Neutral Citation Number: [2022] EWHC 2023 (Ch)

Case No: CR-2019-001325

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

IN THE MATTER OF CARDIFF CITY FOOTBALL CLUB (HOLDINGS) LIMITED AND IN THE MATTER OF THE COMPANIES ACT 2006

Royal Courts of Justice
7 Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 29/07/2022

Before :

MR JUSTICE ADAM JOHNSON

- -

Between :

Michael John Isaac	**Petitioner**
- and -	
(1) Tan Sri Dato' Seri Vincent Tan	
(2) Cardiff City Football Club (Holdings) Limited	**Respondents**

- -
- -

David Reade QC and Grahame Anderson (instructed by **Carbon Law Partners**) for the **Petitioner**
Emily Betts and Ryan Hocking (instructed by **Capital Law**) for the **Respondents**

Hearing dates: 11, 14-18 and 23 February 2022

- -

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to the National Archives. The date and time for hand-down is deemed to be 10.30am on Friday 29 July 2022.

.....

CONTENTS

Mr Justice Adam Johnson:

Introduction & Outline

1. Mr Issac is a minority shareholder in Cardiff City Football Club (Holdings) Limited ("*the Company*"), which is the holding company of Cardiff City Football Club Limited ("*the Club*"). He petitions the Court for relief under Companies Act 2006 ("*CA*"), s.994. He says that the Company's affairs have been conducted in a manner which has caused him unfair prejudice. More specifically, his complaint is about an open offer of shares made by the Company following a resolution of the Board of Directors dated 18 May 2018. For reasons which will be explained below, this has been referred to as "*the 5:2 Offer*". The important point about it is that the 5:2 Offer was taken up only by one shareholder in the Company, namely the First Respondent, Mr Tan. Mr Tan is a Malaysian businessman who was already at that stage the majority shareholder in the Company, holding some 94.22 % of the issued shares. The result of Mr Tan taking up the 5:2 Offer and no-one else doing so was that his shareholding increased to 98.3%. Mr Isaac's shareholding in the Company was reduced from 3.97% to 1.18%. Mr Isaac says that this dilution of his percentage shareholding was prejudicial to him, and unfairly so: prejudicial because it left him worse off in terms of his shareholding interest, and unfair because he alleges the whole exercise was in fact orchestrated by Mr Tan, who was motivated not by any proper business purpose but instead by personal animosity towards him (Mr Isaac), following a falling out between them. Mr Isaac says that although the proposal for the 5:2 Offer was approved by the Company's Board of Directors, the directors really did no more than rubber stamp the decision Mr Tan had already made, and so did not exercise their own independent judgment as they were required to (CA s.173), and/or failed to exercise their power to allot new shares only for a proper purpose (CA s.171). What is said is that the directors exercised their allotment power in order to further Mr Tan's personal vendetta against Mr Isaac, and not in order to improve the Company's financial position.

2. The Respondents deny these allegations. Mr Tan's position, as principal Respondent, is that the 5:2 Offer was entirely regular. The background is that by 2018, the Company had for some time been funded by means of substantial loans advanced by Mr Tan. Back in February 2016, Mr Tan had made a public commitment to reduce the amount of the Company's and the Club's indebtedness. This was a matter of concern to supporters of the Club at the time, because of its effect on the operations of the Club having regard to UEFA's Financial Fair Play Regulations. In fact, in early 2016 the Club had been embargoed from acquiring new players during the January transfer window as a result of restrictions under those Regulations. The public commitment made by Mr Tan in February 2016 became known as "*the Pledge*", and in short, Mr Tan's position is that the 5:2 Offer in May 2018 represented the culmination of the Pledge. That was because he paid for the new shares issued to him under the 5:2 Offer by agreeing to writing off a very large sum – approximately £67m – which at the time was owed to him by the Company. Thus, says Mr Tan, his motivation was a proper one. There was a very good commercial reason for the 5:2 Offer, and it was not orchestrated as a means of pursuing a vendetta against Mr Isaac. For essentially the same reason, the Company's Board of Directors acted entirely properly: there was a sound commercial purpose for the 5:2 Offer, which improved the Company's balance sheet; the Company's Directors were independently satisfied of that and accordingly exercised their allotment power for an entirely proper purpose.

3. In terms of relief, Mr Isaac seeks an order that Mr Tan should buy his shareholding for fair value. He says the appropriate valuation date is a point in May 2018, immediately before the 5:2 Offer. In other words, he seeks an order for sale on the basis of a 3.97% shareholding, not a 1.18% shareholding. Mr Tan, however, says that if there is an order for sale, it should be for a present day valuation. This timing point is significant, because the parties are agreed that if a present day valuation date is taken, then Mr Isaac's shares (whatever the percentage value of his shareholding) have nil value. If a May 2018 date is taken, however, then Mr Isaac relies on expert evidence to show that his shareholding has a *pro rata* value of £2,910,000, or £1,600,506 after application of a minority discount. Mr Tan though relies on expert evidence to show that even as at May 2018, Mr Isaac's shareholding had a nil value.

4. Expressed at a high level, therefore, the issues I have to decide are as follows:

   i) What were the motivations underlying the 5:2 Offer, and has Mr Isaac made out his case that it was the product of Mr Tan's personal animosity towards him?

   ii) If so, did that amount to conduct of the Company's affairs in a manner which was unfairly prejudicial, within the meaning of that phrase in CA s.994? More specifically, (a) does the conduct of Mr Tan as majority shareholder in the Company, in allegedly using the corporate structure of the Company to further his own agenda, qualify as conduct of "*the company's affairs ... in a manner that is unfairly prejudicial*" (my emphasis); and/or (b) was there in any event a breach of duty by the directors of the Company in resolving to approve the arrangements for the 5:2 Offer in the way they did?

   iii) If unfair prejudice is shown, then accepting the appropriate remedy would be for Mr Tan to be required to buy Mr Isaac's shareholding, what valuation date should apply and what value should be ascribed to that shareholding?

The Trial & the Witnesses

Scope of the Trial

5. I must first deal with a pleading point. In my Judgment given at the start of Day 2 of the Trial, I indicated that the issues in play were effectively those in paragraphs 27 and 28 of the Petition, focusing on the 5:2 Offer. There are certain issues between the parties, however, as to what allegations fall within the scope of those paragraphs. The Respondents' position is that, properly construed, all they amount to are a challenge to the lawfulness of the decision taken by the Board on 18 May 2018, on the basis that in making the decision it did, the Board was acting for an improper purpose contrary to the duty of the directors under CA s.171. Moreover, they say that the allegation of improper purpose is a narrow one: it is only that the 5:2 offer was "*vindictively motivated following the discontinuation of the proceedings brought against Mr Isaac by the Company*". This is a refence to proceedings against Mr Isaac in June 2016, which were then discontinued shortly before trial in February 2018. I will say more about them below at [35]. For present purposes, the Respondents' position is that matters pre-dating the discontinuation of those proceedings in February 2018 are irrelevant.

6. Mr Isaac's position is that the pleading goes wider than that, and that:

i) it includes engagement not only with the conduct of the Board, but also with the conduct of Mr Tan;

ii) it embraces the sources of Mr Tan's vindictive motivation going beyond the discontinuation of the proceedings against Mr Isaac;

iii) it includes not only an allegation that the Board acted in excess of its powers (CA s.171), but also that the directors followed Mr Tan's wishes unthinkingly, and so were in breach of their duty to act independently (CA s.173).

7. It is useful to set out the relevant paragraphs in full:

> "*27. Mr Tan diluted Mr Isaac's shareholding in 2018. The allotment of shares on or about 26th May 2018 increased the total number of shares issued in the Company to 865,296,023, with the consequence that Mr Isaac's shareholding of 11,203,201 was reduced from 3.87% of the issued shares to 1.29%. The allotment in 2018 followed the discontinuation of the proceedings brought by the Company against Mr Isaac, as pleaded below. Whilst the 2018 allotment is described in the filing at Companies House as being for cash, the rights issue document makes it clear that the shares were allotted in consideration for the conversion of a loan from Mr Tan to the Company. The price at which the shares were allotted was significantly less than the share price applied in November 2016; despite the Club's promotion to the Premier League for the season 2018/19 with a consequent improvement in the Club's, and therefore the Company's, financial position. Further, the price at which the shares were allocated, in return for the conversion of the loan, was [a] lower share price than that recorded as being that at which there was a right to convert the loan to equity, under the terms of the loan as shown in the notes to the Company's accounts.*
>
> *28. Mr Tan therefore exercised his control over the affairs of the Company so as to allocate shares with the objective of diluting the value of Mr Isaac's shareholding. In doing so he did not act in the best interests of the Company or of the shareholders as a whole. It is specifically averred that the 2018 allotment was vindictively motivated following the discontinuation of the proceedings brought against Mr Isaac by the Company, at the behest of Mr Tan, and not for the proper purposes of the Company*."

8. On this pleading issue, my conclusion is that I prefer Mr Isaac's submissions:

i) The conduct of Mr Tan, as well as the conduct of the Board, is expressly relied on and in my judgment is therefore in scope, in pleading terms. Whether such conduct can, in the circumstances of this case, amount to unfairly prejudicial conduct is of course a different question and essentially a matter of law. I will return to this below.

ii) In my judgment the pleading clearly encompasses an allegation that the Board failed to act independently, in breach of the s.173 CA duty. That is because of the assertion that in orchestrating the 5:2 Offer, Mr Tan "*exercised his control over the affairs of the Company …* ". I find it impossible to read that language as anything other than a reference back to the earlier section of the Petition between paragraphs 19 and 24, under the heading "*Management at the whim of the majority shareholder rather than by directors exercising independent judgment*", which expressly includes (at para. 21) reliance on the duty under s.173. The allegations in para. 28 thus include, to my mind, an allegation that the directors failed to exercise independent judgment in approving the 5:2 Offer: instead, in breach of the s.173 duty, they unthinkingly did what Mr Tan wanted them to.

iii) Finally, I find it quite artificial to read para. 28 as meaning that the only matter relied on as the source of Mr Tan's feelings of vindictiveness towards Mr Isaac is the discontinuation of the proceedings brought against Mr Isaac. Rather, the discontinuance of the proceedings is merely referenced as the most recent waypoint in a longer history of animosity between Mr Tan and Mr Isaac. That is not to say that it is part of this action for the Court to seek to determine the causes of the alleged animosity between the parties, and whether the feelings borne by Mr Tan towards Mr Isaac (or vice versa) were justified or not. Rather, it is enough to assess whether there was in fact a feeling of personal animosity on the part of Mr Tan, and if so, whether that was a motivating factor operating on his mind in informing the steps he took in relation to the 5:2 Offer. In forming that assessment, it seems to me entirely clear that para. 28 of the Petition includes in its scope a wider history than simply the period following discontinuance of the proceedings against Mr Isaac.

The Factual Witnesses

The Petitioner's Case

9. Mr Isaac gave factual evidence in support of his own case. I consider him to have been an honest witness, although at times his memory was a little frail and he required assistance from the documents in order to tell the full story. He has plainly been bruised by his dealings with Mr Tan and feels that he has been badly treated. That sense of conviction in his position came across clearly in his evidence.

The Respondents' case

10. Two factual witnesses gave evidence for the Respondents, namely Mr Philip Jenkins and Mr Steven Borley. Mr Jenkins is the individual responsible for overseeing the Company's and the Club's finance operations. He was involved in formulating the 5:2 Offer, and he gave evidence both as to the background to the 5:2 Offer and as to its implementation.

11. Mr Borley is a director of the Company and the Club, and in fact has been a director of the Club since 1998, and so currently is its longest serving director. He was one of two directors who participated in the Company's Board Meeting on 18 May 2018 at which the 5:2 Offer was approved.

12. I am satisfied that both Mr Jenkins and Mr Borley gave their evidence honestly. Mr Jenkins was appropriately cautious and precise in the answers he gave. Mr Borley appeared to me entirely straightforward in his responses.

13. The Respondents' evidence was perhaps more notable, however, for the potential witnesses who did not give evidence. The protagonists whose evidence the Court would have expected to hear included Mr Tan himself, whose motivations were directly in issue, and at least two others.

14. The first is Mr Lim Meng Kwong ("*Mr Lim*"), who until May 2017 was both Senior General Manager of Investments and Special Projects Director at Mr Tan's business, Berjaya Group, and also a director of the Company and the Club. As the correspondence will show, Mr Lim was directly involved in structuring the 5:2 Offer and in acting as a point of contact with Mr Tan.

15. The second is Mr Mehmet Dalman ("*Mr Dalman*"), who was Chairman and Director of the Company in May 2018, and was the second director, in addition to Mr Borley, who participated in the Board meeting on 18 May 2018. Mr Dalman was also a director and Chairman of HR Owen plc, a subsidiary of Berjaya Group.

16. It will be necessary for me to consider what significance, if any, should be attached to the fact of these witnesses not giving evidence. Recently, in Royal Mail Group v. Efobi [2021] UKSC 33, [2021] 1 WLR 3863, Lord Leggatt at [41] indicated that the approach in such cases should not be over-formalistic:

> *"The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in Wisniewski v Central Manchester Health Authority [1998] PIQR P324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules."*

Relevant Background

Mr Tan's Lending

17. Mr Tan completed a takeover of the Company in May 2010. Thereafter, he provided substantial funding to the Club by way of a series of very substantial loans. Certain early loans (the "*Early Loans*") were repayable on demand but subject to an option exercisable at Mr Tan's election to convert any outstanding debt to equity at a price of 15.69p per share. In his evidence, Mr Borley explained that the 15.69p figure represented an historic valuation used at one stage by a Mr Samir Hammam, a previous investor, during the period of his involvement with the Club.

18. In mid-2013, Mr Tan bought out a number of minority shareholdings in the Company, again at 15.69p per share. Mr Isaac, however, remained a shareholder. Mr Isaac's position was that Mr Tan asked him not to sell, and to retain his minority stake.

19. Mr Tan's then outstanding lending was consolidated under an agreement dated 12 May 2014 ("*the 2014 Loan Agreement*"). This lending included certain loans referred to as the "*Scheduled Loans*". Under the terms of the 2014 Loan Agreement, the Scheduled Loans also carried the same conversion right (at a price of 15.69p per share) as existed in relation to the Early Loans.

20. Mr Tan also agreed under the 2014 Loan Agreement to make available further lending. This was to be under an ongoing £50m facility, again subject to a right to convert outstanding debt to equity at a value of 15.69p per share.

21. The terms of the Scheduled Loans were then modified by an agreement dated 29 May 2015 (the "*Restatement Deed*"). By that stage, the Scheduled Loans totalled about £87m. Mr Jenkins explained the background during the course of his evidence. The amendments to the terms of the Scheduled Loans involved an agreement that they would be treated as interest free, and would no longer be subject to Mr Tan's conversion right. Mr Jenkins was not able to give the technical reasons for it, but the effect of these changes at the time – which were supported by the Company's auditors – was to generate a substantial credit to the Company's profit & loss account. That in turn produced a benefit under the Financial Fair Play Rules. For present purposes, the relevance is that Mr Tan lost his *right* to convert a substantial amount of his existing debt into equity; to do so thereafter, as regards the Scheduled Loans at least, he would need the Company's and the Club's agreement.

The Langston Proceedings

22. Meanwhile, the Company had been involved in a long-running dispute involving an entity called the Langston Group Corporation. This is what eventually led to the falling-out between Mr Tan and Mr Isaac. A settlement agreement was entered into in 2013 (the "*Langston Settlement*"), but then a dispute arose as to implementation of the Langston Settlement. In February 2015, Langston commenced legal proceedings against the Club and Mr Tan personally (the "*Langston Proceedings*"). There was a disagreement – the details of which are irrelevant for present purposes – about whether Mr Isaac provided appropriate support to the Club and Mr Tan in the context of the Langston Proceedings. Mr Isaac considered he had; but Mr Tan did not, and at a Board Meeting of the Club on 5 June 2015, the Chairman, Mr Dalman, recorded that he had

been in contact with Mr Tan, who "*doesn't want [Mr Isaac] on the board anymore due to the way he has conducted himself in the Langston matter.*"

Resolutions to remove Mr Isaac

23. In early November 2015, Mr Nott of the Company's solicitors Capital Law told Mr Isaac that Mr Tan wanted him to stand down as a director of the Club with immediate effect. No doubt recognising the reality, Isaac wrote to Mr Tan on 16 November 2015. In his letter he referred to having kept his shares at Mr Tan's request, when everyone else sold. He agreed, in light of Mr Tan's request, to stand down as a director of the Club; but he went on:

> "*My one and only request is that you now buy my shares*."

24. Mr Isaac did not receive any response to that letter. Instead, resolutions were proposed both of the Club and the Company, to remove Mr Isaac as director. General meetings were scheduled for 21 December 2015.

25. The day before the scheduled meetings, on 20 December 2015, Mr Isaac circulated to a number of other minority shareholders in the Company a document (the "*20 December Letter*") setting out a series of complaints about both the Club and Mr Tan personally. These reflected complaints Mr Isaac had already made to the Football Association of Wales.

26. On 21 December 2015, the Board of the Company exercised the Company's right as sole shareholder in the Club, and voted to remove Mr Isaac as a director of the Club. The meeting of the Company's shareholders, however, was adjourned. Mr Borley gave evidence about this, and explained that when he arrived at the meeting, he discovered that a number of minority shareholders had turned up, who were supporters of Mr Hammam. There was a concern that they would behave in an unruly and disruptive manner, and in light of that the meeting was adjourned.

The "*squeeze out*" advice

27. On the same day, the then General Manager of the Club, Mr Ken Choo, took advice from Capital Law on the circumstances in which a majority shareholder might be able to exercise a "*squeeze out*" right to acquire all the remaining shares in a company. At the time Mr Tan held some 89.15% of the shares in the Company, and the other minority shareholders (including Mr Isaac) the remaining 10.85%. Capital Law gave their advice but Mr Choo thought the idea of Mr Tan buying out the minority shareholders was "*not realistic*" and so in an email of 21 December he made an alternative suggestion. This was that Mr Tan could convert £28m of debt to equity, which would then give him – at a conversion rate of 15.69p per share – a 95.04% shareholding.

Early 2016: the Pledge

28. In January 2016, the Football League placed the Club under a transfer embargo as a result of the Club's losses incurred in the year ending 31 May 2015. This was obviously a serious matter for the Club and for its fans.

29. The Langston Proceedings settled in February 2016.

30. Also during February 2016, against the backdrop of the transfer embargo, Mr Tan visited the UK. At a press conference on 11 February 2016, he made the commitment I have already referred to as the Pledge. This was reflected as follows in an official Club Statement released on 12 February 2016:

> "*For the financial year 2015/16, Tan Sri Vincent Tan will convert an additional £68m from debt into equity and waive a further £10m of debt owed to him.*
>
> *The remaining debt, amounting to approximately £40 million … will be converted from debt into equity over the next five years at the current maximum permitted Financial Fair Play regulated figure of £8 million per year*".

31. The Pledge thus involved, as immediate steps, the conversion of £68m from debt to equity during the 2015/16 season (i.e., on the face of it by 31 May 2016), and an agreement to waive a further £10m owed to Mr Tan.

Immediate steps in relation to the Pledge

32. Mr Jenkins gave detailed evidence about the steps taken in light of Mr Tan's announcement in February 2016. Mishcon de Reya were engaged. Mr Jenkins worked with them to develop detailed proposals. The upshot was a note sent by Mr Jenkins to Mr Tan's assistant, Mr Steven Tan, on 14 April 2016. Certain practical issues were addressed, including the need for the Company's Board to be authorised to issue new shares. At the time the Board had only a limited existing authority which in any event was due to expire at the end of July 2016. As to achieving the £68m figure referenced in the Pledge, Mr Jenkins' note said that only approximately £23m could be converted from loans which carried an existing right to convert into equity. The remainder would have to come from those loans which were "*interest free without conversion rights*" (i.e., the Scheduled Loans).

33. Another potential issue was the possibility of an unfair prejudice petition, from shareholders who might claim that their holdings had been wrongly diluted. One possible antidote to this was the idea of an "*Open Offer*" to be made to the minority shareholders (or at least some of them), to subscribe for new shares themselves, in proportion to their existing shareholdings, at the same price to be paid by Mr Tan. This might also have the advantage of generating further cash for the Company.

November 2016 Shareholder Resolutions

34. After this initial flurry of activity, progress in relation to the Pledge effectively came to a halt, although in August 2016 Mr Tan served a conversion notice in relation to another £8m of debt. By then of course the directors' existing authority to allot new shares had expired, and so a new authority was required. This was provided in written resolutions of shareholders in the Company dated 8 November 2016, which both (a) provided that the directors were "*generally and unconditionally authorised to allot new shares of the Company … up to an aggregate to 1,200,000,000 shares of £0.10 each having an aggregate nominal value of £120,000,000*"; and (b) disapplied the operation of the pre-emption right that would otherwise have applied under CA s.561. At a meeting of the

Board of the Company on 17 November 2016, Mr Tan was duly allotted roughly 51 million new shares, in response to his conversion notice, at a price of 15.69p per share.

The Isaac Litigation

35. Meanwhile, in June 2016 – so after settlement of the Langston proceedings – the Club had commenced a new piece of litigation of its own, against Mr Isaac personally (the "*Isaac Litigation*"). The claim included allegations that Mr Isaac had breached his duties as a director and/or had defamed the Club. The Club's specific complaints were said to arise from (a) Mr Isaac's conduct during the course of the Langston Proceedings; and (b) the statements and representations made in Mr Isaac's 20 December Letter, which the Club said were inaccurate.

36. Perhaps in light of this, Mr Isaac took matters into his own hands and resigned his directorship of the Company on 22 July 2016.

April 2017 and after: Mr Lim's Proposals

37. After some delay in relation to the Pledge, or at any rate only intermittent activity, new energy came in the Spring of 2017. Mr Lim emailed Mr Jenkins on 19 April 2017, and asked for information about "*all tan sri loans*", as well as "*the latest shareholders list showing the top 5 shareholders …*".

38. On 20 April, Mr Lim emailed again with directions, namely (1) Mr Tan wished to convert his entire balance of £12.68m in loans which were interest bearing with conversion rights, at the option price of 15.69p; and (2) there should also be what was described as a "*Renounceable Rights Issue of two (2) new shares for every one (1) held at par value*", Mr Tan to subscribe for his new shares by using his loan advances (i.e., the Scheduled Loans) which were non-interest bearing and carried no conversion rights.

39. A document headed "*Shareholding Structure*" sought to illustrate the possible effect of these proposals. The effect of Step (1) would be to increase Mr Tan's shareholding from 91.90% to 94.22% (and to decrease Mr Isaac's holding from 5.57% to 3.97%, and the interests of the other "Minorities" from 2.53% to 1.81%).

40. Thereafter, the *"[m]ost likely*" scenario described in relation to Step (2) (the "*Renounceable Rights Issue*") was one in which only Mr Tan (and not Mr Isaac or any of the other minorities) would subscribe. The outcome in that scenario showed Mr Tan's shareholding increasing from 94.22% to 98%; Mr Isaac's holding decreasing from 3.97% to 1.38%; and the holdings of other minorities decreasing from 1.81% to 0.63%.

41. Further activity followed. On 9 May 2017, Mishcon sent an email setting out a review of various proposals. It is clear from this email that they were mindful of the risk of an unfair prejudice petition from disaffected minority shareholders, including Mr Isaac. Two possibilities were discussed. One was the possibility of giving the minority shareholders bonus shares, but Mishcon identified a number of practical problems with this. The other possibility was a 2 for 1 offer but with differential pricing – i.e. an offer on terms that the minority shareholders would subscribe at a lower price per share than Mr Tan. Mishcon suggested that Mr Tan subscribe at 20p per share and the minorities at 10p per share – i.e., par value. It was also proposed that there be a cut-off to exclude

from any offer those shareholders with very small shareholdings (the Company had a number of such shareholders for historic reasons, holding only several hundred shares each).

42. In his email in reply of 11 May 2017, Mr Jenkins liked the concept of differential pricing, but did not think it practical at the prices suggested by Mishcon, because 20p per share would imply a purchase price for Mr Tan of over £106m, in order to maintain an overall 94.22% shareholding (assuming that the offer was taken up by all qualifying minority shareholders). Mr Tan's available loan balance, however, was only £87m (approximately).

43. As a possible alternative, Mr Jenkins proposed that Mr Tan subscribe at 16.3p, and the minorities at 10p. That would leave a small loan balance of c. £300,000, but assuming all offeree shareholders subscribed, would still leave Mr Tan with a 94.22% shareholding.

44. On 21 June 2017, Mr Jenkins sent a one page summary of the advice as it stood at that point both to Mr Lim and Mr Steven Tan, copying Mr Choo. Mr Lim emailed back on the same day with his comments, in the form of a mark-up of the summary. He did not like the idea of differential pricing ("*no … why TSVT pays more?*"). He was pleased with the advice that the historic option price of 15.69p per share did not have to be used, and thus said: "*good … rights issue at par value of 10p p share*".

45. On 22 June, Mr Lim wrote with a more developed proposal, in an email to Mr Jenkins, Mr Steven Tan and Mr Choo. He said:

> "*Am proposing a Rights Issue of 3 for 1 at par value.*
>
> *Payments is 20p and capitalization of 10p from reserves.*
>
> *Total consideration is 30p.*
>
> *Doable*?"

46. Some further light is shed on Mr Lim's thinking, and indeed Mr Tan's thinking, by an exchange of WhatsApp messages they had at around this time. In a message to Mr Tan, Mr Lim set out the above proposal ("*Basically Rights Issue of 3 for 1 at 10p share. Consideration is 20p and bonus of 10p fr the reserves*"). He went on to say the following, which indicates the inspiration underlying his proposal:

> "*Pay less but resulting with taan sri having a higher percentage if Minorities not subscribing for the Rights Issue.*
>
> *(direct conversion will be cost more and resulting in lower percentage) (subject to a cut off to exclude certain shareholders with very small shareholdings)*
>
> *Eventual tan sri shareholding is 98.5%. M Isaac reduces to 1.04%.*
>
> *Need auditor comment … and may be, a legal comment*."

47. Mr Tan however was not satisfied. He said:

> "*That's the best? try to go above 99%*".

48. In his cross-examination, Mr Jenkins confirmed he had not previously been aware of this WhatsApp exchange.

49. After this, matters again progressed somewhat slowly. Mr Jenkins produced a further briefing paper in October 2017. On 15 November, however, Mr Lim produced another proposal. He set this out in an email to Mr Jenkins, again copied to Mr Steven Tan and Mr Choo. The idea this time was for a 7 for 2 "*Rights Issue*", to comprise:

> *" … cash call of 50p for every two shares held, and two 'bonus' shares for every two subscribed shares. Only when shareholder subscribes for the cash portion of the Rights Issue, he is entitled to the bonus shares."*

50. In an accompanying table, Mr Lim calculated the possible effects of this proposal. Assuming none of the minority shareholders subscribed, the overall effect was to increase Mr Tan's shareholding from 94.22% to 98.66%, and to reduce Mr Isaac's shareholding from 3.97% to 0.92% (and the interests of the other minorities from 1.81% to 0.42%).

51. Mr Lim was obviously trying to do what Mr Tan wanted, and to get his shareholding above 99%. He could not quite manage it, but he was close.

52. At the end of his covering email, Mr Lim said: "*I look forward to positive reply as Tan Sri is pushing this exercise*".

53. The following day, 16 November 2017, Mr Lim provided a further copy of his table, but amended to delete the column showing the impact on Mr Isaac and the other minority shareholders in the event of them not subscribing (headed in the original, "*Most likely Resultant No. of shares*"). This was to be provided, instead of the original version, *"[w]hen forwarding to consultants, auditors or lawyers*". In his cross-examination, Mr Jenkins was asked whether he could shed any light on Mr Lim's motivation in wishing only this amended version to be forwarded to professional advisers, but he did not feel able to speculate as to what Mr Lim had in mind.

<u>January 2018: Mr Jenkins' Final Proposal</u>

54. Mr Lim's proposal was again dependent on the issue of bonus shares, but just as before, that was not considered practical and Mishcon advised against it. Thus, by January 2018, Mr Jenkins was able to say in an email to Mr Lim and others that they had "*ruled out*" the bonus issue option. Instead, he set out the basic terms of the proposal which was eventually adopted and implemented. This involved an open offer to qualifying shareholders (to exclude shareholders holding fewer than 100,000 ordinary shares), on the basis that they could subscribe for 5 new ordinary shares for every 2 existing shares (hence, the *5:2 Offer*), such shares to be issued at their 10p nominal value.

55. In his evidence at the trial, Mr Jenkins gave this explanation as to how he arrived at the 5:2 ratio:

> "*A. The end point was that to deliver the pledge, which was to effectively write off £68 million worth of loan to equity, then a calculation which says that if you can issue those at 10p, what's the ratio of shares you have to issue to get you to 68 million, and actually the actual figure was about something like 2.45-something-to-one shares, so I simply converted that to being a five-for-two because it was administratively easier to operate in terms of getting to the end number of shares. So 2.4 – I think it was about 2.45-to-one meant that Mr Tan converted roughly 67 million shares to equity, so I just converted 2.45-to-one to being five-for-two, just from a pure ease of administration. The end point was to deliver the pledge*"

The Isaac Litigation is Discontinued

56. In February 2018, the Isaac Litigation was discontinued. In the usual way, Mr Isaac was paid his costs.

Approval from Mr Tan

57. Approval from Mr Tan was still needed for the 5:2 Offer. The precise circumstances of this are unclear, but the documents contain another WhatsApp message from Mr Lim to Mr Tan, which appears to be at some point in Spring 2018, because a WhatsApp message at what appears to be the same time refers to Cardiff City being promoted to the Premier League, which was in May 2018. At any rate, Mr Lim's message summarised the position as follows:

> "*The amount of advances for conversion is $66.42 mil.*
>
> *Conversion is at par value 10p.*
>
> *With the conversion, your shareholding will increase from 94.2% to 98.3% (assuming no one subscribes for the Rights Issue).*
>
> *Once BNM is obtained, the RI document will be sent out and the RI will be completed within a month*."

58. The reference to BNM was to Bank Negara Malaysia, whose approval was required for the transaction.

59. On 3 May 2018, Mr Lim was able to email Mr Jenkins to say "*Tan Sri has agreed and approved the restricted Rights Issue, Please proceed to issue the offer documents*."

60. By 12 May, BNM approval had been obtained, although it was not available in English translation. Mr Tan was nonetheless keen to implement the transaction, and Mr Lim was eager to show progress. He emailed Mr Jenkins to say:

> "*Pls DO NOT delay further as Tan Sri would like the scheme to be implemented immediately. The translation will come later*""

61. This may have been prompted by a further WhatsApp message between Mr Tan and Mr Lim at around the time, in which Mr Tan said:

> "*Cardiff City share conversion when ready? Expedite it.*"

Approval by the Company's Board

62. By 15 May 2018, Mishcon had available a number of draft documents which they sent to Mr Jenkins. These included an Offer document for the eligible shareholders – referred to as "*Qualifying Shareholders*". Other documents included a novation agreement, which was necessary since Mr Tan's lending had been to the Club, but he wished to acquire shares in the Company: consequently the debt had to be novated to the Company, and then converted under the 5:2 Offer.

63. By 17 May, Mr Jenkins was able to circulate a package of documents to the Company's Board comprising a final version of the Offer document and a draft set of Board Minutes. The Offer document said the following about the purpose of the Offer:

> *"The reason for the proposed Fundraising is to provide additional capital to the Company's balance sheet, reduce the Company's indebtedness and, if Qualifying Shareholders other than Vincent Tan subscribe, to provide the Company with additional working capital resources."*

64. A Board Meeting was proposed for the following day, 18 May 2018. In the event, the Board meeting was held by telephone conference call. The directors present were Mr Dalman, the Chairman, and Mr Borley. Mr Jenkins was also in attendance. His evidence was that he took the Board through the issues, using the draft Board Minutes as an agenda.

65. Mr Borley gave evidence about the Board Meeting and was cross-examined. In his Witness Statement, Mr Borley had referred to being told at the Board Meeting by Mr Jenkins that Mr Tan was exercising a pre-existing right to convert his loans. Mr Borley corrected that point when he gave his evidence. He said that at the time of the meeting, he was just concentrating on the fact that the Board was being asked to agree a debt/equity conversion. He did not think about the loans being convertible as such, under any pre-existing right. He just looked at it as debt.

66. In cross-examination, Mr Borley described the conduct of the Board Meeting as follows:

> "*Q. Do you have any recollection at all of the actual Board meeting of 18 May?*
>
> *A: Yes.*
>
> *...*
>
> *Q: What recollection do you have?*
>
> *…*

> *A: -- my Lord, I remember that it was a conference call. I remember Mr. Jenkins going through the rationale, going through the process of each and every step that we needed to take to be able to approve the conversion and the share offer*."

67. The Resolutions at the Board Meeting included (Resolution 1) approval of the terms of the 5:2 Offer and of an accompanying Offer Letter to Qualifying Shareholders, and also (Resolution 3) a decision to allot shares to all Qualifying Shareholders who accepted the 5:2 Offer.

68. Other WhatsApp messages sent at around this time (they are undated in the Bundles, but one can infer the likely timings) show Mr Tan being anxious to know the outcome. In one message he said:

> "*Resolve increase paid up in Ccfc? My stake now at 99%?*
>
> *When all ok*?"

69. The reply was as follows:

> "*If no one subscribes for the RI your shareholding interest will increase to 98.3%"*

70. A further message then said:

> "*Restricted rights issue will be despatched on 25 May and expected to be completed within 2 weeks*".

Mr Isaac Decides not to take up the 5:2 Offer

71. Having received the Offer Letter, Mr Isaac sent a letter on 1 June 2018 via his solicitors, Kennedys, making an allegation of unfair prejudice. The Company responded via a letter from Capital Law dated 6 June 2018. The Company denied any irregularity, and extended the date for acceptance of the Offer terms by Mr Isaac to 12 June 2018.

72. In the event, Mr Isaac did not take up the Offer. At 10p per share, he would have needed to invest some £2.8m in order to maintain his level of shareholding. In his evidence Mr Isaac said he did not have that sort of money at his disposal, and candidly accepted that even if he had, he would not have wished to invest it in Cardiff City after the way he had been treated. That was despite the majority of the costs expended by him in defending the Isaac Litigation having by this stage been paid to him by way of interim payment. Mr Isaac described the situation as very emotional.

73. In a final, relevant WhatsApp exchange with Mr Choo, Mr Tan asked:

> "*Have we finish the shares issues so that my stakes in the club increase to maximum percentage?*"

74. Mr Choo replied:

> "*Yes done*."

The Factual Story: Assessment of the Evidence and Conclusions

Mr Tan's Motivation

75. The first question is what was Mr Tan's motive in pressing for the exercise which became the 5:2 Offer. There are said to be competing alternative explanations. The first (advocated by Mr Tan himself) is that Mr Tan was seeking only to fulfil the Pledge, made in 2016, by converting a substantial amount of debt into equity in the Company. The second (advocated by Mr Isaac) is that Mr Tan was motivated by a feeling of personal animosity towards Mr Isaac.

76. My assessment of the evidence is that in fact both propositions are true, and that Mr Tan had mixed motives for pushing what became the 5:2 Offer. I say that for the following reasons:

    i) Mr Isaac made his offer to sell his shares to Mr Tan in November 2015. He received no response, although steps were taken shortly thereafter in December 2015 to remove him both as a director of the Club and of the Company. Mr Tan certainly had the financial wherewithal to be able to buy Mr Isaac's shares, and had acquired other minority shareholdings in 2013 at the historic price of 15.69p. He could easily have done the same with Mr Isaac's shareholding and indeed it would have been an obvious thing to do.

    ii) Coming as they did against the backdrop of Mr Tan's and Mr Isaac's falling out in connection with the Langston Proceedings, which were still ongoing in late 2015, these events seem to me to give rise to the obvious inference that operating on Mr Tan's mind at the time was a degree of personal animus towards Mr Isaac: he would not give Mr Isaac the satisfaction of buying his shareholding but would find some other way of dealing with him. To my mind, this is also the most likely explanation for Mr Choo's reaction to the "*squeeze out*" advice obtained in the immediate aftermath of the abortive meeting of the Company's shareholders on 21 December 2015 (above at [27]). Mr Choo did not think the idea of Mr Tan buying out the minority shareholders, including Mr Isaac, was realistic, although no doubt he could have done so if he wished. It was not realistic in the sense that Mr Tan would not have wanted to. The alternative suggested was a debt for equity swap. The obvious inference is that Mr Tan, although certainly wanting to diminish the position of the minority shareholders including in particular Mr Isaac, wished to be able to do so on a basis that did not involve paying them anything for their shareholdings.

    iii) At the same time, however, I am persuaded that the Pledge was a genuine commitment. It came after the controversy of January 2016, when the Club had been placed under a transfer embargo by the Football League. It was reflected in a public statement made by the Club, and reflected a commitment to the Club and its fans. It was self-evidently a good thing for the Club to see its overall level of indebtedness reduced.

    iv) That said, I am also quite clear on the evidence that at some point – I cannot be sure precisely when – the idea must have dawned on Mr Tan of killing two birds

with one stone. That is to say, he could convert his substantial outstanding debt under the Pledge in a manner which would increase his own shareholding in the Company whilst simultaneously reducing the holdings of the minorities, including Mr Isaac.

v) To my mind, this basic intention then explains much of what follows. I accept the fact that, from his point of view, what Mr Jenkins was trying to do was to realise the vision contained in the Pledge, of converting a substantial amount of debt into equity. What he was not aware of, however, was that at the same time there was another – and parallel – agenda in play, which was the particular interest of Mr Tan in diluting the interests and influence of the minorities, including particularly Mr Isaac.

vi) This comes across very clearly to my mind in the various communications to and from Mr Lim, starting in April 2017 (see [27] to [54] above). These reveal a keen interest in maximising the overall value of Mr Tan's shareholding, and decreasing those of the minorities, including Mr Isaac.

vii) This explains Mr Lim's idea, in his email of 22 June 2017, of using funds from the Company's reserves to increase the number of shares Mr Tan would obtain for a 20p subscription price (see [45] above). The idea was that if he paid 20p (the price of two shares at par), Mr Tan would acquire a third share paid for out of the Company's reserves (also at the 10p par value).

viii) That structure would give Mr Tan 98.5%, and "*Mr Isaac reduces to 1.04%*" (see [46] above). The specific reference in Mr Lim's email to Mr Isaac is obviously important: he was a target of special interest for Mr Tan. What is also clear in my opinion is that there was something of a misunderstanding by Mr Lim of the advice given by Mishcon de Reya in their email of 9 May 2018 (above at [41]). That advice had been to offer bonus shares to the *minority* shareholders only, as a way of structuring the debt/equity swap by Mr Tan in a way which would minimise the risk of unfair prejudice. Mr Lim saw it differently, however, because his formulation involved giving *Mr Tan* bonus shares (paid for from reserves), as a way of increasing his overall shareholding as long as the minority shareholders did not subscribe.

ix) To begin with Mr Tan was not happy with only a 98.5% shareholding and pushed for more if possible ("*try to go above 99%*"). Mr Lim thought again, and in November came back with his next idea, which was a 7 for 2 "*Rights Issue*", again to include bonus shares. That would have the effect, if none of the minorities subscribed, of increasing Mr Tan's shareholding to 98.66% - not quite the 99% or above that Mr Tan wanted, but an improvement on 98.5%.

x) Again, it seems to me an obvious inference that an important target of this planning was Mr Isaac. Moreover, it also seems to me clear that Mr Tan – and Mr Lim on his behalf – wished to try and disguise Mr Tan's motivation vis-à-vis Mr Isaac. That is why, when Mr Lim provided a further copy of his workings on 16 November 2017, for use with the Company's external advisers (above at [53]), the column identifying the likely dilution of the minorities (including Mr Isaac) was removed.

xi) Mr Lim's idea would not work, because it was not practicable for the Company to issue any bonus shares; but in the event this did not matter. Mr Jenkins' maths (see [55] above) identified that it was possible to get to more or less the desired end-point by means of a 5:2 structure (what became the 5:2 Offer), which would give Mr Tan 98.3% if no-one else subscribed (see above at [57]). That was not quite what Mr Tan had wanted, but was good enough and he approved it.

xii) Also significant, in my opinion, is the pace at which the Pledge was implemented. In its original form the Pledge involved a commitment to convert £68m of debt into equity in the 2015/16 year, but that did not happen. Implementation of the Pledge was delayed. The reasons for the initial delay in the period to early 2017 are obscure, but to my mind what is clear thereafter is that the delay was largely attributable to the efforts being undertaken by Mr Lim to structure implementation of the Pledge in a manner which would maximise the overall value of Mr Tan's shareholding and minimise the values of the holdings of the minority shareholders, in particular Mr Isaac. Final approval was not given until Mr Tan was content that his objective would be achieved.

The Motivations of Mr Borley and Mr Dalman

77. The gist of the criticism levelled at Mr Borley and Mr Dalman was that the Board meeting on 18 May 2018 was no more than a rubber-stamping exercise of the structure already approved by Mr Tan, so the outcome of the meeting was a *fait accompli*. In support of that argument, Mr Reade QC relied on the fact that the Minutes of the meeting were drawn up beforehand, and on the fact that there was no evidence of the directors (Mr Borley and Mr Dalman) questioning what was proposed or interrogating its logic. Mr Reade QC said there were many questions which could and should have been asked, and gave examples in his written closing submissions:

> "*There were questions that should have been asked: why was Mr. Tan getting so many shares when, if the 15.69p option price had been applied rather than par, he would have got fewer? How had par been arrived at as the price? Why 5:2? Why did it need to be all or nothing when minority shareholders might be more likely to put up capital if they did not have to go all in? What other price options had been considered? What was the advice on prejudice to the minority? What extra rights did Mr. Tan acquire if his shareholding increased in this way? Why weren't his convertible loans used?*"

78. None of this was disputed on the evidence. I have already mentioned Mr Borley's account of the Board Meeting (above at [66]), which did not involve any recollection of interrogation of any of those points. Likewise, in his Second Witness Statement Mr Borley's evidence was that he did not specifically think about Mr Isaac's position, when present at the meeting. He was not challenged on that point during cross-examination.

79. Mr Borley did however have the following exchange with Mr Reade QC:

> *"Q. I am going to put to you, you did not think about much at all, because what you were doing, as was the normal practice, was approving resolutions that had been placed before you.*

> *A. I do not agree with that, my Lord. Basically, football clubs, and I think the football industry is coming to the place where debt in football clubs is not healthy. The football world does not want to see another Bury where it disappears off the face of the earth because of external debt. I have always campaigned with the football league that they should be looking to incentivise clubs to change debt into equity, the main principle for that being, is if an owner gets fed up with a club you do not want somebody knocking on the door the next day saying 'Can I have my £100 million back?' If he has put it in his equity, it has gone, and every time I put money into the football club I did it on the basis I said goodbye to it the day it went in and if it ever came back, it was a bonus, my Lord."*

80. What comes across from this evidence, which I accept, is that Mr Borley did have one point at least in mind, which was the value to the Club of its indebtedness to Mr Tan being reduced. Mr Borley considered that to be an important issue in its own right, and his decision to support the idea of the 5:2 Offer was made on that basis.

81. Dealing with the question of his independence, Mr Reade QC also put to Mr Borley the point that if he had disagreed with Mr Tan, then his fate as a director would have been sealed, like that of Mr Isaac. Mr Borley gave the following response:

> *"Well, I did survive that position because I did disagree with something Mr Tan did not want, and, as I said, I have always taken the view that I am a non-executive director, I speak my mind, I give my view. Whether others accept it, or not, that is their position. Being a director, or being in a meeting, you have to contribute, and if you are not contributing either towards the running of the club or to the purpose of the meeting, what is the purpose of being there, my Lord? So if they no longer wanted me there, I am sure my wife and my family would love to have me back, because doing 25 years in football, I have sacrificed my weekends, I have sacrificed my children growing up and I have sacrificed my grandkids, all for the fact that I have given 25 years of my life towards this football club, my Lord."*

82. Again, I accept that evidence. I have no real doubt that Mr Borley genuinely believed that reducing the Club's indebtedness to Mr Tan was in the Club's interest. I also have no real doubt that, if he had considered it a bad idea, Mr Borley would have said so, without concern for the personal consequences for him as a director. He was and is, first and foremost, a passionate supporter of the Club, to which he has owed a long allegiance pre-dating by many years any relationship with Mr Tan. Mr Borley, I am sure, put the Club first and foremost in his thinking.

83. Turning to Mr Dalman, of course I had no evidence from him and he was not available for cross-examination at the trial. His position is more difficult to assess. I will have to come back to it below at [103] and [118].

Unfair Prejudice: Discussion and Conclusions

Mr Tan

84. There is first the question of whether Mr Tan's conduct in and of itself is capable of amounting to unfair prejudice in the conduct of the Company's affairs. I think not. That is essentially for two reasons.

85. The first reason is that I do not regard the acts of Mr Tan which are sought to be impugned as amounting to *conduct of the Company's affairs*. Section 994 is engaged only where "*the company's affairs are or have been conducted*" in an unfairly prejudicial manner. In Re Unisoft Group Ltd (No. 3) [1994] 1 BCLC 609, p. 623, Harman J drew a distinction between the acts or conduct of a company and the acts or conduct of a shareholder in his private capacity: the former are within section 994 but the latter are not. Thus, as the editors of Minority Shareholders – Law Practice and Procedure (6th Edn.) point out (at 6.22), there is a difference between the exercise of a member's votes, which is a private and personal act, and the passing of a resolution at a general meeting, which is an act of the company.

86. Here, it seems to me that what is really alleged against Mr Tan is that he used his position as majority shareholder in, and major lender to, the Company and the Club in order to put pressure on the Board to accede to his demands and thus get his own way. Even if he did, however, I do not see that those matters in and of themselves amount to conduct *of the Company*. Rather, they are matters which are personal and private to Mr Tan himself. He was entitled, *qua* shareholder and creditor, to seek to exercise such commercial pressure as was at his disposal in his own interests. In doing so, it seems to me he was acting on his own account, and so whatever he chose to do or not do cannot properly be characterised as the conduct of *the Company's* affairs. What was certainly an act of the Company was the way in which the Board reacted to the steps taken by Mr Tan: but that is a different matter.

87. The second (and related) reason is this. I do not detect anything unlawful or unconscionable in Mr Tan acting in the way he did, even if he was motivated by a personal feeling of vindictiveness against Mr Isaac.

88. Here we must be a little careful. In his submissions on behalf of Mr Isaac, Mr Reade QC pressed me to accept that what Mr Tan did was *unfair*. I agree it was unfair in the moral sense. Based on my findings above, it seems to me it was vindictive and unpleasant behaviour, and is to be deprecated. But to say something is unfair in that sense is not the same as saying it is unfair or unconscionable in the legal sense, because one can behave unpleasantly and unfairly (and people often do) without behaving unlawfully.

89. I accept, as Mr Reade QC also submitted, that the jurisdiction under CA s.994 is a broad one, but to state that as a general proposition really takes one no further. There are boundaries, and as Lord Hoffmann explained in his speech on O'Neill v. Phillips [1999] 1 WLR 1092 at p. 1098D, the concept of fairness under s.994 must be applied judicially and the content given to it must be based on rational principles. Moreover, context is everything and, in the context of a s.994 petition, the context is an association of persons together for an economic purpose, usually with some degree of formality, including that *"[t]he terms of the association are contained in the articles of association and*

sometimes collateral agreements between the shareholders" (p. 1098G). Thus (p. 1098H-1099A):

> " *... a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he has agreed that the affairs of the company should be conducted*".

90. That is subject to an important qualification, however, namely that (p. 1099A):

> *" ... there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely on their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith".*

91. In the present case, there is no shareholders' agreement, and it was not argued that Mr Tan had infringed any provision of the Company's articles. Thus, taking Lord Hoffmann's first point, I do not see that Mr Isaac can complain that there was a breach by him of the terms on which he agreed that the affairs of the company should be conducted.

92. Lord Hoffmann's second point was directed to those cases where it is unfair for those conducting the affairs of the company to rely on their strict legal rights. The paradigm case is that of the quasi-partnership company, exemplified by Ebrahimi v. Westbourne Galleries [1973] AC 360. In this present case, Mr Reade QC drew a parallel with Ebrahimi and sought to rely on it. I do not consider that it assists him, however. The point in Ebrahimi was that the majority shareholders used their majority position to remove the minority shareholder, who was also a director, from his directorship position. They were entirely within their legal rights to do so, because the relevant Companies Act provision (now to be found in CA s.168) entitled them to remove a director upon a majority vote of the shareholders. The finding of the House of Lords, however, was that the majority shareholders were constrained in equity from exercising their strict legal rights and removing the minority shareholder from his management position as director. That was because of an understanding or arrangement binding on the majority in equity, which arose out of the circumstances in which the company had come to be incorporated. The parties' business was originally a partnership, and had only later taken corporate form. As a partnership, the partners were bound by an obligation of good faith and operated on the basis that they would each be entitled to participate in the management of their joint enterprise. The essential reasoning in the case, it seems to me, is that this background justified the conclusion that notwithstanding the later act of incorporation, the (former) partners would be bound by an understanding or arrangement binding in equity that they would manage the business in more or less the same basic way as before, with each of them being involved. Since they entered into their incorporated venture on that basis, it was unconscionable for the majority shareholder later to exercise the majority voting right in order to exclude the minority shareholder from his directorship post and so from any management role in the business. That was contrary to the understanding on which the business had been incorporated. Thus, the majority were constrained by equity from exercising their strict legal rights, and the result on the facts was an order that the company be wound up on the just and equitable ground.

93. That is very far away from the present case. The unfairness in Ebrahimi was of a very particular type. It was unfairness in the sense of it being unfair for the majority to override the arrangement or understanding they had with the minority, which limited their ability to exercise their strict legal rights however they wanted to.

94. In the present case, no such equitable constraint on the exercise by Mr Tan of his strict legal rights, either as shareholder or lender, is pleaded or relied upon. Instead, it is only said that Mr Tan has behaved unfairly towards Mr Isaac in the most general sense. That may be true – it seems to me it is. But it does not provide a basis for the grant of relief from unfair prejudice. The problem is that, absent any legal or equitable constraints, Mr Tan was free to use his shareholding or the leverage arising from his position as lender however he wished. He did not agree to any constraint on the exercise of his legal rights in either capacity, still less to any constraint on his ability to exercise such commercial leverage as he had in order to seek to achieve his own personal objectives, which is really what happened here. Mr Isaac may in a general sense feel that Mr Tan's exercising such commercial leverage for his own purposes was unfair, but the problem is that, unlike the minority shareholder in Ebrahimi, he cannot point to any agreement or understanding that Mr Tan would not do so.

The Board of Directors

95. As I have already held, on my view of the Petitioner's pleaded case, separate points arise under ss. 171 and 173 CA 2006. It is convenient to deal with s. 173 first, i.e., the duty to exercise independent judgment.

Did the directors act independently?

96. CA s.173 requires company directors to exercise independent judgment.

97. In the present case, this strikes me as essentially a factual question. Mr Isaac's bald and ambitious proposition is that the Board of the Company simply did what Mr Tan wanted, unthinkingly. On the facts, I do not consider that case to be made out.

98. To begin with, there was a justifiable commercial rationale for what the Board was being asked to do, namely authorise an allotment of shares and approve the terms of the 5:2 Offer. The commercial rationale was to reduce the Company's indebtedness and, if Qualifying Shareholders other than Mr Tan subscribed, to raise new working capital (above at [63]). In saying that I accept that the possibility of new working capital being raised was portrayed in the Offer Letter as very much a secondary objective, and I also accept that on proper analysis it was a very unlikely outcome. But there were good reasons for the 5:2 Offer to proceed nonetheless. It was very much in the Company's interests, as Mr Isaac himself accepted during cross-examination, for the indebtedness to Mr Tan to be reduced. To put it another way, the nature of the Board's decision in and of itself does not suggest a lack of independence: it is just the sort of decision which, looked at objectively, one might expect an independent Board to have taken.

99. I do not see there is much force in Mr Isaac's point that the course of the planning exercise which eventually led to the Board meeting was driven largely by Mr Tan and those on his side of the equation – meaning principally Mr Lim. On this point, I accept Mr Jenkins' evidence that it was obviously critical to have the form of the proposal agreed with Mr Tan, because without his agreement it simply could not happen. So it

made good sense for the position vis-à-vis Mr Tan to be squared off before the proposal was finally and formally put to the Board.

100. Neither do I consider it to be a matter of concern, in and of itself, that the relevant Board minutes were prepared in advance and used as an agenda for the Board meeting of 18 May 2018, which Mr Jenkins spoke to. Whilst not ideal, this is not I think an unusual practice, and in my view there is nothing inherently wrong with it as long as it is clear that the Board remains open to take its own view as the meeting develops, if necessary in a manner at variance with the draft Minutes. I consider it is reading too much into the preparation of the draft Minutes in this case to say they give rise to the inference that the Board did not give independent consideration to the matters it had to resolve.

101. Turning then to Mr Borley, I am quite satisfied on the basis of his evidence that Mr Borley exercised his own independent judgment. I have already accepted the account he gave of his motivations (above at [79]), and of the nature of his relationship with Mr Tan (above at [81]). The former suggests that he had formed his own view of the wisdom and desirability of the 5:2 Offer; the latter suggests that, if he had disagreed with it and thought it not in the Company's interests, he would not have been afraid to say so.

102. In the final analysis, as it seems to me, it was not seriously suggested that Mr Borley failed to apply his own independent judgment. What was said was that he had failed to apply his mind adequately to the assessment he had to make (see above at [77]). But to say that someone's judgment may have been flawed is not the same as saying that that person failed to act independently, which was Mr Isaac's pleaded case on this point. Although in some cases a lack of inquiry by a director may be taken as evidence of a lack of independence, I do not think that logic applies on the facts of this case for the reasons I have already given: Mr Borley's evidence was that he had given independent thought to the problem he was faced with and had formed his own view about it. I do not think that, despite the apparently rather formulaic course of the Board Meeting, the argument to the contrary is made out.

103. There is then the question of Mr Dalman. I had no evidence from him, and Mr Isaac said little about him specifically.

104. I am prepared to accept that Mr Dalman's position was likely different to that of Mr Borley, because whereas Mr Borley's allegiance was first and foremost to the Club, Mr Dalman had a closer association with Mr Tan (being Chairman of one of the companies in Mr Tan's Berjaya Group). I infer it is more likely that Mr Dalman had in his mind the desirability of producing an outcome which favoured Mr Tan's interests, i.e. one which involved dilution of Mr Isaac's shareholding.

105. Even so that does not, I think, enable me to conclude that Mr Dalman failed to exercise independent judgment. It is perfectly possible, it seems to me, for a company director, acting independently, to form the view that the company's best interests are achieved by implementing just the same proposal as is favoured by the company's majority shareholder, who has been responsible for appointing that director. Such a coincidence of interests is not unusual, and the fact that it existed in this case does not, I think, enable me to conclude that Mr Dalman failed to act independently. The decision he took, although certainly it favoured Mr Tan, was also justified commercially from the Company's point of view. Neither the decision itself, nor the manner in which it was

taken, enables me to conclude that in supporting it Mr Dalman acted without giving it independent thought. The better conclusion on the evidence, it seems to me, is that Mr Dalman took the decision independently and for what he considered to be good reasons, just as Mr Borley did.

Did the directors act for a proper purpose?

106. Section 171 CA 2006 is headed, "*Duty to act within powers*", and provides as follows:

> "*A director must –*
>
> *(a) act in accordance with the company's constitution; and*
>
> *(b) only exercise powers for the purposes for which they are conferred*."

107. On the facts of this case, the particular act of the Board which must be examined is the decision to allot new shares, taken at the Board meeting on 18 May 2018. The power whose exercise is said to have been wrongful is thus the power to allot new shares.

108. A good starting point is Howard Smith v. Ampol Petroleum [1974] AC 821 which was directly concerned with the power to allot shares. In giving the advice of the Privy Council, Lord Wilberforce said this of the case where the complaint made is one of improper exercise of a power:

> " *... it is necessary to start with a consideration of the power whose exercise is in question, in this case a power to issue shares. Having ascertained, on a fair view, the nature of this power, and having defined as can best be done in light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion whether that purpose was proper or not*."

109. In the present case, the directors were exercising the power conferred on them following the resolutions of the shareholders dated 8 November 2016 (above at [34]). That resolution conferred on the directors a general and unconditional authorisation to allot new shares of 10p each, and expressly disapplied the pre-emption rights that would otherwise have applied under the Company's articles. Moreover, that general authorisation was given against the background of the Pledge, and thus in light of Mr Tan's anticipated ongoing plan of converting debt to equity.

110. That being so, it seems to me plain that the power to allot shares was properly exercisable in order to facilitate Mr Tan's planned conversion of debt into equity. Indeed, the relevant authority was conferred on the Board expressly for that purpose.

111. I do not think it matters that the 5:2 Offer was not, as such, intended to improve the Company's working capital position (it could not do so because the relevant debt was recorded as a non-current liability in the Club's accounts, and consequently writing it down would not serve to reduce *current* liabilities therefore could have no impact on

the working capital position). The point is addressed in Howard Smith v. Ampol, where Lord Wilberforce said expressly at p. 835C that " *... it is ... too narrow an approach to say that the only valid purpose for which shares may be issued is to raise capital for the company. The discretion is not in terms limited in this way: the law should not impose such a limitation on directors' powers*". In the circumstances of this case, for the reasons already given, I am satisfied that the allotment of new shares for the purpose of clearing the debt owed to Mr Tan was a proper one. Even though it would not improve the working capital position of the Company, it would improve the Company's balance sheet position (and that of the Club), and promote greater financial stability, for the reasons given by Mr Borley.

112. What was not a proper purpose, however, was the dual purpose which Mr Tan had, which was to seek to dilute Mr Isaac's shareholding, by structuring the debt conversion in a manner which would carry the best chance of maximising his shareholding and minimising those of Mr Isaac and of the other minority shareholders.

113. As I have already explained, I do not consider Mr Tan's state of mind and motivations to be determinative, because he was a shareholder and lender, who was unconstrained in exercising the commercial leverage he had. What is important however is the position of the directors, Mr Borley and Mr Dalman.

114. Taking Mr Borley first of all, I simply do not consider on the evidence that he had Mr Tan's improper purpose in mind. In my opinion, he had his own purpose in mind (see above at [80]), which was to reduce the Club's, and the Company's, debt. That was a legitimate purpose.

115. In fact, as I have already mentioned, no point as such was put to Mr Borley that he was motivated by an improper purpose. Instead, as I understood it, what Mr Reade QC invited me to do was to infer an improper purpose from the fact that Mr Borley did not seek to interrogate the proposal put to him, including in particular by asking questions about the offer price (which was only the 10p par value of the shares, and not the 15.69p used previously in connection with Mr Tan's contractual conversion rights). By analogy with the reasoning of HHJ Purle QC in Re Sunrise Radio [2009] EWHC 2893 (Ch), [2010] 1 BCLC 367, Mr Reade QC seemed to argue that since no proper consideration was given by the Board to the separate position of Mr Isaac or indeed of the other minority shareholders (*cf* Sunrise Radio at [113]), it must follow that the purpose of the allotment was improper.

116. With respect, this seems to me to be a somewhat confusing submission. The point in Sunrise Radio seems to have been that that the directors, in reaching their decision, failed to act fairly as between the majority and the minority shareholders, by failing to fix the price of a new allotment of shares at a value which, since it was known the minority shareholder would not subscribe, would nonetheless reduce or limit the potential dilution of the minority shareholding (see again Sunrise Radio at [113]). That was in circumstances where the allotment was to take place at par, whereas there was evidence that the shares were worth materially in excess of that to the majority shareholders. In those circumstances, the breach of duty by the directors was their failure to "*take all relevant considerations into account*" (see again at [113]), which on the facts was both unfair and prejudicial (unfair because it was a breach of duty, and prejudicial because had the directors taken all relevant considerations into account, the majority would have had to pay more for their new shares, and would thus have received

fewer shares for the same money, and the dilutive effect on the minority shareholder would have been lessened).

117. I think the difficulty with this point is that it does not reflect the pleaded case (see above at [7]). Although that mentions the offer price of 10p per share as part of the context, the pleaded case advanced is not that the directors of the Company failed in their duty by overlooking relevant factors they should have taken into account. The point of the pleaded criticism is much more straightforward than that. It is that the Board unthinkingly allocated shares with the express and (as I read it) sole objective of implementing Mr Tan's desire to dilute Mr Isaac's shareholding. I do not consider that that case is made out as against Mr Borley, because (as I have held) he *did* think for himself, and his purpose was not to dilute Mr Isaac's shareholding. Indeed, his unchallenged evidence was that he did not think about Mr Isaac at all.

118. What then of Mr Dalman? The position there is more difficult, I think. I had no evidence from him, but consistent with the position I have already adopted, it seems to me an entirely reasonable inference that he *would* have had in mind the particular benefit to Mr Tan which would flow from the 5:2 Offer if (as was expected) it was not taken up by Mr Isaac – i.e., the dilution of Mr Isaac's shareholding. At the same time, however, I consider that he, like Mr Borley, would have seen the sound commercial sense in the Club's and the Company's indebtedness to Mr Tan being reduced, in line with the Pledge.

119. Here one runs into just the sort of practical difficulty identified by Lord Sumption JSC in Eclairs Group Limied & Anor v. JKX Oil & Gas plc. The Supreme Court in that case was concerned with a different sort of power, namely the power to issue disclosure notices to shareholders. But Lord Sumption made some general observations about cases where the exercise of a power is challenged on the basis that it is undertaken for an improper purpose. The conventional approach in such cases – and the one on the face of it applied in Howard Smith v. Ampol Petroleum – is to ask what was the "*primary*" or "*dominant*" purpose underlying the exercise of the power. At [20] Lord Sumption explained the difficulty which can arise in applying this test in practice:

> *"The practical difficulty was pointed out by Dixon J in the passage which I have quoted. It would involve a forensic enquiry into the relative intensity of the directors' feelings about the various considerations that influenced them. A director may have been influenced by a number of factors, but if they all point in the same direction he will have had no reason at the time to arrange them in order of importance. The attempt to do so later in the course of the dispute is likely to be both artificial and defensive. Moreover, a realistic appreciation of the directors' position will show that it is liable to lead to the wrong answer. Directors of companies cannot be expected to maintain an unworldly ignorance of the consequences of their acts or a lofty indifference to their implications. A director may be perfectly conscious of the collateral advantages of the course of action that he proposes, while appreciating that they are not legitimate reasons for adopting it. He may even enthusiastically welcome them. It does not follow without more that the pursuit of those advantages was his purpose in supporting the decision. All of*

> *these problems are aggravated where there are several directors, each with his own point of view".*

120. As regards Mr Dalman, I find myself presented with just this sort of difficulty. I have identified two likely purposes influencing him, one a proper purpose and one not. I find it very difficult if not impossible to identify what, in his case, would have been the primary or dominant purpose. The difficulty is obviously compounded by the fact that he did not give evidence and was not cross-examined.

121. Faced with this practical problem in JKX, Lord Sumption's solution (speaking obiter, although Lord Hodge JSC concurred with his comments) was to make a distinction between the lawfulness of an act and the consequences of any unlawfulness.

122. As to the question of lawfulness *per se*, Lord Sumption considered the answer in the context of directors' duties to be straightforward. The statutory language in s.171 CA is clear. Directors must exercise their powers "*only*" for the purposes for which they are conferred. Thus, the *" ... duty is broken if they allow themselves to be influence by any improper purpose*" (per Lord Sumption at [21], emphasis in original).

123. I find that logic, although expressed *obiter*, to be entirely compelling, and on the facts of this case it leads me to the conclusion that Mr Dalman, based on the inference I have drawn, *did* act for an improper purpose, whereas Mr Borley did not.

124. That is not, however, the end of the inquiry. The second step in Lord Sumption's analysis is to consider the consequences of the unlawfulness. In his discussion, Lord Sumption was concerned with the question whether an unlawful purpose might invalidate the decision in question, or whether the decision might stand despite the unlawfulness. He considered the correct analysis to be one of causation:

> "*One has to focus on the improper purpose and ask whether the decision would have been made if the directors had not been moved by it. If the answer is that without the improper purpose(s) the decision impugned would never have been made, then it would be irrational to allow it to stand simply because the directors had other, proper considerations in mind as well, to which perhaps they attached greater importance. This was the point made by Dixon J in the passage immediately following the one which I have cited from his judgment in Mills v Mills:*
>
> > *'But if, except for some ulterior and illegitimate object, the power would not have been exercised, that which has been attempted as an ostensible exercise of the power will be void, notwithstanding that the directors may incidentally bring about a result which is within the purpose of the power and which they consider desirable.'*
>
> *Correspondingly, if there were proper reasons for exercising the power and it would still have been exercised for those reasons even in the absence of improper ones, it is difficult to see why justice should require the decision to be set aside*."

125. In the present case, I am not concerned with the validity as such of the decision to allot new shares to Mr Tan. That decision is not sought to be unwound. Instead, the decision being regarded as effective, the Petitioner's argument is that it was unfairly prejudicial in the statutory sense.

126. It seems to me that one can easily adapt Lord Sumption's logic and apply it in this scenario. Indeed, in the Sunrise Radio case, as Ms Betts for the Respondents pointed out in argument, HHJ Purle QC did more or less exactly that. In the passage I have already drawn attention to at [113], he accepted the submission that, even though the directors had failed to take into account relevant factors in making their decision, and even though that was a breach of duty by them which was *ipso facto* unfair, it would not be prejudicial if it could be shown that, had they in fact taken all relevant matters into account, they would have made the same decision nonetheless. On the facts, however, that could not be shown, and so the relevant prejudice *was* made out.

127. In the present case, applying the same line of reasoning, I conclude that although Mr Dalman took into account an improper purpose and thus acted in breach of duty, so giving rise to unfairness, there was no prejudice to Mr Isaac arising therefrom. That is because, even had Mr Dalman paid no regard at all to Mr Tan's improper purpose, there would nonetheless still have been a proper reason for making an allotment of new shares to Mr Tan, and I find that Mr Dalman would still in fact have supported the decision to do so (as Mr Borley did).

128. Thus, I find that even without Mr Tan's improper purpose as a factor, the Board as a whole would still have made the decision it did. That being so, I do not consider that the presence of that factor in the mind of Mr Dalman resulted in any unfairness in the statutory sense.

Valuation: Discussion and Conclusions

129. My view on the question of liability makes it strictly unnecessary for me to state any conclusions on the issue of remedy, and on the question of valuation of Mr Isaac's shareholding in particular. Nonetheless, in light of the full arguments and evidence addressing these points, I will set out some brief conclusions by reference to three topics, as follows: (1) What would have been the correct valuation date? (2) Should Mr Isaac's shareholding have been valued subject to a minority discount? (3) What valuation figure would have been justified?

130. I should say that in dealing with valuation issues, both sides relied on expert evidence: Mr Isaac relied on the evidence of Mr Steven Taylor of Interpath Advisory, and the Respondents on the evidence of Mr Nicholas Good, a partner at KPMG. I am satisfied that both experts gave their evidence honestly and to the best of their abilities and did their best to assist the Court. They had differing styles – Mr Taylor's perhaps relying more on instinct and general knowledge, and Mr Good's being more analytical. As will appear, there was a difference between them on two important points of principle, which I will address further below.

Date of Valuation

131. In Profinance Trust SA v. Gladstone [2001] EWCA Civ. 1031, [2002] 1 BCLC 141, Robert Walker LJ said at [60]-[61] that the "*starting point*" is to assume that the

Petitioner's shares should be valued at the current value. That, he considered, reflected the general trend over the previous 15 years. Also at [61], however, Robert Walker LJ said that there will be "*many cases in which fairness (to one side or the other) requires the court to take another date*".

132. In this case, the experts are agreed that the present day equity value attaching to the Company is nil, and so a current valuation would yield a nil value for Mr Isaac's shares.

133. Had I determined Mr Isaac's allegation of unfair prejudice to have been made out, however, I would have set a valuation date in May 2018, i.e. I would have ordered a sale of Mr Isaac's shares on terms reflecting their value before the dilution of which he complains.

134. I consider that such an outcome would have been justified by the overall fairness of the situation Mr Isaac found himself in. In saying that, what I mean is that fairness would have required an outcome which reflected a clean break at that point in time between Mr Isaac and the Company, the Club and indeed Mr Tan. That is what Mr Isaac had proposed long before in his offer letter of November 2015. His suggestion was that he step aside from his directorships but that Mr Tan should acquire his shareholding. The response was to take steps to remove him from his directorship posts and rather than buying his shares seek to dilute his shareholding interest. On such facts, it seems to me, had unfair prejudice been made out, a remedy which reflected a clean break in May 2018 would have been a fair outcome overall, and would properly have reflected the nature of the unfair prejudice in question looked at in context.

Minority Discount

135. In certain cases of unfair prejudice, the Court has proceeded on the basis that the sale value of the successful Petitioner's minority shareholding should be arrived at without any discount for its minority status. Instead, the *pro rata* value of the shareholding is taken.

136. Although the categories case in which a *pro rata* valuation is applied are not closed – the overriding objective in every case is to arrive at a remedy which is fair, and so each case must turn on its own facts – the paradigm is the quasi-partnership case (see the discussion of Ebrahimi v. Westbourne Galleries, above). The special characteristic of such cases is that the parties' business relationship, although carried on in corporate form, has many of the same incidents as a partnership; and it is thought to be fair, where the basis of the relationship has effectively broken down because of unfairly prejudicial conduct on the part of the respondent, to allow the departing quasi-partner to recover in full the rateable value of his share of the business, in the same way that he would have done in a partnership case if the partnership business were sold as a going concern: see, e.g., CVC Opportunity Equity Partners Ltd v. Demarco Almeida [2002] UK PC 16, [2002] B.C.C 684 at [40], per Lord Millett, as referenced in Shanda Games Ltd v. Masco Capital Investments Ltd [2020] UKPC2, [2020] B.C.C 466 by Lady Arden at [39].

137. I see no parallel between such cases and the present case, or any other special factors, which would support the idea of a *pro rata* valuation of Mr Isaac's minority shareholding. Had Mr Isaac succeeded and obtained an order for sale, what he would have been selling would have been his minority stake; and that is what one would have

needed to value. If valued as a minority shareholding it should, as both experts were agreed, attract a minority discount.

Share Value as at May 2018

The Experts' Views and the Issues between them

138. Both experts considered that the better way of valuing the overall equity in the Company involved a two stage approach, as follows. The first step is to calculate the Company's enterprise value, using a revenue multiple analysis. Having done that, the second step is then to deduct a figure for net debt, to give an equity value for the shares in the Company.

139. The experts were agreed on the figure to be used in step 2: the appropriate net debt figure was £138m. So whatever enterprise value was arrived at as a result of step 1, £138m was to be deducted from it.

140. The experts however disagreed on the calculation of enterprise value, using the revenue multiple approach.

141. Conceptually, the revenue multiple approach is a market approach. It looks to benchmark the subject entity against comparable entities which have been bought and sold in the market. By taking the price paid by purchasers in comparable transactions, and the earnings of the entities in question, the approach involves a simple calculation of the ratio between the two – i.e., it looks to identify the multiple of earnings represented by the purchase price. Then, taking a figure for the projected earnings of the subject entity, one can estimate a purchase price by applying to it the earnings multiple (say, 2x earnings) derived from comparable transactions.

142. As far as the Company is concerned, the experts were agreed that the appropriate earnings figure for the calculation was its budgeted revenue figure for the 2018/19 season, approximately £126m.

143. There was disagreement, however, on two key points. The first was the appropriate multiple, based on comparable transactions, to apply to that earnings figure. The second was a related question. It was concerned with the fact that in May 2018, Cardiff City was newly promoted to the Premier League. The question was whether some specific discount should be applied to reflect the risk of relegation in the short term back down to the Championship. This latter point was the major point of disagreement between the experts, and led to the most significant difference in their respective valuations.

144. To summarise the experts' respective positions:

    i) The Petitioner's expert, Mr Taylor, suggested a range of multiples, of between 1.5 and 1.6 x earnings, to derive an enterprise value for the Company of between £189m and £202m (based on the projected earnings figure of £126m). Then taking these figures and cross-checking them using other possible valuation methods, and taking account of the general market for the Club which he considered would have been "*very active*", Mr Taylor concluded that the appropriate range for the enterprise value figure was between £190m and

£210m. After deducting net debt, this would give an equity value of between (at the bottom of his range) £52m, and (at the top of his range) £72m.

ii) The Respondents' expert, Mr Good, applied a multiple of 1.4 to the same earnings figure to derive an enterprise value of £176m. Thus far, his approach was similar to that of Mr Taylor. He then, however, included an additional step. His logic in doing so was to reflect the fact that the £176m enterprise value represented the value of the Company while the Club was a Premiership Club. But it might not remain a Premiership Club. It might be relegated in short order, and if so then its value would be significantly less. To take account of such relegation risk, Mr Good applied a discount to his Premiership enterprise value. In doing so, Mr Good assumed a 50% risk of relegation, and (the other side of the same coin) a 50% chance of staying in the Premiership. Reflecting this in valuation terms, Mr Good arrived at an overall valuation by taking 50% of the value of the Company while the Club remained in the Premiership (£176m x50% = 88m) and adding to it 50% of the value of the Company on relegation (which in his First Report Mr Good calculated at £19.5m, based on 100% valuation of £39m), to give a final figure for the enterprise value of the Company of £107.5m. From this, Mr Good posited an overall valuation range of £100m to £110m. Either way, however, the effect was a nil or negative overall equity value, after deducting the agreed net debt figure of £138m. (I should say that in his oral evidence, Mr Good recognised that his £39m valuation figure for the Company while the Club was a Championship Club needed revising upward, *inter alia* to take account of the parachute payments a Premiership club would receive on relegation; but that adjustment did not result in any different valuation overall, because it would still result in a nil or negative equity value).

145. Thus, the two points of principle for decision are as follows. First, what revenue multiple figure should be applied – is it 1.4, or a range between 1.5 and 1.6? Second, having applied that revenue multiple to the agreed projected earnings figure of £126m, should a further discount be applied to take account of the risk of relegation? For the reasons which appear below, it seems to me that the questions are inter-related and I will address them together.

Discussion and Conclusion on Valuation

146. In truth, there was little between the experts on the question of the appropriate revenue multiple. Mr Good took as his data points the revenue multiples achieved on sales of 4 Premiership Clubs, namely: Crystal Palace - 1.4x earnings; Swansea City - 1.4x earnings; Southampton FC –1.4x earnings; West Bromwich Albion - 2x earnings. Mr Good arrived at his final figure of 1.4x earnings for Cardiff City by taking the median (i.e., middle figure) of this set, namely a multiple of 1.4.

147. Mr Taylor relied on three of the same transactions (he excluded Crystal Palace), but derived slightly different multiples. His assessments were: Swansea City - 1.3x earnings; Southampton FC – 1.4x earnings, or possibly up to 1.7x earnings (the uncertainty arises because information about the relevant transaction is unclear); West Bromwich Albion – 1.8x earnings.

148. From this, Mr Taylor derived his range of 1.5 to 1.6x revenue. He considered Southampton FC to be probably the best comparator, but at the top of his range of

multiples for Southampton FC, considered the 1.7x multiple to be too aggressive for Cardiff City, which had less of a Premier League history. Overall, he felt a range of 1.5 to 1.6 was a fair assessment.

149. As to the question of a further discount for relegation risk, the logic of Mr Good's position was that his 1.4x earnings multiple was derived from data relating to sales of clubs which were established in the Premier League. Their position was different to a newly promoted club, which would have a higher chance of relegation. So a further adjustment was needed to give an accurate picture of the position of a club such as Cardiff City. He resisted the idea that his methodology resulted in any element of double-counting, because although some element of relegation risk was reflected in the multiples for the comparator clubs he relied on, that was of an altogether lesser order than the relegation risk affecting a club like Cardiff City.

150. In response, Mr Taylor had a number of points. The first was to say that the earnings multiples derived from the comparator transactions must already have embedded within them an allowance for the risk of relegation – in other words, the market would already have priced in that risk in arriving at the sales values (and therefore the earnings multiples) achieved. No further adjustment was required, or if it was, then it was sufficiently reflected in his range of 1.5 to 1.6x earnings. Second, Mr Taylor said that such an aggressive discount as Mr Good proposed did not make a proper allowance for the character of the type of person who would be a likely buyer – he said that those buying football clubs are most likely to be passionate supporters or individuals looking for trophy assets, who are likely to be bullish and optimistic and to focus more on the upside and not the downside risk. Such people would likely be motivated by instincts beyond the purely commercial, and some allowance must be made for that in assessing value. Third, Mr Taylor argued that Mr Good's approach was too simplistic, in assuming a binary outcome between staying in the Premiership and relegation to the Championship. There was also a chance of relegation followed by promotion again the following year – the phenomenon of "*yo-yoing*" between the two Divisions was not unusual.

151. In light of this evidence and submissions, it seems to me the appropriate way of addressing both points is to approach the calculation of the enterprise value of the Company on the basis of a multiple of 1.3x earnings, without any further deduction beyond that.

152. I say that because I consider *some* further adjustment to the multiples arrived at from the comparator sales common to the experts (Swansea City, Southampton, West Bromwich Albion) is justified, given that the risk profiles of those teams in terms of relegation *were* different to that of Cardiff City. But at the same time, I consider Mr Good's methodology is rather too aggressive, having regard to the factors relied on by Mr Taylor (see immediately above). I accept the general proposition advanced by Mr Taylor that the value of football clubs is not based on entirely rational commercial criteria. I also accept the proposition that the value of Cardiff City (and thus of the Company) in May 2018 is likely to have been assessed at the time on the basis of a time horizon which contemplated outcomes beyond the essentially binary choice between remaining in the Premiership after the 2018/19 season, or being relegated. My judgment is that an earnings multiple of 1.3x earnings is the better overall reflection, based on the available data, of the relevant risks, so far as they are relevant to the question of value.

153. In terms of overall equity value for the Company, therefore, this approach yields the following result: 1.3x earnings estimated at £126m = £163.8m enterprise value. Minus net debt of £138m = £25.8m equity value.

154. I should say for the sake of completeness that, in addition to the market-based, revenue multiple method, Mr Taylor (but not Mr Good) relied on three other valuation methods for the purposes of a cross-check, namely a Discounted Cashflow method, a method using the Markham Multivariate Model (based on a paper by Dr Thomas Markham, which presented a formula for the valuation of Premier League Clubs), and finally what Mr Taylor called his "*very simple model*". In the final analysis, however, I did not derive much assistance from these different methodologies. Not even Mr Taylor put them at the forefront of his analysis and they were not adopted by Mr Good.

155. During the trial, the Markham Multivariate Model received particular attention. The particular point which arose was again the question whether it clearly reflected the risk of relegation likely to attach to a newly-promoted club such as Cardiff City. In the end however it seemed to me that neither expert was properly qualified to provide evidence on the structure and makeup of the Markham Multivariate Model and its suitability in the circumstances of this case, and in fact neither claimed to be so qualified. In the absence of clear evidence as to the operation of the Model, I did not feel able to place reliance on it, and preferred to rely on the market valuation method which both experts were agreed on and as to which they were both well qualified to give evidence.

156. Finally, there is the question of minority discount. The experts were agreed that, applying conventional valuation methodologies, a discount was required. There was a large measure of agreement between them. Mr Taylor's proposed a range, namely a discount of between 37% and 52%. Mr Good proposed a discount of 50%. I conclude that a fair discount would be a figure in the middle of Mr Taylor's range, i.e. 45%.

157. Overall, therefore, had it been necessary for me to set a sale value for Mr Isaac's shares as at May 2018, that value would have been £563,343 for his 3.97% shareholding. The calculation is as follows: overall equity value of the Company - £25.8m; *pro rata* value of a 3.97% shareholding - £1,024,260; less a 45% discount (£460,917) gives a total remaining value of £563,343.

Overall Conclusion

158. Regrettably, in light of my findings as to Mr Tan's motivations, I have come to the conclusion that Mr Isaac's allegations of unfair prejudice are not made out.