was provided by Cohen & Gresser on 4 July 2023 for his signature. Mr Orynbayev replied on 12 July 2023:

"Unfortunately at this point the transaction with the Austrian company for reasons beyond our control has not worked.

I informed Ron about this.

I am looking for another buyer of my shares and will come back as soon as such a buyer is identified"

This implies that Safin Vienna was not able to proceed at that time for its own reasons.

- 145. On 16 August 2023, Mr Orynbayev said in a further email to Cohen & Gresser, copied to the directors of the Company and its solicitors, that he was working with Safin Vienna to finish the deal.
- 146. None of this was disclosed by the Petitioner at the without notice hearing. Mr Orynbayev accepts in his Third Affidavit that there were issues with Safin Vienna's bank refusing to accept funds from Mr Yessenov, but says that that was a matter that by 16 August 2023 "was in train to be resolved", when on 1 September 2023 the Company "point blank refused" to register Safin as a shareholder. (That is a reference to a letter of that date written by the Company's solicitors, Willkie Farr & Gallagher, which contends that the Company was entitled to refuse to register Safin Vienna as a shareholder.)
- 147. The undisclosed material, if fairly disclosed, could well have thrown doubt on whether it was right that the Second Respondent was blocking the sale of the Petitioner's shares before the matter was put in the hands of solicitors. Whether that is what happened or not I cannot determine, but, again, what matters is that the full picture was not presented fairly to the court. A partial picture was provided, consisting only of the Petitioner's

assertion that the Second Respondent had reneged on the *pari passu* agreement and proceeded only in his own interest.

Summary on non-disclosure

- 148. Putting together the failure by the Petitioner to disclose (1) Mr Orynbayev's involvement in the negotiations with GOK, his approval of a settlement at US\$150 million and the fact that, as he now says, the objection to the settlement was not principally about the price paid for the assets sold, (2) Mr Orynbayev's approval of or involvement in some of the RJI transactions with the Company, (3) Mr Orynbayev's knowledge of the proposal for a US\$12 million termination payment to the Second Respondent, and (4) the true picture (however uncertain or confusing) about the attempt to sell the Petitioner's shareholding to Safin Vienna at about the same time as closure of the settlement with GOK and the sale of Magellan's shares to Mr Yessenov, there has been a serious failure to comply with the Petitioner's obligation to make a fair presentation of the facts at the without notice hearing. The failure was not innocent, though I do not find that Mr Orynbayev deliberately set out to deceive the court. He presented an account of the matters complained of that was selective and favourable to the Petitioner, without apparently understanding (despite what he said in his First Affidavit about the duty of full and frank disclosure) that he was required to be scrupulously fair in disclosing the full picture, especially given the seriousness of the allegations made against the Respondents. This is a serious case of failure and the freezing injunction granted must be set aside.
- 149. As for the permission obtained without notice to serve the claim out of the jurisdiction on Jysan, that was obtained on the basis that there was a claim served as of right on the Company and its directors, and that Jysan, as the majority and only other shareholder and appointor of the directors, was a necessary and proper party to the proceedings. Although there was a failure of full and frank disclosure in relation to the substantive allegations made against the Respondents, including the failure to disclose that the settlement with GOK was approved by Jysan's parent company, NGF, these failures do not affect the assessment of whether there was an arguable case for relief being granted (the Respondents did not seek to challenge the conclusion that there was a good arguable case on the merits), the applicability of gateway (3) to the position of Jysan as the only other shareholder of the Company, or the question of whether there was some other jurisdiction that was more obviously the appropriate forum for the matters alleged to be tried.
- 150. As a result of my decision on the stay applications, the hearing of the Petition will proceed in court and the Petitioner's claim for relief will be tried. Jysan remains a necessary and proper party to that claim, given that it is alleged to have been responsible for what its director appointees caused the Company to do and that, in case of any order that the shares of the Petitioner be bought out, it (or the Company) are the persons against whom such an order would most naturally be made. In the exercise of my discretion, I will therefore not set aside the order for service out on Jysan.

VII. Should further injunctive relief be granted?

151. In consequence of the without notice injunction having been set aside for a serious failure of fair presentation, a heavy onus lies on the Petitioner to justify the re-grant of an

- injunction. The court has a discretion to impose a fresh injunction, if it is in the interests of justice to do so, though it should not be too ready to do so (jurisdiction to be exercised "sparingly").
- 152. In this regard, the Petitioner relies on the fact that no challenge was made to there being a good arguable case on the issues raised in the Petition and there being a real risk of dissipation of the assets that are currently frozen. Subject therefore to where the balance of convenience now lies and the exercise of discretion, a re-grant of a freezing injunction can be said to be justified to that extent. The Petitioner urged me not to abandon a sense of reality about the good arguable case and the need for injunctive relief.
- 153. I will review the justification for the injunction that was originally sought in the light of the fuller evidence that now exists. That evidence in my judgment throws real doubt on the credibility of the contention that the sale of the Company's Kazakhstan-based assets to GOK for \$75 million was a fraud on the Company or its minority shareholder to the extent of the difference between the book value of those assets (or the August 2023 valuation) and the price paid. The circumstances in which those assets came to be sold have not been fully explored, but what is evident is that the assets in the hands of GOK or Mr Yessenov were very much more valuable than they were in the hands of the Company, and that all concerned, including Mr Orynbayev, appear to have recognised that a sale was probably necessary, to unlock some value to the Company.
- 154. There remains a real question about whether the R2 Post-Settlement Disbursements were lawful, which in aggregate are worth some \$47 million, in addition to the Director Remuneration issues. The Petitioner Lock-In issue may support a valuation of the Petitioner's shareholding at \$8.4 million, but only in the context of the sale of the majority of the Company's assets for \$75 million. The intended transactions were clearly connected, through Mr Yessenov. The arguable value of the claim is therefore at best \$8.4 million, if the Lock-In allegations succeed and Safin Vienna would have been able to complete the purchase of the Petitioner's shares; or otherwise the value of a 2.3% minority holding in the Company assuming its assets were sold for fair value, whatever that might be. In light of the evidence now before me, a non-discounted value based on a possible IPO in future does not at this stage appear credible.
- 155. On the evidence before me, the Petitioner appears to have a good arguable claim (I make no decision as to whether it goes further than that) for a buy-out order at US\$8.4 million. I am not persuaded, on the basis of the evidence as it currently stands, that there is a good arguable case for any larger sum. If no injunction is granted, there is a real risk that the Company and Jysan will have no assets left after a judgment. NGF is being wound up as part of the settlement agreed with GOK and it is therefore unlikely to have a need for its holding company and trading company. That would leave the Petitioner having to seek a financial remedy against the directors of the Company.
- 156. I should not re-grant the injunction solely on the basis that about US\$19 million is frozen in Bangladesh, as that would be to give the Petitioner the benefit of a wrongly-obtained without notice injunction. But regardless of that, the Company has some assets that I am satisfied are otherwise likely to be distributed away (or dissipated, as the Petitioner would say) prior to judgment. The ancillary disclosure given by the Company and Jysan reinforces that risk, but Jysan has very little in terms of assets held for the Company only a sum of US\$125,407.27 in a Virginia bank account, whereas the Company has nearly US\$19 million of its own money. There is therefore no justification for re-granting

- an injunction against Jysan, which as granted was limited to assets held on behalf of the Company.
- 157. On one analysis, the real target of the Petitioner's claim is the Second Respondent, who is alleged to have been at the centre of the wrongdoing. It could therefore be said to be just to leave the Petitioner to pursue its claim against him, who appears likely to be good for the value of the claim and against whom no freezing injunction has yet been sought, or against the Third and Fourth Respondents to the extent that they are found to have been culpably involved in any wrongdoing. Although the Company is alleged to have done the things complained of, it only did so through the instrumentality of the First to Fourth Respondents. The Petitioner would therefore not be left without remedy if the injunction were refused.
- 158. On the other hand, the Petitioner is entitled to pursue its claim against all Respondents and seek a buy-out order against the Company or Jysan: they are the most obvious targets in the event that the Petitioner succeeds on its claim, provided that they have assets capable of funding a share purchase. Further, the fact that the injunction can be limited to a single asset of the Company, which would otherwise be distributed, is an argument in favour of the convenience of re-granting some relief.
- 159. The cash assets that the Company holds are likely to be its remaining assets, as it sold to GOK for \$75 million the substantial majority of the assets of the Company other than significant cash. There is no suggestion that the Company is performing any active functions: the monies paid out of the Bangladesh account since November 2023 are to HMRC, monthly payments to the directors and other employees, transfers to other Company or Jysan accounts, a payment on 31 January 2024 to Motcomb Estates in London (likely to be a rent payment for the offices of the Company identified in the Fourth Respondent's affidavit), and one unexplained payment of US\$122,256.90 to a Mr Pizzichini on 8 January 2024. The Company is therefore effectively sitting on substantial cash assets.
- I bear in mind the materiality of the non-disclosure and the importance of deterrence, but I consider that it would be unjust in the circumstances not to re-grant some relief. It would be unjust to refuse the Petitioner protection against the deliberate dissipation of assets that might otherwise be available to satisfy a judgment in its favour. It is more convenient, given the nature of the claim, the relief sought and the Company's assets, that a more limited freezing injunction be granted against the Company in relation to the Bangladesh account, than for the Petitioner now to have to pursue interim relief against the Second, Third and Fourth Respondents. (If put to a choice, the Second, Third and Fourth Respondents would also be likely to consider that more convenient.) There is no indication that any creditors of the Company would be prejudiced.
- 161. Mr Singla did finally suggest that if I were to reach this point, I should refuse a re-grant of injunctive relief because the Respondents had offered to pay US\$8 million of Jysan's money into court, in order to stay the order for ancillary disclosure, and that if that offer had been accepted the Petitioner would now be in a better position. I do not see that as a reason to withhold an injunction, in my discretion, that it is otherwise just to grant if anything it is the other way round, as the offer demonstrates that a specific and limited injunction will not cause serious prejudice to the Company and its parent company. The matter may however be relevant to costs.

- 162. Despite the discharge of the existing freezing injunction, I will therefore grant an injunction that freezes up to US\$8.4 million in the Bangladesh bank account. (The Company has the option of paying that sum into court fully to release the bank account from the injunction, but I will not order that as it would amount to granting the Petitioner security for its claim.) Any payments out of the account for reasonable costs and expenditure allegedly in the ordinary and proper course of business that would reduce the balance below US\$8.4 million will be subject to 2 clear working days' prior notice to the Petitioner.
- 163. I make no further allowance for interest or costs in the amount to be frozen, in view of what has happened.

VIII Reasons for hearing the applications in private

- 164. I heard the without notice application in private for the usual reason that to disclose the fact or nature of the application might defeat its purpose, by tipping off the Respondents to take immediate steps to transfer the cash assets to another person: CPR rule 39.2(3)(a) applies.
- 165. The Respondents applied for the return date hearing and the hearing of the application for a stay to be in private and for anonymisation in the court lists. I directed on an interim basis that the case should be listed anonymously on day 1 but that it would be heard first in open court, where the application for a hearing in private and any further measures could be made. It was so made by Mr Singla at the start of the hearing.
- 166. The basis of the application was that, in view of the application for a stay pursuant to s.9 Arbitration Act, the fact and content of the allegations made against the First and Fifth Respondents in the Petition should be treated as confidential information, within rule 39.2(3)(c). If the stay application succeeded, it followed that the Petitioner had wrongly issued the proceedings against the Company and Jysan in court, and they were entitled to have the fact and content of the dispute dealt with in private, without publicity. Accordingly, it would be necessary to sit in private in order to secure the proper administration of justice, within rule 39.2(3), until that issue had been decided.
- 167. It has previously been held in *CDE v NOP* [2021] EWCA Civ 1908; [2022] 4 WLR 6 that arbitral confidentiality can justify sitting in private. Rule 39.2 does not apply to s.9 applications (CPR rule 62.10) and so the court has a general discretion to sit in private on hearing such an application. In practice, that discretion is invariably exercised in favour of a private and anonymised hearing of the application.
- 168. Since, on the application for a stay in exercise of case management powers, the Second, Third and Fourth Respondents were seeking to stay the proceedings against them in favour of arbitration, it was argued that the Court should hear all the stay applications in private and, unless it rejected those applications before the return date hearing, those hearings should also be held in private, to preserve in the interim the potentially confidential information.
- 169. A return date of a freezing injunction is not normally held in private, if the respondent is represented or present and able to put their case, there being then no necessity to sit in

private to secure the proper administration of justice. But if the without notice injunction were set aside on the ground of a mandatory stay, or the return date otherwise stayed in favour of arbitration, there would be no return date hearing, and so the Respondents contended that the hearing should remain in private until I had ruled on the stay applications. It was further said that it would be impossible to deal with the substance of the allegations using some kind of code and thereby avoid identifying the parties. If the Second, Third and Fourth Defendants were named, the identity of the Company and Jysan would easily be deduced.

- 170. The Petitioner recognised that it was a matter for the court rather than it whether to sit in private, but legitimately drew attention to the importance of open justice and of the court needing to be satisfied that it was necessary to sit in private to secure the proper administration of justice. It was argued that there was no entitlement to blanket anonymity for the Company and Jysan and no entitlement at all for the directors, and that the right question was whether it was necessary to sit in private in order to protect putatively confidential information.
- 171. I decided that until I had resolved the application for a mandatory stay of the proceedings which as this judgment demonstrates was not a straightforward matter it would be wrong potentially to prejudice the Company's and Jysan's properly arguable right to have this dispute dealt with in private. I accepted that it was impossible to hear the case against the directors in open court without the Company and Jysan being identified, and that it was not practicable on the facts of this case to avoid naming individuals, parties and countries in such a way as to protect the putative confidentiality. Once the matter was heard to any extent in open court, the genie could not be put back into the bottle, if I were to decide that the court proceedings should be stayed. That would potentially infringe the substantive rights of the Company and Jysan, as established by *CDE v NOP*.
- 172. That in my judgment made it necessary to hear the matter in private to secure the proper administration of justice.
- 173. As it turns out, the applications for a stay have been refused and this judgment will be handed down in open court.