Neutral Citation Number: [2021] EWHC 1526 (Ch)

Case No: HC-2017-001692

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUST AND PROBATE LIST (ChD)

Rolls Building
Fetter Lane
London, EC4A 1NL

14 June 2021

Before :

JUDGE JONATHAN RICHARDS
Sitting as a Deputy Judge of the High Court

- -

Between :

ZAVARCO UK PLC	**Claimant**
- and –	
RANJEET SINGH SIDHU	**Defendant**

- -

Patrick Lawrence QC and Peter Morcos (instructed by **Needle Partners Limited)**
for the **Claimant**
Robert-Jan Temmink QC and Tom Nixon (instructed by **Teacher Stern LLP**)
for the **Defendant**

Hearing date: 12 to 19 May 2021
Draft judgment circulated: 7 June 2021

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

- -

COVID-19 Protocol: This judgment is handed down remotely by circulation to the parties' representatives by email, release to BAILII. The date and time for hand-down is deemed to be 10am on 14 June 2021.

Judge Jonathan Richards:

1. This dispute concerns the rule, set out in s584 of the Companies Act 2006 (the "2006 Act"), that shares taken by a subscriber to the memorandum of a public limited company ("plc") must be paid up in cash. It also concerns the more general prohibition, in s593 of the 2006 Act, against plcs issuing shares for non-cash consideration, unless an exception applies. The issues, in a nutshell, are whether an exception to the requirements of either or both of s584 and s593 applies and, if not, what consequences should flow from the undisputed fact that certain shares in the Claimant (which I refer to as "Z plc") were not paid up in cash.

STATUTORY PROVISIONS

2. Section 584 of the 2006 Act provides:

> ***Public companies: shares taken by subscribers of memorandum***
>
> *584 Shares taken by a subscriber to the memorandum of a public company in pursuance of an undertaking of his in the memorandum, and any premium on the shares, must be paid up in cash.*

3. Section 584, therefore, is concerned with the position of a subscriber to a plc's memorandum. Section 593 sets out requirements applicable to "allotments" more generally in the following terms (so far as material):

> ***593 Public company: valuation of non-cash consideration for shares***
>
> *(1) A public company must not allot shares as fully or partly paid up (as to their nominal value or any premium on them) otherwise than in cash unless—*
>
> > *(a) the consideration for the allotment has been independently valued in accordance with the provisions of this Chapter,*
> >
> > *(b) the valuer's report has been made to the company during the six months immediately preceding the allotment of the shares, and*
> >
> > *(c) a copy of the report has been sent to the proposed allottee.*
>
> *....*

4. It was common ground, in this case, that no independent valuation complying with the terms of s593 was produced and therefore I do not reproduce the requirements applicable to such a report. Section 593(3) sets out consequences that are to apply where shares are issued in breach of the requirement of s593(1):

> *(3) If a company allots shares in contravention of subsection (1) and either—*

> *(a) the allottee has not received the valuer's report required to be sent to him, or*
>
> *(b) there has been some other contravention of the requirements of this section or section 596 that the allottee knew or ought to have known amounted to a contravention,*
>
> *the allottee is liable to pay the company an amount equal to the aggregate of the nominal value of the shares and the whole of any premium (or, if the case so requires, so much of that aggregate as is treated as paid up by the consideration), with interest at the appropriate rate.*

5. Section 594 sets out an exception to the requirements of s593 and provides, so far as material, as follows:

> ***594 Exception to valuation requirement: arrangement with another company***
>
> *(1) Section 593 (valuation of non-cash consideration) does not apply to the allotment of shares by a company ("company A") in connection with an arrangement to which this section applies.*
>
> *(2) This section applies to an arrangement for the allotment of shares in company A on terms that the whole or part of the consideration for the shares allotted is to be provided by—*
>
> *(a) the transfer to that company…*
>
> *of all or some of the shares, or of all or some of the shares of a particular class, in another company ("company B").*
>
> *…*
>
> *(4) This section applies to an arrangement only if under the arrangement it is open to all the holders of the shares in company B (or, where the arrangement applies only to shares of a particular class, to all the holders of shares of that class) to take part in the arrangement.*
>
> *…*
>
> *(6) In this section—*
>
> *(a) "arrangement" means any agreement, scheme or arrangement (including an arrangement sanctioned in accordance with—*
>
> *(i) Part 26 or 26A (arrangements and reconstructions), or*
>
> *(ii) section 110 of the Insolvency Act 1986 (c 45) or Article 96 of the Insolvency (Northern Ireland) Order 1989 (SI 1989/2405 (NI 19)) (liquidator in winding up accepting shares as consideration for sale of company property)), and*

(b) "company", except in reference to company A, includes any body corporate.

6. I will consider the applicability or otherwise of this provision later on in this judgment, but for the time being make the following general observations:

   i) The definition of "arrangement" is inclusive. It includes the schemes under part 26 of the Act and under s110 of the Insolvency Act 1986 that will be familiar to company law and insolvency practitioners, but it is not limited to such schemes.

   ii) Since, by s594(6)(b), Company B can be a "body corporate", as well as a "company", it follows that the conditions of s594 can be met even if Company B is incorporated outside the UK.

7. Section 606 gives the court discretion to grant relief to any person with an obligation to pay for a company's shares in the following terms, so far as material:

606 Power of court to grant relief

(1) A person who—

(a) is liable to a company under any provision of this Chapter in relation to payment in respect of any shares in the company, or

(b) is liable to a company by virtue of an undertaking given to it in, or in connection with, payment for any shares in the company,

may apply to the court to be exempted in whole or in part from the liability.

(2) In the case of a liability within subsection (1)(a), the court may exempt the applicant from the liability only if and to the extent that it appears to the court just and equitable to do so having regard to—

(a) whether the applicant has paid, or is liable to pay, any amount in respect of—

(i) any other liability arising in relation to those shares under any provision of this Chapter or Chapter 5, or

(ii) any liability arising by virtue of any undertaking given in or in connection with payment for those shares;

(b) whether any person other than the applicant has paid or is likely to pay, whether in pursuance of any order of the court or otherwise, any such amount;

(c) whether the applicant or any other person—

> *(i) has performed in whole or in part, or is likely so to perform any such undertaking, or*
>
> *(ii) has done or is likely to do any other thing in payment or part payment for the shares.*
>
> *(3) In the case of a liability within subsection (1)(b), the court may exempt the applicant from the liability only if and to the extent that it appears to the court just and equitable to do so having regard to—*
>
> *(a) whether the applicant has paid or is liable to pay any amount in respect of liability arising in relation to the shares under any provision of this Chapter or Chapter 5;*
>
> *(b) whether any person other than the applicant has paid or is likely to pay, whether in pursuance of any order of the court or otherwise, any such amount.*
>
> *(4) In determining whether it should exempt the applicant in whole or in part from any liability, the court must have regard to the following overriding principles—*
>
> *(a) that a company that has allotted shares should receive money or money's worth at least equal in value to the aggregate of the nominal value of those shares and the whole of any premium or, if the case so requires, so much of that aggregate as is treated as paid up*
>
> *(b) subject to this, that where such a company would, if the court did not grant the exemption, have more than one remedy against a particular person, it should be for the company to decide which remedy it should remain entitled to pursue.*

BACKGROUND AND OVERVIEW OF THE PARTIES' POSITIONS

Formation of OFSB and ZB

8. A material part of the case of the Defendant (to whom I will refer as "RSS") depended on assertions as to various transactions relating to shares of two Malaysian companies: Zavarco Berhad[1] ("ZB") and Open Fibre Sdn Berhad ("OFSB"). Many of RSS's factual assertions were disputed and, to the extent necessary, I will make findings on those issues later in this judgment. This section sets out findings of undisputed fact relating to these three companies.

9. OFSB was incorporated in 2007. Its initial subscriber shares were registered in the name of Roslina Ibrahim and Ku Hasniza. It was, in legal form, a "Sdn Berhad", a company incorporated under the law of Malaysia with separate legal

[1] ZB was originally named "Vasseti Berhad" reflecting the fact that "Vasseti" was the brand name then in use with the brand name "Zavarco" being adopted only following the incorporation of Z plc. In general the words "Vasseti" and "Zavarco" are used interchangeably in the documentation, though I will tend to use the Zavarco formulation.

personality analogous to a private limited company in the UK. On 5 August 2009, OFSB issued 99,998 ordinary shares of Malaysian Ringgit ("RM") 1.00 each to RSS, at that time representing almost the entirety of its issued share capital. At or around this time, RSS also became a director of OFSB. The details of the arrangements and, in particular, RSS's assertion that he became the beneficial owner of 50% of the shares in OFSB with Shailen Popatlal, also known as Shailen Gajera ("SG") are disputed. However, both parties agree that, at a high level of generality, RSS initially became involved because OFSB and V Telecoms Berhad ("VTEL") which was to become OFSB's subsidiary, needed money to develop a fibre optic telecommunications network in Malaysia for which VTEL owned a government concession. RSS was well-connected in the Malaysian business community and was thought able to help with that money raising.

10. On 25 June 2010, OFSB issued 396 million preference shares of RM 1.00 each to third parties. OFSB had been seeking a much larger investment of over RM 1 billion but had failed to achieve that. OFSB paid this sum either to acquire, or subscribe for, 396 million fully paid ordinary shares in VTEL. OFSB also at some point acquired 650 million "unpaid shares" in VTEL, this figure representing the balance of the funding that VTEL was thought to need. VTEL was a "Berhad", a company incorporated in Malaysia with separate legal personality analogous to a public limited company in the UK. At this point, therefore, OFSB was a holding company and owned 91% of the shares in VTEL with the remaining 9% owned by a company called Paneagle Holdings Berhad ("PHB").

11. On 12 July 2010, OFSB issued 100,000 ordinary shares to Ku Hasniza. RSS says (and this is disputed) that Ku Hasniza held these shares as nominee for SG.

12. ZB was incorporated in early 2010. It too was a Berhad and became a holding company. In December 2010 it acquired OFSB's holding of shares in VTEL in consideration of the issue of 3,960,000 "A" shares of RM100 each to OFSB. It also issued 15,000 ordinary shares of RM1.00 each to persons other than OFSB. ZB also acquired other businesses but these were much less significant than the telecoms business held by VTEL.

13. Although the parties disagreed on the details of the arrangements involving ZB, they were broadly agreed on the high-level function that it served as a holding company. Previous attempts to secure funding for the telecoms business through OFSB had not enjoyed full success. By forming ZB and giving it "substance" both by ensuring that it already held the telecoms business, and by approaching respected individuals to hold shares and serve on its board, it was hoped that investor interest would be stimulated and funds could be raised in ZB.

14. With the aim of giving ZB substance, RSS secured the agreement of Tan Sri Syed Mohd Yusof Bin Tun Syed Nasir ("TSSY"), a respected Malaysian businessman ("Tan Sri" being an honorific awarded personally by the King of Malaysia), to becoming a director and shareholder in ZB. RSS also secured the agreement of his family friend, Dato M Harisharan Pal Singh ("Dato Singh") to hold shares and become a director. "Dato" is also an honorific awarded by the hereditary ruler of one of Malaysia's autonomous regions and so Dato Singh's involvement also added substance to ZB. A respected retired general, General Dato Mahmud, also

agreed to serve on the board of ZB in return for a salary and to take a single share in the company.

15. As at 29 June 2011, a crucial date in these proceedings, because it was the date of Z plc's incorporation, it was common ground that the following persons were registered as holders of ZB shares:

    i) RSS held 9,999,999 ordinary shares of RM 1.00 each.

    ii) TSSY held 4 million ordinary shares of RM 1.00 each.

    iii) Dato Singh held 1 million ordinary shares of RM 1.00 as nominee for RSS.

    iv) OFSB held 3,960,000 "A ordinary shares" of RM 100 each (the "A Shares") being the shares issued as consideration for OFSB's acquisition of the VTEL shares

    v) A single ordinary share of RM 1.00 was held by General Mahmud as nominee for RSS.

16. Those, however, were not the only shareholders on ZB's register on 29 June 2011. It was common ground that ZB had also issued a number of preference shares. ZB's annual return drawn up to 30 June 2011 showed a large number of additional shareholders. However, it did not explain what classes of shares were held by these shareholders. I have inferred that any shareholder not listed in paragraph 15 above held preference shares in ZB since that was what Mr Sidhu said in his evidence and I was not shown any evidence to the contrary suggesting that there were any ordinary shareholders in addition to those set out in paragraph 15. This process suggests that the preference shares were significant in number (amounting to in excess of 40m shares), although I had no evidence as to the nominal value of these preference shares.

Formation of Z plc, its acquisition of ZB and its listing

17. Again, while there was significant dispute as to the detail, and legal effect, of the arrangements under which Z plc was incorporated, the rationale for its incorporation, at least at a high level, was common ground. Even with the formation of ZB, fundraising efforts were not proceeding as hoped. RSS and SG were introduced to Mr Nasir Mogul, an American businessman and corporate advisor, who suggested a different approach. That would involve the formation of a UK plc (which would become a new holding company on acquiring all of the ordinary shares in ZB). That new holding company could then be listed on the Frankfurt Stock Exchange.

18. Clearly, investors acquiring shares on the Frankfurt Stock Exchange would be interested in the value of the principal underlying asset, the "jewel in the crown" consisting of the telecoms business. RSS and SG were both attracted to listing Z plc on the Frankfurt Stock Exchange because that stock exchange would permit a valuation of the telecoms business to be based on projected future cash flows of the business and not just on revenue that the business was currently earning. VTEL's actual revenues at this time were modest (in 2009, RSS estimated that its

annual profit was just RM 5m, around EUR 1m). Yet, if it were able to raise the necessary funding to develop its own fibre-optic network its revenues would increase. Accordingly, if VTEL's value could be determined on the basis of the future revenues that it could expect if it had its own network, the price at which shares in its listed holding company could be offered to the public would be correspondingly increased. The listing was achieved by means of the steps described below. Both parties accept that the plan was implemented too quickly, and without proper care. Moreover, quite extraordinarily, even though the formation of a plc in the UK was at the heart of the plan, no-one thought to take any UK legal advice at all.

19. Z plc was incorporated in England and Wales on 29 June 2011 under the name Vasseti (UK) PLC. The subscribers to Z's memorandum of association were RSS and TSSY. Both RSS and TSSY signed Z plc's memorandum as subscribers. Z plc's memorandum of association stated, at its beginning:

> *"Each subscriber to this memorandum of association wishes to form a company under the Companies Act 2006 and agrees to become a member of the company and to take at least one share".*

20. Z plc's initial share capital consisted of 1.2bn shares of EUR 0.1 each. Immediately following its incorporation, TSSY was the registered owner of 360 million shares in Z plc with RSS holding the remaining 840 million. The beneficial ownership of these shares is disputed. It is common ground that neither RSS nor TSSY paid any cash for these shares.

21. On or around 25 July 2011, Z plc acquired, from ZB's former shareholders, all of the ZB ordinary shares referred to in paragraph 15 above. Z plc did not acquire any of the preference shares in ZB. Rather, holders of ZB preference shares were given the option either to convert their preference shares into ZB ordinary shares (which were then transferred to Z plc) or to have their preference shares redeemed for cash as described in more detail later in this judgment.

22. A document dated 29 June 2011 (the "Share Sale Agreement") purported to set out terms on which a group of shareholders defined as the "Vendors" would transfer their shares in ZB to Z plc. The "Vendors" were defined as OFSB, RSS, TSSY, Dato Singh and General Mahmud and thus included all of the holders of ordinary shares in ZB set out at paragraph 15 above. None of the preference shareholders in ZB were party to the Share Sale Agreement.

23. Despite being dated 29 June 2011, it was common ground that the Share Sale Agreement was not actually signed until 8 August 2011. Z plc argues that the agreement had been deliberately "backdated" in order to give a misleading impression as to the date it was entered into. RSS puts forward a more benign interpretation to the effect that the Share Sale Agreement was understood by all parties to set out the terms of an agreement that had been concluded by 29 June 2011 and its date was simply an error, arising out of the fact that drafts of that document had been in circulation since 29 June.

24. Pursuant to the Share Sale Agreement, the Vendors agreed to sell ordinary shares in ZB to Z plc. By Clause 4.1 of the Share Sale Agreement, the consideration for

that sale was expressed to be the issue of 1.5 billion ordinary shares in Z plc to have a par value of EUR 0.10 each.

25. Clause 4.2 of the Share Sale Agreement provided as follows:

> *"4.2 The Parties hereto hereby agree that the VUK Shares [i.e. the consideration shares to be issued pursuant to Clause 4.1] shall be issued to the persons named in Schedule 2, which will be made available to the Purchaser by the 23 July 2011 or such other dates to be agreed by the Parties herein. The VUK shares issued shall rank pari passu in all respects to the existing ordinary shares of the Purchaser. Schedule 2 shall consist of detailed particulars of the names and allotment of the Consideration for the 1.5 billion VUK Shares".*

26. Two points are significant for the discussion that follows. First, Schedule 2 was blank in the document as signed. Second, the statement in Clause 4.2 that the consideration shares were to rank pari passu in all respects to the existing ordinary shares in Z plc raises the question whether the Share Sale Agreement envisaged that the consideration shares to be issued were in addition to its then existing share capital consisting of 1.2 billion ordinary shares, or whether as RSS argues, Z plc's 1.2 billion subscriber shares were intended to represent part of the 1.5 billion shares to be issued as consideration.

27. As noted above, the Share Sale Agreement provided for the allotment and issue of 1.5 billion consideration shares. However, immediately after its incorporation, Z plc had just 1.2 billion shares in issue. It was common ground that Z plc did issue an additional 300 million ordinary shares at some point, though neither side sought to establish the identity of the shareholders to whom those additional 300 million shares were issued.

The listing of Z plc

28. Three documents in particular are significant in the context of Z plc's listing. The first was a valuation of ZB prepared by Ari & Co. That document was dated 29 June 2011 (although it appears that it too had been backdated) and it valued ZB at EUR 2.38 billion. That was a startling valuation for a company whose principal asset was a telecoms business that, just two years previously, had been making an annual profit of around EUR 1 million per annum. The valuation noted that it was derived from "forecasted and projected consolidated earnings", but it did not say what those earnings were forecast to be or what, if any, processes had been followed to check the likelihood of the forecasts being met. Neither SG nor RSS was able, in their evidence, to mount any serious defence of this valuation, and could not identify any reason why ZB's value had increased so significantly in just two years. I have concluded that neither had any belief that the Ari & Co valuation set out a realistic valuation for ZB. Indeed, in an email dated 28 June 2011 that SG sent to RSS and Roslina Ibrahim, SG expressed scepticism about a valuation of even EUR 1.5 billion noting that, applying a price/earnings ratio of 15, that could only be sustained if the group was generating an annual profit of EUR 100 million (RM 450 million at the time). Of this he wrote:

> *"Say by some chance VTEL brings PROFIT for RM100 mil, VDT & MTV jointly [two other businesses owned by ZB] brings PROFIT of RM100mil and VEB [another business] brings PROFIT of RM100m – that stacks up to RM300mil. Balance RM150mil comes from Channel VTV, Medina Real Estate … VLC etc. Operations of our companies has to run better than Google to go on that ramp. But we can do it – coz we better than the rest."*

29. The next significant document was a letter signed by Crilly & Co, a UK firm of chartered accountants and addressed to the Frankfurt Stock Exchange. There was a dispute as to whether the letter was ever sent, and as to whether SG or RSS had any involvement in its preparation which I will address later. But it is clear that the letter was signed by Crilly & Co, dated 26 July 2011 and purported to confirm that Z plc had an equity capital of at least EUR 120 million which had been paid in cash. Moreover, the letter confirmed that Crilly & Co had seen evidence to support that statement. It was common ground that the text of the Crilly & Co letter was deeply unsatisfactory. Crilly & Co could not have seen any evidence that Z plc's share capital was paid up in cash as to EUR 120 million for the simple reason that its share capital had not been paid up in cash.

30. There was also a letter dated 14 July 2011. That letter bore RSS's electronic signature, although its reference (1107140344sg) suggested that it may have been drafted by SG. The letter purported to confirm that, on 14 July 2011, Z plc had at least 35 shareholders but this confirmation was false as Z plc had only two registered shareholders on that date.

31. The listing of Z plc on the Frankfurt Stock Exchange became effective on 23 August 2011. On that date, therefore, both RSS and TSSY held shares that could, in theory, have been dealt over that exchange. Employees of the group also received some shares in Z plc as did former holders of preference shares who had taken up the option to convert their preference shares in ZB into ZB ordinary shares and to exchange those for Z plc shares. However, recognising that Z plc's share price, already resting on shaky foundations because of the optimistic valuation of its underlying assets, would be likely to collapse if a large number of shares came onto the market at the same time, the shareholders agreed a "moratorium" on sale of those shares on the Frankfurt Stock Exchange until January 2013. That therefore resulted in a position where, until January 2013, only a small proportion of Z plc's share capital (broadly representing that initially acquired by third party investors on its flotation) were available for trading on the exchange. The remainder (at least the 1.2bn shares initially issued to RSS and TSSY and probably more given that third party investors did not acquire the full balance of 300 million when Z plc was floated) was held back and unavailable for trading.

32. Following its listing Z plc's share price initially held up well. The shares opened at a price in excess of EUR 1.00 per share and climbed even higher in subsequent months. However, as soon as the moratorium expired, as RSS put it in his evidence, "everybody went to market" and the share price collapsed. Whereas the share price on 27 December 2012 was EUR 1.396 per share, the price on 3 January 2013 was just EUR 0.45 per share. It was to fall much lower.

The respective positions of the parties

33. These proceedings concern the 840 million shares issued to RSS immediately following Z plc's incorporation. Z plc argues that RSS was obliged to pay those shares up in cash and, since he has not done so, is presently obliged to pay Z plc EUR 84 million for those shares. It reasons as follows:

    i) RSS took his 840 million shares in Z plc in his capacity as subscriber to Z plc's memorandum. Section 584 required those shares to be paid up in cash only. It was not open to Z plc and RSS to contract contrary to the requirements of s584 and, accordingly, the contract between Z plc and RSS required these 840 million shares to be paid up in cash. Since RSS has not to date paid any cash for those shares, Z plc has a debt claim against him for EUR 84 million. Alternatively, Z has a statutory claim, under the provisions of s584, to require RSS to pay it cash of EUR 84 million.

    ii) Alternatively, the restriction imposed by s593 of the 2006 Act was engaged. Since Z plc had not obtained a valuation that complied with s593 and so had not sent any such valuation to RSS as required by s593(3)(a), and since RSS's shares were not issued pursuant to an arrangement falling within s594, s593(3) imposed a statutory liability on RSS to pay cash of EUR 84 million.

34. RSS argues that the terms on which the shares were allotted on 29 June 2011 and, in particular, the question whether there was an arrangement falling within s594, needs to be understood by reference to the entire relevant course of dealings between him and other relevant actors including OFSB, ZB, Z plc and SG. He argues that:

    i) It was understood at all times that neither he nor TSSY would have any obligation to pay cash for their 1.2 billion shares. Instead, all of those shares were to be paid up by Z plc's acquisition of the ZB shares described in paragraph 15.

    ii) He only took a single share in Z plc "in pursuance of an undertaking of his in the memorandum". Accordingly, the requirements of s584 apply only to a single share and require him to pay cash of only EUR 0.10 to Z plc.

    iii) He accepts that the requirements of s593 were engaged in relation to the 840 million shares that he received and that no valuation complying with s593 was obtained. However, he argues that he received those shares in connection with an arrangement that satisfied the requirements of s594. Accordingly, an exception to s593 applied and he had no obligation under s593(3) to pay cash to Z plc.

35. The next layer of disagreement related to the order that should be made if either s584 or s593(3) imposed an obligation enforceable by Z plc to require RSS to pay Z plc cash. RSS argues that Z plc is estopped from insisting on any rights that it has. Even if no estoppel applies, RSS argues that any obligation he has to Z plc should be relieved under s606. Z plc denies that there is any estoppel and denies that RSS should be relieved from his obligation.

36. The parties agreed a list of issues which is reproduced as the Appendix to this judgment which I will use to order my analysis. The court has already considered several of the issues in dispute in the judgment (the "Nasir Judgment") of Mr Martin Griffiths QC sitting as a deputy judge of the High Court (as he then was) in *Zavarco plc v Nasir* [2017] EWHC 2877 (Ch). That judgment concerned Z plc's similar claim against TSSY for payment of EUR 36 million in respect of the on grounds similar to those advanced in the present proceedings. Both parties were agreed that questions of fact determined in the Nasir Judgment were in no sense binding on me in these proceedings since RSS was not a party in those proceedings – see for example the judgment of Leggatt LJ in *Rogers v Hoyle* [2015] QB 265. The parties were also agreed that, insofar as it determined questions of law, the Nasir Judgment is of persuasive authority only in these proceedings.

37. It is, however, relevant to note an important difference between these proceedings and those that led to the Nasir Judgment. In the Nasir Judgment, the court found that the 1.2 billion subscriber shares in Z plc issued to RSS and TSSY stood separate from the 1.5 billion shares in Z plc that were to form consideration for the acquisition of the ZB shares (see [86] of the Nasir Judgment). The court also concluded that there was no understanding to the effect that TSSY's shares would be paid up otherwise than in cash. Z plc does not ask me to make similar findings in these proceedings. It does not contend that it was expected in 2011 that Z plc would have 2.7 billion shares, so it accepts that the 1.5 billion shares referred to in the Share Purchase Agreement includes the 1.2 billion subscriber shares. It does not assert that any of the individuals involved (including RSS, TSSY and SG) anticipated that Z plc would receive cash in return for the issue of its 1.2 billion subscriber shares.

FINDINGS OF FACT ON ISSUES IN DISPUTE

38. The parties approached this case from very different perspectives. Z plc argues that the case can be resolved in its favour following a relatively straightforward application of pure legal principles as RSS's undertaking to take shares in Z plc, understood in the light of s584 of the 2006 Act, gives Z plc an enforceable right to payment of EUR 84m in cash. RSS denies that Z plc has any right to a cash payment under s584. He acknowledges that s593(3) is capable of imposing an obligation on RSS to pay cash but urges me to make detailed factual findings (including as to the nature of SG's proprietary interest in various companies) in order to conclude that the exception in s594 applies. For its part, Z plc does not accept that findings on these issues are necessary, since whoever was the beneficial owner of shares in the companies involved, there was no "arrangement" falling within s594.

39. If I simply determined the questions of law that Z plc says will dispose of this case there might be a risk, if the case went further, that necessary factual findings are not made. For that reason I will make factual findings on matters that RSS argued were central to his case.

Whether SG had any proprietary interest in the shares in OFSB, ZB or Z plc

40. A significant part of RSS's case relies on the proposition that he and SG were "business partners" in the sense that OFSB, ZB and Z plc were in effect joint venture arrangements so that, notwithstanding the identity of the legal owners of shares in those companies from time to time, both he and SG had a proprietary beneficial interest in those shares. RSS says that the shares in OFSB were owned beneficially 50:50 between him and SG and the shares in ZB (until it became a subsidiary of Z plc) were owned beneficially in the ratio 35:35:30 as between him, SG and TSSY. Moreover, RSS argues that on its formation, the shares in Z plc were also owned in the ratio 35:35:30 as between himself, SG and TSSY, perhaps with some minor adjustments to deal with the ownership of shares that were to be acquired by members of the public and employees following Z plc's flotation, and with some further minor adjustments to accommodate the interests of persons who acquired Z plc shares in exchange for their former holdings of ZB preference shares. RSS's analysis of the beneficial interests in OFSB, ZB and Z plc underpins his submissions as to why the 1.2 billion Z plc shares fell within the scope of s594 of the 2006 Act.

41. Z plc takes a markedly different position. Without prejudice to its argument that the beneficial ownership of the various shares does not matter greatly, it says that SG was not a beneficial owner of any shares in OFSB, ZB or Z plc at all. He was simply an adviser. Accordingly, Z plc disputes the premise that there was any "joint venture" involving SG. It certainly does not accept that OFSB was a 50:50 joint venture between SG and RSS: it asserts that beneficial ownership of the OFSB shares at material times rested largely with a gentleman referred to at the hearing as "Zulizman" to whom SG was an adviser.

42. For the reasons that follow, I have concluded that SG did have some proprietary interest in these companies. He was not simply the "management consultant" that he claimed to be.

43. The analysis of this issue must proceed on the basis that OFSB, ZB and Z plc were all, at various stages, holding companies whose principal asset was the telecoms business carried on in VTEL. This common theme runs through the dealings with all three companies. SG's evidence was that he ceased to have any interest, direct or indirect, in the VTEL business after 2001 when Zulizman bought out his interest. These proceedings are concerned with much later events, from 2009 to 2011. However, neither party seeks to argue that there was a point after 2001 at which SG either became, or ceased to be, a beneficial owner of shares in a relevant company. It follows that evidence of SG having a proprietary interest in, say ZB or Z plc towards the end of the period, will tend to suggest that he had a proprietary interest in OFSB at the beginning of the period. Similarly, evidence suggesting that SG had no proprietary interest in OFSB shares at the beginning of the period would tend to support the proposition that he similarly had no proprietary interest in ZB or Z plc shares later on when those companies were established.

44. There were clear inconsistencies in SG's account that his role was simply that of a management consultant, employed by a company called VCB Malaysia, who gave advice to OFSB, ZB and Z plc. There was no evidence of any general

consultancy agreement between VCB Malaysia and any relevant company and emails that SG sent in connection with the affairs of those companies were sent, not from a VCB Malaysia email address, but from his personal "gmail" address. There was no evidence consisting of invoices sent by VCB Malaysia for management consulting services to Z plc, ZB or OFSB. Moreover, on SG's account, Roslina Ibrahim, as the Chief Executive Officer of VCB Malaysia, was SG's boss. Yet I was shown a number of emails in which SG was giving Roslina Ibrahim instructions in relation to the affairs of OFSB, ZB and Z plc. To give just one example, on 2 August 2011, SG sent Roslina Ibrahim an email in connection with the Share Sale Agreement:

> *"Dear Roslina,*
>
> *Please prepare the VUK SPA to include all the names below…"*

45. In 2012 there was evidently a proposal for Roslina Ibrahim to become the CEO of Z plc. On 16 June 2012, SG emailed her and attached a draft management agreement (which he had drafted) setting out her duties and her remuneration. There was no suggestion in that email that SG was passing on instructions from Zulizman, or any other beneficial owner. On the contrary, the document and cover email suggested that SG himself had the power to speak with authority on matters relating to Z plc. Indeed, the email went further and suggested that SG himself had the power to determine roles at VCB as SG told Roslina not to worry about her other duties at VCB as:

> *"I am exiting you from VCB totally upon full redemption of all investments"*

46. Of course, the fact that SG gave a misleading account about Roslina Ibrahim being his boss does not of itself demonstrate that he did have a proprietary interest in shares in ZB, Z plc or OFSB. However, it does suggest that there was a reason why SG wanted to obscure the true position namely that, in relation to those companies, SG was in a position to give Roslina Ibrahim instructions, rather than the other way round. Until 2014, SG was a licensed financial adviser in Malaysia. In that role, he was giving advice to people contemplating making investments in companies, but Malaysian regulatory rules precluded him from giving advice on investments where he held a proprietary interest in the company concerned. I have concluded that SG sought in his evidence to cover up the true position because he knew that, since he did hold a proprietary interest in these companies at various times, he ran the risk of being in breach of Malaysian regulatory requirements by providing financial advice to investors in those companies.

47. Before reaching the above conclusion, I have reflected on the explanation that SG gave in his evidence to the effect that he was merely an adviser and consultant to his principal Zulizman but that he had enjoyed such a wide authority to act on behalf of Zulizman for so long that he came to phrase instructions as coming from him, rather than Zulizman. SG supported that account by explaining that there were good reasons for Zulizman to keep a low profile because he was related to members of the Malaysian government and that Zulizman's wish for a low profile meant that SG did not refer to him by name when giving his instructions.

48. I can accept that an adviser can, over a period of time, come to identify strongly with a client, particularly when that client confers a broad authority to act on his or her behalf. Therefore, I did not consider the fact that, in chats over the BlackBerry Messenger application, RSS and SG spoke of their respective interests in the various businesses to compel the conclusion that SG himself had a proprietary interest. So, for example, when RSS said in a BlackBerry message on 11 July 2011 that he appreciated SG's "partnership", or when he referred to the telecoms as "ur biz" (i.e. SG's business), that does not demonstrate that SG was the beneficial owner of that business. It remains possible that SG was, in his dealings with RSS, keeping to himself that it was Zulizman who was the true beneficial owner.

49. However, the explanation that SG was simply an adviser identifying strongly with his client does not sit easily with the email exchange with Roslina Ibrahim that I have already mentioned. SG said in his witness statement that Zulizman knew Roslina and indeed instructed SG to start working with her in relation to OFSB in August 2007. Since Roslina knew Zulizman there was no need for SG to be coy about referring to him in his dealings with her. He could simply have relayed the message that Zulizman wanted her to become CEO of Z plc and relinquish her role at VCB.

50. SG's explanation is also at odds with crucial evidence contained in a BlackBerry chat between SG and RSS on 29 May 2012. By that time Z plc had been listed. In that chat, RSS and SG discussed various proposals and counter proposals for one of them to "exit" the other by buying their shares in Z plc. SG opened the bidding, referring to an "offer" that DB (perhaps Deutsche Bank) had made to RSS to provide a debt facility of EUR 150m to take Z plc private. SG said:

> *"...since u hv the offer euro 150, why don't you exit me and own 100% of everything"*

51. RSS was not keen and counter suggestions were made (including finding a third-party buyer for the whole company). Later in the exchange, RSS said:

> *"Boss would you be willing to buy me out for RM200m?"*

52. I read little into the use of the word "Boss" in this exchange: RSS, SG and Roslina Ibrahim routinely referred to each other as "boss" which I took as an informal term indicating that each of them was a senior figure, but not as suggesting that any was necessarily the other's boss. However, the striking thing about this exchange is that SG felt free both to make offers for "his" shares to be bought, and to reject proposals that RSS made for his shares to be bought. If SG truly was simply an adviser to Zulizman, even if he had not expressly said that he needed to take instructions, he would have been more measured in dealing with what would have been offers to buy, or sell, Zulizman's property.

53. I therefore reject SG's account that he was a mere consultant to Z plc, ZB and OFSB. I also reject his account that he was, in his dealings with those companies, simply acting at the direction of his principal, Zulizman. SG had some beneficial interest in all three of these companies. In the section that follows I will address the nature of that beneficial interest and the extent to which he shared that beneficial interest with other persons at relevant times.

The division of the beneficial interests in the various companies

OFSB

54. RSS argues that the beneficial interest in OFSB's shares was owned 50% by him and 50% by SG. That argument is advanced on the basis that, in 2009, VTEL was short of funds and so SG entered into a 50:50 partnership with RSS, reflected by each of them having a 50:50 beneficial interest in OFSB's shares, with a view to RSS using his contacts to procure investment for VTEL.

55. I do not, however, consider that analysis to be supported by the evidence. It was indeed the case that SG and RSS hoped that RSS's contacts and fund-raising expertise could be deployed to the benefit of the telecoms business which needed funding. I also accept that it was understood that RSS would be rewarded for his efforts in the form of an equity interest in OFSB. However, I do not consider that this understanding ever coalesced into a formal arrangement under which RSS was to hold a beneficial interest in 50% of OFSB's shares. Nor do I consider that, at the time of Z plc's incorporation or at the time of its acquisition of the ZB shares, RSS held 50% of OFSB's equity beneficially.

56. On 5 August 2009, RSS obtained 99,999 ordinary shares in OFSB and became a board member. SG's evidence is that these shares were issued to RSS to motivate him to raise funds. RSS's case is that he paid RM 10m for these shares in cash and that he held half of the shares as nominee for SG. RSS is scornful of the idea that anyone would be awarded what was, at the time, the overwhelming majority of the shares in a company simply as a motivation to raise funds.

57. I prefer SG's account. RSS's analysis ignores the fact that, at the time he obtained his shares in OFSB, OFSB was simply an empty shell. It was hoped that, in the future, RSS's efforts would lead to it raising funds from investors which it would use to acquire assets. However, since OFSB had no actual assets when RSS acquired his shares, no great generosity or largesse was involved in allowing RSS to hold 99,999 shares in OFSB. I consider that the issue of those shares, and RSS's appointment to the board of OFSB was entirely consistent with SG's account as it enabled RSS to represent to investors that he was personally involved with OFSB which would have made it easier for him to raise funds from his network of friends and business contacts.

58. Nor do I accept RSS's argument that the issue of 100,000 ordinary shares in OFSB to Ku Hasniza on 12 July 2010 was intended to formalise the 50:50 joint venture on the basis that Ku Hasniza held her shares as nominee for SG. Ku Hasniza was indeed a nominee for someone. I have concluded that she held some of her shares as nominee for SG (since, as I have found, SG did have some form of proprietary interest in OFSB shares and Ku Hasniza was a natural person to hold shares for him as nominee). However, as will be seen, there were other stakeholders in OFSB (perhaps including Zulizman) and therefore I am not able to conclude that she held all of her OFSB shares as nominee for SG. In my judgment, the issue of shares to Ku Hasniza had nothing to do with formalising a joint venture between RSS and SG. Rather, its purpose was to give the impression that "Bumiputra" requirements (under which native Malay persons had to hold a

majority of shares in companies wishing to exploit government telecommunication licences) were satisfied.

59. I accept that, if RSS's fund-raising attempts for OFSB had been more successful he would have been rewarded with some equity interest in OFSB. It may be that his reward would have come naturally through his 99,999 ordinary shares if, even allowing for the dilution that would arise if new shares were issued to investors that RSS procured, those shares became more valuable. It may be that he would have been allocated further ordinary shares to reflect his efforts. But those possibilities were never explored because ultimately, attempts to raise funds in OFSB met with limited success. Some RM 396 million was raised in the form of an issue of preference shares. In his witness statement, RSS did not claim the credit for raising this sum and SG asserted that it was raised by "private placement exercises that Zulizman arranged". I am satisfied that RSS's largely unsuccessful fundraising efforts for OFSB did not result in him obtaining a beneficial interest in 50% of OFSB's equity.

60. I am reinforced in this conclusion by contemporaneous BlackBerry Messenger chats between RSS and SG relating to OFSB. For example, prior to the listing, RSS and SG discussed the fees that Nasir Mogul would require for assisting with the listing of Z plc and his possible request for an equity interest by way of reward. SG was sceptical that Nasir Mogul's work merited an award of equity, but RSS urged him to reflect noting that the listing would bring benefits. The exchange continued:

> *"RSS: Boss … don't just say no. Listen to him first. We need him since he has already listed 5 companies.*
>
> *RSS: Between you and me if we work with naser we can just drop OFSB and all your relationship with the melayu.*
>
> *RSS: It will be clean just you and I and we give some share to naser…*
>
> *SG: If I do this deal I will need to clear OFSB out formally.*
>
> *SG: Boss ask him what 5 companies he listed in FSE just in case board of directors asks.*
>
> *…*
>
> *SG: 5% no more.*
>
> *SG: Boss leave OFSB matters to me and u don't get involved. OFSB will listen to me and they trust me."*

61. This exchange sets out a clear impression that, in June or July 2011 when it took place, OFSB was a company whose affairs could not simply be dictated by RSS and SG. I have concluded that there were stakeholders in OFSB, other than RSS and SG, whose views and interests needed to be managed. Moreover, the exchange indicates that SG (and not RSS) was best placed to deal with these other stakeholders and that, while SG was trusted, it could not simply be assumed that SG could dictate what OFSB would do. The exchange is inconsistent with OFSB being a 50:50 joint venture between SG and RSS alone. The suggestion that there

were stakeholders in OFSB other than SG and RSS is also consistent with the fact that OFSB had in issue RM 396 million of preference shares that were held by companies called "Primawin", "CFL" and "ArabEL". SG admitted that he was a director of those companies but said that they were beneficially owned by third parties who looked to SG and VCB for investment and fund management advice. In the absence of much evidence about Primawin, CFL and ArabEL, I have accepted SG's account.

62. That said, the exchange of messages is consistent with SG having some material proprietary interest in OFSB shares. When SG said that he was considering "clear [ing] OFSB out formally" he was alluding to the possibility that, despite having been a shareholder in ZB, OFSB might not itself hold shares in Z plc. He could not have influenced that outcome without a material proprietary interest.

63. RSS argues that the draft management agreement that SG prepared on or around 30 June 2012, described at 45 above, demonstrates that OFSB was controlled as to 50% by RSS and as to 50% by SG. That draft agreement started with a description of the main shareholders of Z plc. It divided those "main shareholders" into the following two groups:

    i) RSS, Vascory Limited and "50% of the interest in Open Fibre Sdn Bhd", with that group expressed to be "represented by" RSS; and

    ii) China Finance Limited, Arab Emirates Capital Limited, Primawin Limited, Paneagle Holdings Berhad and "50% of the interest in Open Fibre Sdn Bhd", with that group expressed to be "represented by" SG.

64. I find the draft agreement to be so confused and unclear as to shed little light on the issue. OFSB is described as a shareholder in Z plc. However, it seems clear that as at 30 June 2012, it was not registered as a shareholder in Z plc (although I accept that other shareholders might well have held Z plc shares as nominee for OFSB). That is significant because the better reading of the agreement appears to be that the "interest in Open Fibre Sdn Bhd" is referring not to shares that OFSB had issued to its shareholders, but rather what was thought to be OFSB's beneficial holding of Z plc shares. Moreover, unclear as it is, the draft agreement paints a picture of the shareholders in Z plc being at odds on a number of issues, with Roslina Ibrahim intended to be an honest broker who would manage the company in an even-handed way having regard to the competing views and interests. On that basis, I regard the statement that RSS and SG respectively "represented" various categories of shareholder as saying little, if anything, about the beneficial ownership of shares in OFSB or Z plc and, instead, as directed to who was to represent the two constituencies of shareholders in what was evidently a material disagreement about the affairs of Z plc.

65. Nor do I consider that much useful insight can be obtained from a BlackBerry Messenger conversation apparently taking place on 17 July 2011. During that conversation, RSS wrote to SG:

> *"And boss on a personal note pls try and figure out you u going to protect our 50% which is held by OFSB and finally with the 3 co PWL*

> – *AEL – CFL* [which I take to be a reference to Primawin, ArabEL and CFL – the holders of preference shares in OFSB]*."*

66. SG did not understand this asking "Why 50%" and closing the exchange by saying "Depends on new money". I do not, however, consider that this exchange can be saying much about the beneficial ownership of OFSB shares since it was concerned with assets held by OFSB and not shares in OFSB.

67. My conclusions on the beneficial ownership of the OFSB shares can therefore be summarised as follows:

    i) RSS held his 99,999 ordinary shares in OFSB beneficially. He therefore had some beneficial interest in OFSB shares.

    ii) SG also held some material beneficial interest in OFSB shares. If he had no such interest, he would not have been able to raise the possibility of "clearing out" OFSB so that it held no shares in Z plc.

    iii) Much of the value in OFSB was attributable to the preference shares that had been issued for RM 396 million which made RSS's and Ku Hasniza's holdings of ordinary shares correspondingly less material in value. The beneficial holders of these preference shares were, to a material extent, clients of VCB Malaysia's fund management business.

    iv) Accordingly, the equity interests in OFSB were not owned beneficially as to 50% by SG and as to 50% by RSS. Rather, OFSB's beneficial owners included third party stakeholders whose decisions SG could not dictate, despite SG's own material beneficial interest. I am not able to determine the precise beneficial interests of all relevant stakeholders in OFSB shares.

ZB

68. RSS argues that, ZB was intended from "day one" to be jointly owned and so serve as VTEL's parent company. I do not accept that broad proposition. ZB was formed as a consequence of previous attempts to raise funds in OFSB enjoying only limited success. Had OFSB's previous fund-raising efforts been more successful, I am not satisfied that ZB would have been established at the time, or in the form, in which it eventually was.

69. Nor do I accept RSS's analysis that, for the period in which ZB was the holding company of VTEL (i.e. until it was acquired by Z plc), there was a clear understanding to the effect that RSS, SG and TSSY were to hold the ordinary shares in ZB beneficially in the ratio 35:35:30. I have reached this conclusion for the following reasons:

    i) OFSB held a sizeable stake in ZB consisting of 3,960,000 A Shares of RM 100 each. No-one was able to explain the terms of the A Shares or provide an explanation as to why their nominal value was so much greater than the nominal value of ZB's ordinary shares. RSS said, in his evidence that the A Shares were "prefs", but that was at odds with the terms of the share sale agreement dated 13 December 2010 under which ZB acquired shares in VTEL, which described these shares as ordinary shares. In the absence of a

proper understanding of the terms of all shares in issue, it is not possible to arrive at a precise percentage for the extent of RSS's beneficial interest in those shares.

ii) As I have found, OFSB was a company with some substance that was answerable to stakeholders who included persons other than SG and RSS. RSS's analysis of the beneficial ownership of ZB shares was rooted in his assertion that OFSB was, in effect, a 50:50 joint venture between him and SG. Since I have not accepted that proposition, it follows that I am not able to accept RSS's formulation of arithmetically precise interests in the shares in ZB.

70. However, while I cannot quantify the precise extent of their beneficial interests, I do find that RSS, SG and TSSY were each to enjoy material beneficial interests in the ZB shares and that the interests of RSS and SG were to be broadly equal for the following reasons:

i) Starting with TSSY, he was adding his considerable name and reputation to ZB and would have been aware that by doing so, he was greatly increasing ZB's prospects of success. I do not consider that he would have been satisfied with anything less than a meaningful equity stake in ZB in return. However, it does not follow that he owned all of his 4 million shares beneficially. After all, Dato Singh was also adding his own name and reputation to ZB but, even though he ostensibly held 1 million shares, all of those were in fact held as nominee for RSS.

ii) RSS was to bring to bear both his reputation and standing in Malaysia and also his network of contacts that would help with finance raising. Only by developing its own fibre-optic network could VTEL become a truly substantial company and RSS was offering a route towards raising the necessary funds. His involvement clearly commanded a material equity stake in ZB.

iii) Contemporaneous discussions over BlackBerry Messenger between RSS and SG give the clear impression that they considered that their respective interests in Z plc were of equal size. I do not consider that the position would have been materially different in relation to ZB.

Z plc

71. Since I am not able to identify precise percentages in which RSS, SG and TSSY held beneficial interests in ZB, it follows that I am not able to identify the precise extent of their beneficial holdings of Z plc.

72. It is clear, however, that each of RSS, SG and TSSY, having held material beneficial interests in ZB shares, were to hold material beneficial interests in Z plc. Later in this judgment, I will analyse the arrangements present on Z plc's incorporation in more detail. For the time being, I will find only that SG held a beneficial interest in a material number of the 1.2 billion shares that were issued following Z plc's incorporation, even though he was not a subscriber to Z plc's memorandum and so not a registered shareholder in Z plc immediately on its

incorporation. Therefore, someone must have been holding shares as nominee for SG. It seems unlikely that TSSY was doing so and I consider that the most likely explanation is that RSS held a material number of the 840 million shares that he acquired on Z plc's incorporation as nominee for SG. I am also satisfied that the respective interests of SG and RSS in Z plc shares were broadly equal.

73. TSSY's position was less clear. I consider that he held some of his 360 million Z plc shares beneficially not least since he had held some shares in ZB beneficially. However, I cannot determine the extent of his beneficial interest precisely. In an email that SG sent RSS on 14 June 2013, SG appeared to be suggesting that TSSY's holding of 360 million shares Z plc shares might be transferred to OFSB "to complete the audit of OFSB" which suggests that SG considered, at least in 2013, that he had some power to direct dealings in TSSY's shares in Z plc.

The scheme or arrangements under which shares were issued on Z plc's incorporation

74. In this section, I make findings as to the arrangements in existence on or prior to 29 June 2011, the date on which Z plc issued 1.2 billion ordinary shares to RSS and TSSY on its incorporation. Both sides accept that, in order for s594 to apply, the requisite "arrangement" for Z plc to issue its shares for non-cash consideration must have come into existence on, or before, the point in time at which those shares were allotted. I will not, however, limit my analysis to events taking place on or before 29 June 2011 as I accept that subsequent events might inform the nature of and extent of any "arrangement" that existed on 29 June 2011.

75. No-one expected that RSS or TSSY would actually pay cash for their Z plc shares, or even give any undertakings to pay cash. I have noted, in paragraph 26 above, the provision of the Share Sale Agreement that could, at first sight, be read as suggesting that the 1.5 billion Z plc shares to be issued as consideration for the acquisition of ZB shares were in addition to 1.2 billion other shares for which cash was subscribed. However, that was simply attributable to a lack of clarity in the drafting of the Share Sale Agreement. The whole rationale for the involvement of RSS and TSSY in both ZB and Z plc was that their names, networks and reputations would enable those companies to be successful by raising money from others. It was not envisaged that RSS or TSSY would themselves subscribe any material cash on Z plc's incorporation. It was for that reason that none of the 1.2 billion shares issued to RSS or TSSY were issued for cash consideration.

76. I also consider all parties were proceeding on the basis of a general assumption that there would be a share-for-share exchange under which existing holders of ZB shares (with the possible exception of holders of preference shares) would transfer their shares to Z plc and Z plc would issue some ordinary shares as consideration. As noted further below, however, while it was understood that Z plc would issue consideration shares, it was far from clear, both at 29 June 2011 and subsequently, who would have the beneficial interest in those consideration shares.

77. The mechanics of Z plc's incorporation were dealt with by Nasir Mogul: contemporaneous email exchanges show Roslina Ibrahim providing him with

information relevant to the incorporation and asking some pertinent questions as to how many shares were to be issued on incorporation and to whom. Nasir Mogul held himself out as having the expertise necessary to incorporate Z plc and Roslina Ibrahim, RSS and SG deferred to that perceived expertise.

78. Unfortunately, Nasir Mogul did not have the necessary expertise. There was no indication that, by 29 June 2011 either he, or anyone involved in Z plc's incorporation turned their mind to the question of how the 1.2 billion shares issued on incorporation would be paid up. In fact there is no indication that it even occurred to anyone that they needed to be paid up in any form. No legal advice was taken in the UK on the requirements applicable to Z plc's incorporation. Rather, it appears that Nasir Mogul himself prepared the documentation, including Z plc's memorandum and statement of initial shareholdings and obtained the signatures of RSS and TSSY.

79. No substantial explanation was given as to why Z plc was incorporated with such a large share capital so early in the process. RSS described this in his witness statement as "essentially a matter of convenience" without saying why it was convenient. It appears as though the incorporation of Z plc with such a large initial share capital might have been the result of some crossed wires between Roslina Ibrahim and Nasir Mogul. On 23 June 2011, Roslina Ibrahim emailed Nasir Mogul to say that, on incorporation of Z plc, 30% of the subscriber shares should be held by TSSY and 70% of the subscriber shares should be held by RSS. That split very broadly reflected their respective percentage holdings of ordinary shares in ZB (ignoring the A Shares) since RSS owned 11 million out of 15 million (around 73.3%) with TSSY holding the remaining 26.7%. However, although Roslina Ibrahim specified the percentage holdings of RSS and TSSY, she did not specify the total number of shares that they were to hold. She seems to have been taken by surprise when Nasir Mogul told her that Z plc had been incorporated with such a large initial capital of 1.2 billion shares in the above ratio. On 1 July 2011, she wrote a pertinent email pointing out that OFSB held 96.35% in terms of nominal value of ZB shares and therefore all other things being equal could expect to hold 96.35% of the total nominal value of shares in Z plc following a share for share exchange. She asked how that end position was to be achieved. She also asked where the shares that were ultimately to be held by public shareholders (following the listing of Z plc) were to come from and whether they were included within the 1.2 billion shares just issued, or whether there was to be a subsequent issue.

80. The email exchange between Roslina Ibrahim and Nasir Mogul brings out a further issue, relating to the position of OFSB. Since it held a large number of shares in ZB it might naturally be expected that it would acquire a large number of shares in Z plc after it transferred its ZB shares to Z plc. But the contemporaneous documentation shows uncertainty as to the position with OFSB. In her email of 1 July 2011, Roslina Ibrahim set out her understanding that OFSB would be issued shares in Z plc. Yet in the BlackBerry Messenger chat to which I have referred in paragraph 60 above, RSS and SG were discussing a proposal to "clear out OFSB formally" which, I have inferred could have involved OFSB receiving no consideration shares in Z plc (or at least no consideration shares that were held in its name, as distinct from shares held for it by others as

nominee or trustee). As events transpired, there was no issue of shares to OFSB commensurate with its significant holding of shares in ZB (although it may have been issued with some or all of the 300 million additional shares that were intended to be sold to external investors – see paragraph 27 above). I have inferred that, as at 29 June 2011, there was no clear understanding or arrangement as to the extent to which any of the 1.2 billion shares held by RSS or TSSY were held beneficially on behalf of OFSB.

81. There was, however, an understanding that RSS and TSSY would hold some of their 1.2 billion Z plc shares beneficially since it was understood that they would be transferring their entire holdings of ZB shares to Z plc and could scarcely be expected to do so without obtaining any consideration for themselves. However, it was not known, on 29 June 2011, how many shares they were to hold beneficially. Moreover, it followed that, to the extent RSS and TSSY did not hold their shares beneficially, they must have been holding them as nominees for others. Neither the identity of those other persons, or the extent of their beneficial interest, was known on 29 June 2011.

82. I am not satisfied that, as at 29 June 2011, there was any arrangement as to how ZB's preference shareholders would be dealt with. On 7 July 2011, Z plc sent its preference shareholders a letter (signed by RSS) outlining a proposal under which those shareholders could elect to convert their shares into ZB ordinary shares on a one-for-one basis with the ZB ordinary shares in turn being acquired by Z plc. The accompanying form of acceptance indicated that Z plc would give consideration in the form of two Z plc ordinary shares for every five ZB ordinary shares acquired. Finalising the terms of the offer to preference shareholders would have involved (i) deciding whether an offer was to be made at all, or whether the preference shareholders were simply to be left holding their preference shares in ZB after Z plc had acquired ZB's ordinary shares; (ii) deciding the ratio in which preference shares could be exchanged for ZB ordinary shares; and (iii) deciding the ratio in which Z plc shares would be offered for ZB ordinary shares acquired on conversion. I am not satisfied that all or any of these details had been finalised on or before 29 June 2011. RSS referred me to an email which SG sent on 30 June 2011 relating to the holders of ZB preference shares. However, that email simply dealt with SG's suggestion that there might be a streamlined mechanism under which preference shareholders could elect to convert their preference shares into ZB ordinary shares, and sell the resulting ZB ordinary shares at the same time, perhaps with RSS being given authority to sign documents on behalf of preference shareholders. The email did not demonstrate that there was a firm arrangement in place relating to the preference shares on 29 June 2011.

83. The point I have made at paragraph 80 above was a specific instance of a more general uncertainty. As at 29 June 2011, no-one seemed to know how many shares in Z plc were to be owned (beneficially) by any of its shareholders. Even by 8 August 2011, when the Share Sale Agreement was signed, it was not possible to provide a completed Schedule 2 setting out how many shares in Z plc were to be held by each shareholder and this issue cannot, therefore, have been any more certain on 29 June 2011. I have concluded that this uncertainty existed for (at least) the following reasons:

i) It was not certain whether OFSB was to become the registered, legal owner of any shares in Z plc, whether such interest as it had was to be held by TSSY or RSS as nominee (or anyone else) for OFSB. Nor was the extent of its beneficial interest in Z plc shares known.

ii) Some shares in Z plc would, following listing, be owned by members of the public. However, on 29 June 2011, no-one knew how strong investor appetite would be for those shares and so no-one knew how many shares in addition to the 1.2 billion already issued would be needed to satisfy the demands of the investing public. Moreover, it was far from clear in the contemporaneous documentation whether public investors would obtain their shares by way of a transfer of a portion of the 1.2 billion shares issued following incorporation, or whether there would be fresh issue of new shares (either directly to incoming investors or by means of an initial issue to someone such as OFSB, followed by a transfer of those shares to investors). Contemporaneous documents simply did not deal with this level of detail.

iii) Some Z plc shares might be needed as consideration for former ZB preference shareholders who converted their preference shares into ZB ordinary shares.

iv) RSS's evidence as to the precise terms on which he held his 840 million subscriber shares in Z plc was not entirely consistent. In his witness statement, he said that he held those shares beneficially for himself as to 50% and 50% for SG and that the shares to be awarded to public investors and former holders of preference shares were to come out of the additional 300 million shares issued subsequent to Z plc's incorporation. His oral evidence was different. In that evidence he said that both he and TSSY might have been obliged to give up some of their respective holdings if there was strong demand from public investors. I have inferred that there would have been similar uncertainty as to the terms on which RSS and TSSY held their shares on 29 June 2011.

Relevant events occurring after Z plc's incorporation

84. Following the incorporation of Z plc, work carried on in relation to the satisfaction of requirements that would enable Z plc's shares to be listed on the Frankfurt Stock Exchange. Much of that work was undertaken by Nasir Mogul and he obtained help, support and information from SG and Roslina Ibrahim. However, although RSS was not performing the "front-line" work in relation to the listing, he was aware that the Frankfurt Stock Exchange had listing requirements that needed to be evidenced by confirmations where appropriate as he accepted that he saw a draft of the Crilly letter referred to in paragraph 29 above at or around the time that it was prepared. SG would also have seen it given his ongoing work in connection with the listing. RSS invited me to infer that, because the Crilly letter contained such an obviously incorrect statement to the effect that Z plc's 1.2 billion subscriber shares had been paid up in cash, SG would have "intercepted" it and it would never have been sent. I will not make that inference. Rather, I conclude that the Crilly letter was prepared in order to satisfy a requirement of the Frankfurt Stock Exchange and accordingly was sent.

Moreover, both SG and RSS were aware that the letter would be sent and, had they turned their mind to text of the letter, would have realised that the confirmation it purported to give was false as the shares had not been paid up in cash.

85. I have reached a similar conclusion in relation to the confirmation that Z plc had at least 35 shareholders referred to in paragraph 30 above. SG drafted the text of this confirmation. RSS signed the final version by affixing his electronic signature to it and the letter was sent to the Frankfurt Stock Exchange. If both had turned their mind to the matter, they would have realised that the confirmation given was false since, at the date of that letter, Z plc did not have at least 35 shareholders.

86. As I have noted in paragraph 24, the Share Sale Agreement was dated 29 June 2011 even though it was not signed until 8 August 2011. I am not prepared to accept that this was simply because that was the date on the first draft of the document and no-one noticed that this had not been updated in the version as signed. On 5 August 2011, SG sent an email to Z plc's finance director asking him to prepare a director's resolution but date it 29 June 2011. He was therefore familiar with the device of "backdating" documents. Had there truly been a settled arrangement on 29 June 2011 that dealt comprehensively with all shareholders' transfers of ZB shares and the consideration shares that they would receive in Z plc, I might have been prepared to conclude that the Share Sale Agreement was backdated because all parties genuinely thought that they were simply reducing to writing an oral agreement that had been concluded on 29 June 2011. Even if not excusable, in such a case the act of backdating the document might have been understandable. However, for reasons I have given, there was no clear agreement in existence on 29 June 2011 and it follows that by being involved in the preparation of the Share Sale Agreement (in SG's case) and by signing it (in RSS's case) both SG and RSS would have been aware that they were creating a misleading impression to the effect that an agreement had been made on 29 June 2011 when in fact any agreement only came into existence later on. That said, I am satisfied that the backdating was not effected in order to give a misleading impression that the requirements of s594 of the 2006 Act were met since it is clear that no-one thought about the applicability or otherwise of s594 until UK company law advice had been obtained, well after 2011.

87. I have noted in paragraph 31 the moratorium as to sales of Z plc shares on the Frankfurt Stock Exchange. Despite that moratorium, RSS sold privately some of his shares to friends and family. In doing so, he did not breach the terms of the moratorium since those sales were not effected on the Frankfurt Stock Exchange and so could not have affected Z plc's share price. However, RSS did profit from those sales, realising some EUR 2-3 million from them. I was shown evidence that one of these sales was for a price slightly less than EUR 1 per share and I have inferred that other sales would have been for similar prices. That was a good return for RSS noting that (i) he had not paid cash for the shares that he sold and (ii) he was in a position to know that there was, to say the least, considerable doubt as to whether the shares in Z plc were worth anything like EUR 1 per share given the optimistic valuations on which that share price was based (see paragraph 28 above).

DISCUSSION

88. RSS's request that I make findings of fact as to the extent of beneficial interests in OFSB, ZB and Z plc was made with a view to advancing his case on s593 and s594 of the 2006 Act. I will, therefore, deal with the parties' agreed list of issues in a different order from that in which they appear in order to bring to the forefront those relating to s593 and s594.

Issue 2 – Are shares taken by a subscriber to a company's memorandum "allotted"?

89. I raised this issue of my own motion noting that s584 applies to shares "taken by a subscriber to the memorandum of a public company" whereas s593 sets out a prohibition on shares being "allotted" for non-cash consideration. I therefore invited the parties to consider whether the process under which subscriber shares are issued on a company's incorporation involved an "allotment" of those shares since, if it did not, the restriction imposed by s593 might not be engaged.

90. Both parties agreed that the 1.2 billion subscriber shares issued on Z plc's incorporation were "allotted" so that the restriction in s593 is of relevance. I am content to determine these proceedings on the basis of that common approach.

Issue 5 – whether there was an arrangement falling within s594(2) of the 2006 Act

<u>The legal requirements imposed by s594</u>

91. Section 594 sets out the general nature of the "arrangements" that can fall within that section. To qualify such arrangements must, in the circumstances of the present dispute, provide for the allotment of shares in Z plc ("Company A" for the purposes of s594) on terms that the whole or part of the consideration for the allotment of the Z plc shares is to be provided by the transfer to Z plc of all or some of the shares, or all or some of the shares of a particular class, in ZB ("Company B" for the purposes of s594).

92. Both parties were agreed that this condition must be tested as at 29 June 2011, when the Z plc shares were allotted, since s594 operates as an exception to the requirement of s593 which would otherwise require a valuation complying with s593 to be available before the allotment is made. That in turn requires that any "arrangement" must be in existence when 840 million shares in Z plc were allotted to RSS.

93. Section 594(2) does not specify the persons to whom the allotment of shares in Z plc must be made. Nor does it specify the persons who must effect the transfer of the shares in ZB. Reading s594(2) in isolation, it is sufficient that there is an arrangement for the allotment of shares in Z plc (to unspecified persons) on terms that the consideration for the shares so allotted is to be provided by unspecified persons transferring shares in ZB to Z plc.

94. Section 594(4) contains additional requirements. It must be open to all the holders of the shares (or where the arrangement applies only to shareholders of a

particular class, the holders of shares of that class) in ZB "to take part in the arrangement". The statute does not set out express guidance as to what it means for a shareholder to "take part in" an arrangement.

Whether the requirements of s594 were satisfied on the facts

95. RSS is correct to argue that there can be an "arrangement" falling within s594 even where no contractually binding agreement has been entered into. That follows from the definition of "arrangement" in s594(6)(a) which includes, but is not limited to, an "agreement". However, in order to constitute an "arrangement", there must be a certain bare minimum of coherence. At [88] of the Nasir Judgment, the court said that there was no arrangement because "nothing was settled". Mr Temmink QC argued that this involved the court placing an impermissible gloss on the legislation. I think this is to misunderstand what the court was saying. Clearly there is no statutory requirement for an arrangement to be "settled". However, I respectfully agree with the court's conclusion in the Nasir Judgment that, in order for something to constitute an "arrangement" it must be possible to say, at least in relation to its key aspects, what the arrangement consisted of.

96. RSS argues that, as at 29 June 2011, there was the necessary arrangement as there was a "scheme" (included within the definition of "arrangement" by s594(6)(a)) for the allotment of shares in Z plc on terms that the whole or part of the consideration for the shares allotted was to be provided by the transfer to Z plc of all or some of the shares of ZB. He submits that it did not matter that every detail of the scheme had not been ironed out.

97. However, in my judgment, this overstates the extent to which an arrangement was in existence on 29 June 2011. The contemporaneous evidence paints a vivid picture of transactions leading up to the listing of Z plc being performed at breakneck speed, without proper consideration, by people who lacked necessary expertise, particularly in the sphere of UK company law. Against that background, the very idea of an "arrangement" being in existence on 29 June 2011 represents an after-the-event rationalisation of what actually happened which was chaotic and largely unstructured. I agree with the submission of Mr Lawrence QC to the effect that this was not a case of an arrangement being drawn up on the back of an envelope; it was a case of there being no envelope at all.

98. I accept that, on 29 June 2011, there was a general understanding that:

    i) Z plc would be incorporated and issue shares to RSS and TSSY.

    ii) On a future date, assuming that the arrangements for the listing of Z plc proceeded satisfactorily, RSS, TSSY and OFSB would transfer their holdings of ordinary shares and A Shares in ZB to Z plc.

99. However, the following matters had not been determined on 29 June 2011:

    i) It was not known how many of their 1.2 billion shares RSS and TSSY held beneficially for themselves and how many they held as nominee for others.

To the extent that they held shares as nominee it was not known who the beneficial owners of those shares were.

ii) As a consequence, even though it was expected that, provided the listing proceeded satisfactorily, OFSB would transfer to Z plc A shares in ZB representing the overwhelming majority of ZB's nominal share capital, it was not known whether OFSB would obtain any beneficial interest in Z plc shares or, if it did, the extent of that beneficial interest.

iii) It was not known whether all holders of preference shares in ZB would have the opportunity to transfer those preference shares to Z plc in return for Z plc ordinary shares and, if so, what the applicable exchange ratio should be.

100. As I have noted, to fall within s594, the arrangement needed to be for both the transfer of ZB shares and the allotment of Z plc shares. Yet the consequence of the points made at 99.i) and 99.ii) was that the nature of the arrangement could not be set out with any coherence. It was anticipated that RSS and TSSY would transfer shares in ZB and be allotted shares in Z plc, but it was not possible to say how many of those allotted shares they held beneficially. OFSB was expected to transfer its A Shares, but would not be allotted any shares in Z plc, since RSS and TSSY were to be the sole registered shareholders of Z plc. Nor was it possible even to say that there was a scheme or arrangement for shares to be allotted at OFSB's direction. OFSB made no express direction that Z plc shares were to be allotted to RSS or TSSY to hold as nominees. It could not have made any such direction since no-one knew how many shares (if any) RSS and TSSY were to hold for OFSB.

101. I reject any argument that the requisite coherence necessary for an "arrangement" to subsist can be deduced either from an understanding that the shares in ZB were to be held in the ratio 35:35:30 as between RSS, SG and TSSY, or from an understanding that shares in OFSB were to be beneficially owned by RSS and SG on a 50:50 basis. I have already explained why I am unable to conclude that the beneficial interests in either ZB or OFSB were held in these proportions and indeed why I am not able to make any firm conclusions as to the precise extent of the beneficial interests in ZB or OFSB held by any particular person.

102. Another way of addressing whether there was an "arrangement" is to consider whether the condition in s594(4) could be tested by determining those classes of share to which the arrangement applied and those to which it did not. ZB had at least three difference classes of share relevant for this purpose: ordinary shares, A Shares and preference shares.

103. As I have concluded, by 29 June 2011, it was understood that something had to happen to the ZB preference shares and they could not simply be left in place. However, as noted at paragraph 99.iii) above, there was not even a firm proposal as to what should happen to them. Accordingly, the status of the averred "arrangement" as it stood in relation to the preference shares was unascertained. A conclusion that the "arrangement" did not apply to the preference shares sits uncomfortably with the clear understanding that something was to happen to them. However, a conclusion that the arrangement did apply to the preference

shares faces the obvious objection that no-one knew what the terms of that arrangement were by 29 June 2011.

104. The status of the "arrangement" as applicable to OFSB as holder of the A Shares was similarly indeterminate. On the one hand it would be counter-intuitive for the arrangement not to apply to such a large shareholder as OFSB particularly given that OFSB was expected to transfer its A Shares to Z plc. However, as I have already noted there were real difficulties, on 29 June 2011, in articulating how any "arrangement" applied to OFSB. The expectation that OFSB would transfer its A Shares is not enough since, to fall within s594, an "arrangement" needs to embrace both a transfer of shares in ZB and an allotment of shares in Z plc. As I have explained, there was no clear understanding as to the extent, if any, to which OFSB was to obtain even a beneficial interest in the shares that Z plc would allot. Nor could it be said how, if at all, OFSB could "take part in" the arrangement since at most there was an expectation that it would transfer A Shares without any certainty as to extent to which it was to obtain a beneficial interest in Z plc shares that were to be allotted.

105. Accordingly, I conclude that there was no "arrangement" to which s594 applied. Therefore, since it was not disputed that RSS did not pay up his 840 million shares in cash, and that no valuation complying with s593 was obtained (and so no valuation sent to RSS as required by s593(3)(a)), it follows that RSS is liable, under s593(3) to pay Z plc the sum of EUR 84 million being the entire nominal value of those shares (it not being suggested that the shares were issued at a premium).

Issue 6 – Estoppel

106. Issue 6 on the parties' agreed list concerns whether Z plc is estopped by convention from asserting that RSS is liable to pay it cash in respect of his 840 million shares.

107. The parties were broadly agreed that the conditions necessary for an estoppel by convention to arise are correctly set out in paragraph 4-108 of the current edition of Chitty on Contracts where it is said:

> *"Estoppel by convention may arise where both parties to a transaction 'act on an assumed state of facts or law, the assumption being either shared by both or made by one and acquiesced in by the other'. The parties are then precluded from denying the truth of that assumption if it would be unjust or unconscionable (typically because the party claiming the benefit has been 'materially influenced' by the common assumption) to allow them (or one of them) to go back on it."*

108. That is indeed a correct summary of the law. It is, however, worth emphasising the following aspects of the doctrine as set out in the judgment of the Court of Appeal in *Blindley Heath Investments Ltd v Bass* [2015] EWCA Civ 1023 at [91] and [92]:

i) It is not enough that the common assumption founding the estoppel is merely understood by the parties in the same way. The assumption must be shown to have "crossed the line" in a manner sufficient to manifest an assent to the assumption.

ii) In a similar vein, the expression of the common assumption by the party said to be estopped must involve an assumption of some element of responsibility for it, in the sense of conveying to the other party an understanding that it was expected that the other party would rely on it.

109. In addition, as regards the requirement of "unconscionability", in *Revenue & Customs v Benchdollar Ltd* [2009] EWHC 1310 (Ch), Briggs J approved the following statement of Dixon J in the High Court of Australia in *Grundt v The Great Boulder Proprietary Goldmines Ltd* [1937] 59 CLR 641 at 675 – 676:

> *"Before anyone can be estopped, he must have played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it".*

110. The averred "common assumption" in this case was that the 840 million shares that Z plc issued to RSS did not need to be paid up in cash as a matter of law. I agree that, certainly up to the point at which the problem was identified, both Z plc and RSS proceeded on the basis that these shares had been paid up, even though RSS had paid no cash for them. But Z plc played no part in the adoption of that common assumption. Nor did it assume any responsibility for it. Z plc was incorporated under arrangements over which it had no control and which were pre-ordained to involve it issuing 1.2 billion shares on its incorporation without receiving any cash at all. In those circumstances, the requisite manifestation of assent by Z plc to the common assumption was not present. Moreover, since Z plc played no part in the formation of the common assumption, no injustice or unfairness is involved in allowing Z plc to ignore it.

111. There is a further reason why no estoppel by convention is present. Parliament has legislated in s593 of the 2006 Act to the effect that Z plc's receipt of ZB shares cannot operate to pay up the 1.2 billion subscriber shares that it issued unless either (i) an independent valuation was received that complied with the requirements of s593 or (ii) the exception in s594 applied. This rule is clearly intended to provide a degree of protection and reassurance to those holding shares in Z plc (noting that, since it is a plc, its shares could be offered to the public) and to others dealing with Z plc, that it has the share capital shown to exist on public documents. Accordingly, if an estoppel operated, shareholders and others dealing with Z plc would be denied the benefit of statutory protections for which Parliament has legislated. The parties were rightly agreed that the statement one occasionally hears to the effect that "there can be no estoppel against a statute" goes too far. It is possible in appropriate cases, where the construction of the statute permits, for persons who are given rights by statute to be estopped themselves from asserting those rights. But where Parliament has legislated for a person to be subject to a duty in the public interest (such as Z plc's duty as a plc not to allot shares for non-cash consideration unless an exception applies) it would not be appropriate for that duty to be negated by operation of an estoppel against the very person charged with performing the duty. That principle emerges

from the decision of the Privy Council in *Maritime Electric Co. v General Dairies Ltd* [1937] AC 610.

112. In my judgment, therefore, Z plc is not estopped by convention from asserting that RSS is liable to pay it EUR 84 million in respect of the shares he acquired on incorporation.

Issue 8 and Issue 9 – Application of s606 of the 2006 Act

113. The effect of my conclusions thus far is that RSS is liable to pay Z plc, under s593(3) of the 2006 Act, the sum of EUR 84 million being the nominal value of the subscriber shares issued to him.

114. Section 606 of the 2006 Act gives the court power to grant relief from this obligation. Neither party was able to provide any authority on the application of s606. In my judgment, the following principles emerge from s606, insofar as relevant to this case:

    i) RSS's obligation to Z plc under s593(3) falls within the scope of s606(1)(a) (since s593 and s606 both form part of Chapter 6 of Part 17 of the 2006 Act). To the extent that RSS had an obligation to pay Z plc cash by virtue of a contractual undertaking, or by virtue of any obligation imposed by s584, that would be within the scope of s606(1)(b).

    ii) In a s606(1)(a) situation, the court cannot grant relief except to the extent that it appears to the court to be just and equitable to do so. In considering that question, the court must have regard to the factors set out in s606(2)(a) to (c).

    iii) In a section 606(1)(b) situation, the court similarly cannot grant relief except to the extent that it appears to it to be just and equitable to do so. In considering that question, the court must consider the factors (which are somewhat different from those applicable in a s606(1)(a) situation) set out in s606(3)(a) and (b).

    iv) The court has a discretion whether to grant relief (as emphasised by the word "may" in s606(2) and s606(3)). That said, since the discretion can be exercised only where it is just and equitable to do so there are unlikely to be many cases where the court decides that the "just and equitable" requirement is satisfied but that it will nevertheless not exercise its discretion.

    v) In both a s606(1)(a) situation and a s606(1)(b) situation, the court must have regard to the "overriding principles" set out in s606(4) when deciding whether to grant relief and, if so to what extent. The effect of the overriding principle in s606(4)(a) is that Z plc should receive money or money's worth on the allotment of 840 million shares to RSS at least equal to those shares' nominal value of EUR 84 million. That money or money's worth need not all come from RSS himself (since both s606(2) and s606(3) permit account to be taken of contributions made by other persons). However, this principle is "overriding" in the sense that, no matter how just and equitable it might

> otherwise appear to grant relief, if Z plc has not, and will not, receive money or money's worth to the value of at least EUR 84 million in return for the allotment of the shares, RSS should not be granted any relief.

115. Given my conclusion that RSS has an obligation to pay cash under s593(3), the source of my power to grant relief is set out in s606(2). I will have regard to the fact that, even though RSS has not himself paid any of the EUR 84m cash that is due under s593(3), Z plc has nevertheless received "payment or part payment" for the shares falling within s606(2)(c). RSS himself transferred to Z plc his holding of 4 million shares in ZB. Moreover, other shareholders in ZB transferred shares to Z plc. While I have explained that there was no "arrangement" complying with s594 in existence on 29 June 2011, I am quite satisfied that, looking at matters at the date of these transfers of ZB shares in July 2011, the expectation of all involved was that the transfers of the ZB shares would serve to pay up the subscriber shares issued to both RSS and TSSY.

116. It is obviously unattractive for Z plc to be able to claim payment twice for the shares it issued. Therefore, one way I could exercise my discretion under s606(2) would be by giving RSS credit for the value of ZB shares that were transferred, either by him or by other persons, in or towards payment of the 840 million Z plc shares. That course of action would be capable of satisfying the overriding principle in s606(4) provided that I could be satisfied as to the value (or at least the minimum value) of the ZB shares that Z plc acquired. So, for example, if I were satisfied that the ZB shares had a value of at least EUR 84 million, the overriding principle in s606(4) would be satisfied even if I relieved RSS from the entirety of his obligation. If I were satisfied that the ZB shares had a value of, say, EUR 30 million I could conceivably reduce RSS's liability to EUR 54 million, although I would naturally hesitate before doing so if I entertained doubts as to RSS's ability or willingness to pay that reduced sum.

117. In his closing submissions on behalf of RSS, Mr Temmink QC invited me to start with what he submitted to be general considerations of justice and equity. Among other points, he placed emphasis on the fact that Z plc is no longer trading and has been in protracted breach of its obligations to file accounts. He submitted that, SG would be the main beneficiary of any payment that RSS is required to make and that this outcome would be manifestly unjust given SG's own role in the incorporation of Z plc which caused the shares to be issued for non-cash consideration in the first place. He argued that RSS could be given relief under s606 without the need for any detailed examination of the value of the ZB shares that Z plc acquired in 2011. I do not accept that submission. Given the overriding principle set out in s606(4), the value of the ZB shares that Z plc acquired is of central relevance that cannot be relegated to the status of an afterthought, to be considered only if more general considerations of justice and equity do not dispose of the matter.

118. I will, therefore, start with an analysis of the value of the ZB shares that Z plc acquired in 2011. RSS invites me to conclude that the relevant portion of the ZB shares that Z plc received had a value of at least EUR 84 million so that I can, without breaching the overriding principle in s606(4), reduce his liability to nil. He has, however, put forward no expert evidence as to the value of those shares even though, by paragraph 5b of an order made by Chief Master Marsh on 13

August 2020, RSS was given permission to adduce expert evidence "as to the valuation of Zavarco Berhad".

119. RSS nevertheless argues that, even without expert evidence, the value of the relevant ZB shares can be ascertained from ZB's audited accounts. For the year ended 31 December 2011, those accounts, audited by UHY Hacker Young, one of the largest audit firms in Malaysia, showed total assets of RM 753,971,177 and total liabilities of RM 98,046,809. The value of ZB's net assets, he argued, established the value of ZB's issued share capital. With an exchange rate of around EUR 1: RM 4.8, he argued that the totality of the shares in issue in ZB was comfortably in excess of EUR 130 million so that the value of the ZB shares that RSS transferred could be taken to be comfortably in excess of EUR 84 million.

120. I am prepared to accept that the value of shares in some companies can safely be ascertained by reference to audited accounts. For example, if a company's audited accounts show that its sole asset consists of a holding of £10 million in nominal amount of UK government gilts, and that it has no liabilities or other activities, it could safely be inferred that the value of its issued share capital is equal to that of the gilts the company holds. But in its accounting period ended 31 December 2011, ZB was a complicated company. Its accounts showed that its fixed assets consisted of assets as diverse as computers, motor vehicles, interests in a golf course and subsidiaries of which VTEL was the most significant. The majority of ZB's assets were attributable to its holding of shares in VTEL. However, as I have already noted, the valuation of VTEL and its business was by no means a straightforward or uncontroversial matter. Ari & Co, by making assumptions as to projected future revenues, was able to conclude that ZB had an enterprise value of EUR 2.382 billion. SG evidently thought that this figure was unrealistic, hence his observation that it was premised on an assumption that the business would grow at a rate "better than Google". RSS made no serious attempt to defend this opinion of value in his cross-examination. Indeed, in noting that the "beauty" of the Frankfurt Stock Exchange was its willingness to accept valuations based on projected future revenues, RSS was effectively acknowledging that the valuation was unrealistic since, if it represented a mainstream approach to valuation, there would be no "beauty" in the Frankfurt Stock Exchange's acceptance of it.

121. I acknowledge that the value for which RSS argues in the context of s606 is much lower than the valuation established by Ari & Co. However, what the above discussion demonstrates is that the valuation of a telecoms company which is presently making modest revenues, but which holds a licence that, following significant capital investment, might enable it to generate significant revenues, is not a straightforward exercise. Moreover, the accuracy of any valuation will depend on the assumptions that underpin it. Without expert evidence as to the kind of assumptions that would be needed to underpin the values appearing on ZB's balance sheet, I cannot be satisfied, on a balance of probabilities that the ZB shares did have the minimum value for which RSS argues. I am only reinforced in that conclusion by the fact that, in his cross-examination, RSS said that, in 2009, the underlying telecoms business was producing a profit of around RM 5 million per year and he was unable to identify any factor that would have

improved the fortunes of the underlying business (as distinct from optimistic valuations based on projected revenue) since then.

122. In urging me to a different conclusion, RSS pointed out that ZB's accounts have been subjected to an audit by an independent accounting firm and that even though subsequent accounts (whether of Z plc or ZB) might have been the subject of qualifications, the value of underlying assets has not been written down. However, that does not address the concern. The primary focus of an auditor is to express an opinion that the accounts prepared by directors show a true and fair view. That is not the same as a guarantee of the value of every asset on a company's balance sheet. Even audited accounts can be incorrect in material respects. Moreover, while expert evidence could be subjected to the scrutiny of another expert, or challenged in cross-examination, the statements as to value appearing in the audited accounts could only be the subject of comment or submissions by counsel and the assumptions underpinning them would be correspondingly difficult to either understand or challenge.

123. I have therefore concluded that the accounts, whether of ZB, or of Z plc do not demonstrate, on a balance of probabilities, that the ZB shares that Z plc received had a value of at least EUR 84 million. I will not, therefore, exempt RSS from the totality of his obligation to pay that sum to Z plc.

124. That naturally gives rise to the question whether RSS should nevertheless be relieved of some of his obligation on the basis that, even if they were not worth EUR 84 million, the ZB shares were worth something. I will not, however, seek to identify a lower value for the ZB shares, and reduce RSS's liability to that extent only, for the following reasons:

    i) First, the reasons I have already given for concluding that a value of EUR 84 million apply equally to any attempt to establish a specific value lower than EUR 84 million. Although it might be said as a matter of pure impression that the shares must have been worth <u>something</u>, the absence of any expert evidence and the inconclusive nature of the accounting evidence make it impossible to substantiate any specific lower value.

    ii) Second, considerations of justice and equity point against the court attempting a broad-brush attempt to identify some value to those shares that is only loosely supported in evidence. The shareholders in Z plc can be presumed to include some persons who bought their shares at what may well have been a material overvalue. RSS sought to argue that SG would personally benefit from any payment made to Z plc, but I was not satisfied on that issue. The evidence demonstrates that, in 2011, RSS was quite content to allow Z plc shares to be offered to public investors at a price with which he and SG had reservations. RSS has chosen now to advance no expert evidence as to the value of the ZB shares, even though he is well resourced and well advised. It would be wrong in principle for him to be able to benefit from a reduction in his liability to pay Z plc, which has the ability at least to provide some compensation to shareholders, in the absence of clear evidence as to the <u>precise</u> reduction that should be made.

iii) Finally, I consider that a broad-brush attempt to discern some value for the ZB shares would be procedurally unfair. RSS is both well-advised and well resourced, accepting in cross-examination that he has spent hundreds of thousands of pounds on legal fees in this dispute. His decision not to rely on expert evidence must have been deliberate, and not one forced on him by lack of resources. Moreover, RSS's decision has had consequences for Z plc which has had no opportunity to call expert evidence of its own because Chief Master Marsh only gave Z plc the right to call expert evidence in response to any evidence given by RSS's own expert. Mr Temmink QC accepted that the first notice that Z plc had of RSS's argument that the value of the ZB shares could be established by reference to its audited accounts alone was in the oral submissions he advanced by way of opening. Accordingly, the late deployment of this argument has resulted in Z plc being denied the ability to address it in expert evidence, to say nothing of the limited time Z plc has had to meet it on the basis of the factual evidence already before the court.

125. I will not, therefore, exercise my discretion under s606 to reduce the amount of RSS's liability under s593(3). For completeness, I note that even if I had concluded that RSS's liability was established under s584 and/or the terms of his contract to acquire subscriber shares (so that the case fell within s606(3) rather than s606(2)), my conclusion would have been the same. There is no material difference between s606(2) and s606(3) in the circumstances of this case.

Other Issues

126. The conclusions I have reached above are sufficient to dispose of this claim. RSS is liable to Z plc in the amount of EUR 84 million pursuant to s593(3) of the 2006 Act, Z plc is not estopped from asserting that liability and I will not reduce RSS's liability pursuant to s606. In reaching these conclusions, I have engaged with the factual aspects of RSS's case.

127. In those circumstances, I do not consider it necessary to determine the issues of law underpinning Z plc's claim based on s584 of the 2006 Act. Those issues are not straightforward and they are better dealt with in a case in which they are essential to the outcome. I will not, therefore, determine Issues 3 or 4 on the parties' agreed list of issues. Issue 7 does not need to be determined given that I have concluded that RSS has a liability to Z plc under s593(3).

128. I will, however, determine Issue 1, the question of how many shares RSS took as subscriber to Z plc's memorandum since it seems to me that it may involve, at least in part, questions of fact that might be relevant if the case goes further and my decision, based on s593(3), is disturbed.

129. Issue 1 arises because the obligation in s584 of the 2006 Act requires only that shares taken by a subscriber to a company's memorandum "in pursuance of an undertaking … in the memorandum" must be paid up in cash.

130. RSS notes that his obligation as set out in Z plc's memorandum was to subscribe for "at least" one share. Therefore, he argues, Z plc could only require him, by virtue of that undertaking to take a single share. From that it follows, in RSS's

submission, that a single share was taken pursuant to the undertaking given by RSS when he subscribed to Z plc's memorandum with the remaining 839,999,999 shares taken pursuant to the arrangement summarised in paragraph 96 above.

131. RSS did indeed undertake only to take "at least one" share. He did not specify a fixed number of shares that he would take. At first blush that might seem slightly curious but it becomes less so when it is appreciated that the form of undertaking given by the subscribers to Z plc's memorandum exactly tracks the provisions of s8(1)(b) of the 2006 Act.

132. I do not consider that RSS's undertaking to take "at least one" share should be construed as necessarily including an undertaking to take however many shares Z plc chose to allot. Such a construction would lead to a potential trap for the unwary since a person who signs a memorandum containing the standard-form undertaking to take at least one share would thereby be giving an open-ended commitment to take a potentially unlimited number of shares and, on Z plc's interpretation of s584, to pay cash for those shares.

133. Therefore, it is necessary to look elsewhere than the wording of the undertaking in the memorandum in order to determine precisely how many shares were to be taken in pursuance of that undertaking. I do not think that the answer is conclusively given by the statement of capital and initial shareholdings delivered by Z plc under s10 of the 2006 Act. The function of that statement is to tell the world at large, among other matters, "the total number of shares of the company to be taken on formation by the subscribers to the memorandum" (see s10(2)(a)). Certainly, the relevant statement in these proceedings showed RSS as taking 840 million shares. However, that statement simply records (correctly) the number of shares that RSS took "on formation". It does not itself determine how many were taken pursuant to his undertaking in the memorandum.

134. In my judgment, the answer is to be found in the entirety of the course of dealing between RSS and Z plc. RSS undertook to take "at least one" share. He was issued 840 million. At no point did he indicate to Z plc that he had received more shares than he had undertaken to accept. Nor do I accept RSS's argument that he took one share pursuant to the undertaking and the remaining 839,999,999 pursuant to the averred arrangement analysed in connection with s594. There is no meaningful distinction between the undertaking in the memorandum and the broad arrangement for ZB shares to be contributed to Z plc on a share-for-share basis. The undertaking in the memorandum was simply the first step in a chain of transactions that enabled RSS to obtain 840 million shares in Z plc that he was intended to obtain. Accordingly, RSS complied with his undertaking to take "at least one" share by taking 840 million. I respectfully agree with the conclusion to similar effect at paragraph [79] of the Nasir Judgment.

DISPOSITION

135. I have, therefore, dealt with all of those issues on the parties' list of issues that need to be determined. I hope that, in the light of this judgment, the parties will be able to agree the terms of an order. I will hear counsel on consequential matters if they cannot so agree.

APPENDIX – THE PARTIES' AGREED LIST OF ISSUES

1. How many shares did RSS take "in pursuance of an undertaking" in Z plc's memorandum within the meaning of s584? 1 or 840 million?

2. Are shares taken "in pursuance of an undertaking" in a memorandum "allotted" so as to be within the scope of both s593 and s584?

3. Does s584 create a right enforceable by a company to require a subscriber to pay for shares taken "in pursuance of an undertaking" in a memorandum in cash? If so, what is the nature of that right?

4. If s584 does create an enforceable right to payment in cash, does s594 operate as an exception to s584 as well as being an exception to s593?

5. Was there an "arrangement" falling within s594(2)? In particular:

    i) Was the arrangement put forward sufficiently certain to satisfy the requirements of s594(2)?

    ii) Was it open to all shareholders (or all holders of shares of those classes to whom the arrangement applied) to take part in the arrangement?

6. Is Z plc estopped from asserting that RSS is liable to pay it cash in respect of his 840 million shares? In particular:

    i) As a matter of law is it impossible for an estoppel to arise because it would be an "estoppel against statute"?

    ii) Were all necessary conditions present for an estoppel to arise?

7. What is the precise nature of Z plc's claim for relief? (For example, is it a claim for payment under s584 or s593?)

8. To what extent is s606 applicable to the relief that Z plc is claiming?

9. What relief, if any, should Z plc have taking into account the provisions of s606 to the extent relevant?