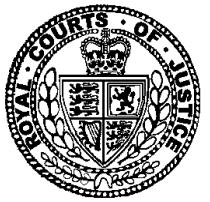

Neutral Citation Number: [2023] EWHC 1203 (Ch)

Case No: BL-2020-002235

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**BUSINESS LIST (Ch)**

Business and Property Courts of England and Wales
7 Rolls Buildings, London, EC4A 1NL

Date: 19 May 2023

**Before** :

**Ashley Greenbank (sitting as a judge of the High Court)**

- - - - - - - - - - - - - - - - - - - - -

**Between:**

**Carlos Ortiz-Patino**

**Claimant**

**- and -**

**MGI Golf and Leisure Opportunities Fund Limited**

**Defendant**

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Gary Blaker KC and Oberon Kwok, counsel** (instructed by **Penningtons Manches Cooper LLP**) for the **Claimant**

**Peter Knox KC** (instructed by **RHF Solicitors LLP**) for the **Defendant**

Hearing dates: 18, 21, 22, 23, 24, 28 and 29 November 2022

- - - - - - - - - - - - - - - - - - - - -

**APPROVED JUDGMENT**

This judgment was handed down remotely by circulation to the parties' representatives by email and released to the National Archives. The date and time for hand-down is deemed to be 10.30am on Friday, 19 May 2023.

**Ashley Greenbank (sitting as a judge of the High Court):**

## INTRODUCTION

1. This case concerns claims arising from agreements relating to the sale of shares in companies holding real estate in Andalucia, Spain, which included the world-famous Valderrama golf course, and certain related trade marks, in October 2012.

2. Those agreements were made between the late Mr Jaime Ortiz-Patino ("JOP") and the Defendant, MGI Golf and Leisure Opportunities Fund Limited ("MGI"), in October 2012. Under those agreements, JOP sold shares in two Swiss companies, Soto Properties SA ("Soto") and Campo Alto SA ("Campo"), to MGI. Soto and Campo were holding companies and held shares in certain Spanish companies that directly or indirectly owned interests in the relevant real estate assets and trade marks. The consideration for the sale of the shares in Soto and Campo included rights to payments calculated by reference to the proceeds of a future sale of the real estate assets or trade marks. Those rights are enshrined in an agreement dated 18 October 2012, made between JOP and MGI, and referred to as the "Profit Sharing Agreement" (or "PSA").

3. The Claimant is Mr Carlos Ortiz-Patino ("COP"). He is one of JOP's two sons, the other being Mr Felipe Ortiz-Patino ("FOP"). The PSA provided for JOP's rights to be transferable on JOP's death to COP or any of COP's children. On JOP's death in 2013, his rights under the PSA were transferred to COP.

4. MGI sold the shares in Soto and Campo to a third-party purchaser, Zagaleta International United Kingdom Inc ("Zagaleta"), in November 2015. COP now claims that he is entitled to payment under the relevant terms of the PSA as a result of that sale and/or for damages for various breaches of the PSA. MGI disputes those claims.

## THE EVIDENCE AND THE WITNESSES

### The evidence

5. The trial bundles contained copies of witness statements served on behalf of the Claimant given by:

   i) COP;

   ii) FOP, COP's brother, who was president of the Valderrama golf club, now known as Real Club Valderrama ("RCV")[1] between 2006 and 2011,

[1] The golf club was previously known as Club de Golf Valderrama but I have referred to it at all times as "RCV" in this judgment.

as well as a director of Soto and Campo and certain of their subsidiary companies for various periods before 2010;

iii) Mr Rafael Collantes, a Spanish tax consultant and adviser to JOP on tax, finance and accounting matters in relation to the sale of shares in Soto and Campo in 2012;

iv) Mr Ramon Davila, a Spanish lawyer, who was the Chief Executive Officer of two of the Spanish companies (Valderrama SA and Valderrama Estates SA) between 1999 and 2002 and an adviser to JOP from 2004 to late 2012;

v) Mr Jaime Morey, a Spanish commercial lawyer, who advised JOP in relation to the sale of shares in Soto and Campo in 2012; and

vi) Mr Guy Vermeuil, a partner in Lenz & Staehelin, a Swiss law firm, that advised JOP the sale of shares in Soto and Campo in 2012.

6. All the Claimant's witnesses, with the exception of COP, gave evidence and were cross-examined on their statements. Mr Collantes, Mr Davila, Mr Morey and Mr Vermeuil gave evidence via video link. FOP gave evidence in person and via video link. COP was not cross-examined on his statement, which was subject to a hearsay notice.

7. The Claimant also relied on expert valuation evidence:

i) a report of Mr James Allwood of Gesvalt Sociedad de Tasacion, SA ("Gesvalt") on the valuation of the real estate assets of Soto and its subsidiaries as at 30 November 2015 (i.e. at the time of the sale to Zagaleta); and

ii) a report of Mr Robert Sharp of Valuation Consultants Limited on the valuation of the trade mark assets of Soto, Campo and their subsidiaries as at 30 November 2015.

Mr Allwood and Mr Sharp gave evidence in person and were cross-examined on their reports.

8. The trial bundles also contained copies of four witness statements served on behalf of the Defendant given by Mr Richard Moxon, a director of the Defendant. Mr Richard Moxon gave evidence in person and was cross-examined on his statements.

## The witnesses

9. COP's witness statement referred only to certain matters relating to the background to the sale of the shares in Soto and Campo to MGI and the commencement of these proceedings. It was not challenged.

10. FOP was the Claimant's main witness. For the most part, he was straightforward in his evidence and he gave clear answers to the questions put to him in cross-examination. There were two main exceptions.

    i) The first is that FOP was at times vague in his responses regarding the circumstances in which he resigned as a director of several group companies in 2009 and 2010 following the disagreement with his father, JOP, and in which he ceased to be the President of RCV in April 2011. For example, I did not find his assertion that he could not recall a letter sent to him by his father accusing him of mismanagement of group companies at all convincing.

    ii) The second is that, as he accepted, following the breakdown in the relationship with his father in 2010, FOP was not closely involved in the negotiation with The Stripe Group Limited ("TSG") which led to the agreement for the sale of shares in Soto in September 2010 (which did not complete) or the subsequent negotiation for the sale of the shares in Soto and Campo to MGI which led to the agreements in October 2012. As a result, his evidence regarding the background to the negotiations was not clear.

11. The matters on which the Claimant's other witnesses – Mr Collantes, Mr Davila, Mr Morey and Mr Vermeuil – were able to give direct evidence were limited. However, they all gave evidence in straightforward manner. I have accepted their evidence.

12. The Defendant's only witness was Mr Moxon. Mr Moxon is, and at material times in the events that give rise to these claims, was, a director of the Defendant, MGI. I found two particular difficulties with his evidence.

    i) First, for reasons that I will address later in this judgment, Mr Moxon had limited involvement in some of the key events in this case. The negotiation of the agreements for the acquisition of the shares in Soto and Campo by MGI in October 2012 was handled largely by Mr David Spencer, who was a director of TSG and also a director of MGI for much of the period in question. Mr Spencer was also largely responsible for the management (or, as the Claimant's assert, mismanagement) of the some of the Spanish companies in the period from the completion of the 2012 SPA to June 2014. Mr Moxon was therefore not able to speak

authoritatively to many of the issues arising from the documents for the acquisition of the shares in Soto and Campo or the period immediately following the acquisition.

ii) Second, and no doubt partly due to the issues to which I refer in the sub-paragraph above, Mr Moxon's evidence was littered with inconsistencies, some of which I will address later in this judgment. Mr Blaker KC, in closing, suggested that Mr Moxon could not be relied upon as a truthful witness. I would not go that far. However, his evidence was symptomatic of the Defendant's rather shambolic preparation for and conduct of this case, which has been a recurring theme. As a result, I have had to treat Mr Moxon's evidence with some caution.

13. One important aspect of this case is therefore that there is little or no first-hand witness evidence of the background to the execution of the key contractual documentation. The same applies to the crucial period following the acquisition of the shares in Soto and Campo by MGI. The main protagonists did not give evidence: JOP died in January 2013 and MGI was represented in the negotiations by Mr Spencer, who was not put forward as a witness by MGI.

## THE FACTS

14. In this section, I have set out my findings of fact. I have divided this section into the following parts:

i) the general factual background before the negotiations with TSG in 2010;

ii) the events leading to the sale of the shares in Soto and Campo to MGI in October 2012;

iii) the details of the transaction for the sale of shares in Soto and Campo to MGI in October 2012;

iv) the events following that sale during MGI's ownership of the Soto and Campo shares; and

v) the sale of the shares in Soto and Campo by MGI to Zagaleta in November 2015.

### Background

15. I will describe the factual background as it existed at the end of 2009 and before the commencement of negotiations between JOP and TSG for the sale of shares in Soto and Campo. In doing so, I will also refer to events that occurred before

that date which are important in understanding the position at the end of 2009 and the later events which form the substance of this case.

16. These facts and indeed later events have to be seen against a backdrop of the worsening economic conditions arising from the financial crisis at the time, which had particularly deleterious effects on the market for real estate in Spain.

***The corporate structure***

17. As at 31 December 2009, JOP was the owner of the entire issued share capital of Soto and Campo. At that time, JOP held the shares in Soto through a Bermudan company, known as "Surf Song". Surf Song was merged into Soto with effect from 30 June 2010, after which JOP held the shares in Soto directly. Surf Song is not relevant to any of the issues in this case and I have for the most part ignored it in the remainder of this judgment.

18. Soto and Campo were holding companies. Soto owned shares in two companies incorporated in Spain: Valderrama SA ("Valsa") and Valderrama Estates SA ("Vesa").

19. Soto held A shares, C shares, and D shares in Valsa, representing approximately 94% of the share capital. The B shares in Valsa, representing approximately 6% of the share capital were held by certain members of RCV, the golf club. Valsa itself owned the land comprising the Valderrama golf course and three plots of land close to the course, known as Calle Colon 1 and 3, and Plot R. It also owned certain trade marks relating to the Valderrama golf course.

20. Soto also owned the entire issued share capital of Vesa, which owned various plots of land close to the Valderrama golf course and certain related trade marks. The plots of land held by Vesa included Plot I, which was sub-divided into 5 plots, two plots of land at Soto Alto, three plots of land at Calle Ebro and a villa at Calle Fondo 28.

21. Campo owned the entire issued share capital of Valderrama 07 SL ("V07"). V07 was a company incorporated in Spain. It owned land at Castellar de la Frontera, a few kilometres from the Valderrama golf course, and certain trade marks.

22. In this judgment, I have referred to Soto, Campo and their subsidiaries, Valsa, Vesa and V07, collectively as the "Valderrama Companies".

***The Valderrama golf course and golf club***

23. Valsa had owned the land comprising the Valderrama golf course since 1985. In 1989, Valsa granted a lease of the course to RCV, with a term which expired on 30 June 2010. At the same time, JOP bought out the other shareholders in

Soto and became the owner of the entire issued share capital of Soto. JOP also became President of RCV around this time.

24. In 2005, the arrangements between Valsa and RCV were renegotiated. On 3 November 2005, RCV, Valsa and Soto entered into a series of agreements (including a "Framework Agreement") pursuant to which:

i) Valsa granted to RCV a new lease of the golf course and related facilities (including the club house) until 30 June 2050 at an annual rent of €800,000 index-linked with effect from 1 July 2010;

ii) RCV paid a premium of €17,168,000 for the new lease;

iii) RCV undertook to maintain the golf course;

iv) Valsa granted to RCV a royalty-free, non-transferable licence to use its registered trade marks, for the term of the new lease, in relation to the sale of golf-related products at the club;

v) the bye-laws of Valsa were to be amended to enshrine within them certain protections and enhanced rights for the holders of the B shares including a requirement for the approval of a resolution of the holders of the B shares if the indebtedness of Valsa (which included the provision of guarantees) was to exceed 50% of the amount of its share capital and reserves as stated in the latest approved accounts of Valsa;

vi) Valsa agreed not to transfer the title to the "leased facilities" (i.e. the golf course) to a third party during the term of the new lease without first offering RCV the opportunity to purchase the title on the same terms. If RCV exercised its right and purchased the title to the golf course on those terms, Valsa was to be put into liquidation and, on such liquidation, the holders of the B shares in Valsa would be entitled to 50% of Valsa's surplus assets. In the alternative, Soto could agree to sell the A, C and D shares in Valsa to RCV at a price equal to 50% of the price offered by the third party for the golf course, less Valsa's indebtedness;

vii) Valsa agreed not to transfer the trade marks to a third party during the term of the new lease without first offering RCV the opportunity to purchase the trade marks on similar terms to those which applied to the golf course;

viii) Soto agreed to pay €2 million to RCV if the Valderrama name was used in any form in a new golf course which the Ortiz-Patino family was intending to build;

ix) it was agreed that a new board of governors of RCV would take office on 30 June 2006 and, from that date, JOP would cease to be President of RCV and FOP would become President.

25. The effect of the agreement with RCV was that, in 2009, there were significant restrictions on JOP's ability to deal with and exploit the land and trade marks owned by Valsa.

***The land at Castellar de la Frontera***

26. As I have mentioned above, through Campo and V07, JOP also owned land at Castellar de la Frontera (the "Castellar land"). JOP planned to develop the Catellar land into a new golf course, with an attached residential development.

27. In 2009, a form of planning permission was granted for the Castellar land. The permission was recorded on the area plan, the *plan especial*, for the town of Castellar. In addition, Mr Davila, on behalf of JOP and V07, helped prepare an application for a *declaracion de interes touristico* in relation to the Castellar land. The declaracion was obtained from the relevant authorities in Andalucia in July 2012. It allowed for the development of a golf course, a hotel and a residential complex on the Castellar land and significantly increased the development value of the land.

28. As part of this process, a fee would become payable to the local authorities as and when development took place on the land. The fee was usually calculated as a percentage of the value of the developed land, however, the exact amount of the fee was subject to negotiation between the developer and the local authorities. The fee would have to be paid before a building licence (which would allow development to commence) was granted.

***Financial problems for JOP and the Valderrama Companies***

29. In the period leading up to the end of 2009, Soto and Campo and their subsidiaries held real estate assets and trade marks. However, there were material restrictions, in particular, over Valsa's ability to exploit the land and the trade marks that it owned. The companies were not actively exploiting the trade marks (and had not done so for some time). Other than the income from the lease to RCV, they had no income. It was accepted by FOP that the companies were significantly affected by the deep depression in the Spanish real estate market.

30. JOP's personal financial position was also significantly affected by the financial crisis and its effect on the Spanish real estate market. As a result, he did not have, or was unable to obtain, finance to continue to develop the properties as he had wished to do.

31. In the period between 2007 and 2009, JOP and the Spanish subsidiaries of Soto and Campo obtained loans from various banks, which were secured by charges over the golf course or the rental income from the lease of the golf course.

    i) On 12 January 2007, Valsa obtained a loan from Barclays for €3,306,655 with a repayment date in January 2019, secured by a first mortgage over the golf course. The interest on this loan was initially paid from the rental income from the lease of the golf course.

    ii) On 26 March 2009, JOP obtained a personal credit facility of €16m from Banco Banif SA ("Banif"), a subsidiary of Banco Santander. The borrowings under this facility were secured on the rent from the lease of golf course, and by a pledge by JOP of A, C and D shares in Valsa. In December 2009, the Valsa board authorized JOP to charge the rents from the golf course as security for the personal loan from Banif.

    iii) On 30 June 2009, Banco Santander made a loan to Vesa of €1,038,889 secured by a charge over the golf course.

32. These borrowings continued into 2010.

    i) The rent from the lease of golf course and the A, C and D shares in Valsa were also pledged as security for a loan of €3,500,000 to V07 from Banif in May 2010.

    ii) On 28 June 2010, Vesa obtained a loan of €885,000 from La Caixa. This loan was also secured by a mortgage on the golf course.

33. The RCV and the holders of the B shares in Valsa were not made aware of these arrangements at the time. The effect of these borrowings and the security arrangements for them was that the indebtedness of Valsa exceeded the limit of 50% of its capital and reserves without the approval of a resolution of the holders of the B shares as required by the Framework Agreement and the bye-laws of Valsa.

***Disagreement between JOP and FOP***

34. FOP was a director of and responsible for the day-to-day management of the Valderrama Companies from around 2000 to 2009. In the course of 2009, JOP took back personal control of the Valderrama Companies. For example:

    i) on 18 March 2009, all directors of Soto (including FOP) with the exception of JOP were removed from the board; and

    ii) JOP revoked all the appointments and powers of attorney given to FOP in relation to the Valderrama Companies.

35. FOP's evidence was that he ceased to be involved because of a disagreement with his father about the direction in which to take the Valderrama Companies. However, the evidence suggests that JOP was concerned about FOP's administration of the companies and the level of indebtedness that had been incurred by them. There is a reference in documentation regarding later court proceedings to a letter written by JOP to FOP in which JOP described the administration of the companies by FOP as "atrocious, dishonest and unjustifiable". FOP says that he does not recall this letter – which hardly seems credible – and instead refers to a later meeting with RCV members at which JOP attacked his management of the Valderrama Companies.

36. For the purpose of this judgment, the precise reasons for their disagreement are of little relevance. It is, however, clear that from this point in 2009, FOP and JOP had fallen out. From this time onwards, and although he remained President of RCV until April 2011, FOP, on his own evidence, had little or no involvement in the management of the Valderrama Companies or the negotiations for their sale which followed. There was no rapprochement before JOP's death in early 2013.

37. As part of the disentanglement of their affairs, Soto took on the benefit of a debt owed by FOP to Vesa, representing a loan of sums that would be paid to FOP in respect of remuneration for his services to the Valderrama Companies. JOP also agreed that FOP would be paid a fee of €2 million if a "serious funded offer" was received for the Castellar land.

***Proposals to sell the Valderrama Companies***

38. By the end of 2009, JOP's financial position and that of the Valderrama Companies was particularly acute. JOP began to take steps to realize his some of his investments in order to reduce both the level of indebtedness in the Valderrama Companies and his own debts.

39. At first, JOP's proposal was to sell shares in Campo or the Castellar land even though a sale of the Castellar land would result in JOP giving up his long-held dream of building a new golf course from scratch. However, a sale of the Castellar land was regarded as the simplest way of generating cash for the group as there were fewer creditors involved and no minority interests to deal with.

40. Savills were instructed to find buyers for Campo or the Castellar land in the summer of 2009. Negotiations began with a potential buyer, B4 Developments ("B4"). An offer was received from B4, in early 2010, which valued the company at approximately €21 million, debt-free. However, the offer was conditional on funding and structured so that the consideration would be paid in instalments over time as certain milestones were achieved. JOP rejected the offer.

41. JOP had also given Banif a mandate to find buyers for Campo or the Castellar land. However, none of the offers for Campo or the Castellar land were accepted by JOP. JOP had changed his mind. He decided to keep the Castellar land and instead to sell Soto. He instructed Banif to seek buyers for Soto and, although discussion with the potential buyers for the Castellar land continued in the background, once a potential buyer for Soto was found (see below), JOP's focus was very much on securing a sale of shares in Soto and using the proceeds of that sale to reduce his debts and allow him to proceed with the development of a golf course on the Castellar land.

## Events leading to the 2012 SPA

### *The introduction of TSG as a buyer for Soto*

42. Banif introduced TSG as potential buyers for Soto early in 2010. TSG was represented in all these negotiations by Mr David Spencer – an individual who was well-known in the golfing world. It was understood that the ultimate investors in TSG included Mr Spencer and Mr Greg Norman, the former professional golfer.

43. When certain members of RCV became aware of the possible involvement of TSG, they wrote to FOP in his capacity as the chairman of RCV on 1 February 2010 asking him to renegotiate aspects of the Framework Agreement and the lease of the golf course to increase the rights of RCV under those agreements. The letter also referred to the grant of security over the golf course in order to finance Valsa without the approval of the B shareholders. It did not refer to charges over the golf course or the rental income from the golf course to support personal borrowings of JOP or the borrowings of other companies, from which I infer that the members of RCV were still not aware of those arrangements at this time and that the letter was referring to the loan from Barclays.

44. It is FOP's evidence, which I accept, that during this period, his father (JOP) sought to introduce Mr Spencer as a potential future owner at a general information meeting organized for the members of the golf club. The members of the golf club refused to meet Mr Spencer.

45. It would appear that the members of the RCV's particular concern was that their pre-emption rights in the Framework Agreement might be overridden by a sale of the shares in Soto. Following the announcement of the proposed sale of the golf course in the media, members of RCV asked FOP whether RCV could exercise the pre-emption rights in relation to both the golf course and the trade marks. FOP says that, following this approach, he wrote to Mr Spencer informing him of the existence of the pre-emption rights.

46. Several legal opinions were obtained in connection with the negotiation of the 2010 SPA as to whether RCV could exercise the pre-emption rights. All of the opinions concluded that RCV's right of pre-emption did not apply to a sale of shares in Soto. RCV commissioned its own legal opinion, but it came to the same conclusion.

***Negotiations with TSG***

47. Notwithstanding the opposition of many members of RCV, JOP pressed ahead with negotiations for the sale of Soto to TSG. He was represented in the negotiations with TSG by Lenz & Staehelin, Mr Morey and Mr Collantes.

48. TSG undertook extensive due diligence on Soto, its subsidiaries, and their assets. Schellenberg Wittmer, another Swiss law firm, provided Swiss legal due diligence, DLA Piper UK LLP ("DLA") provided more general legal due diligence and KPMG undertook financial and accounting due diligence. Each of Schellenberg Wittmer, DLA and KPMG produced a due diligence report. The reports are dated 20 September 2010, in the case of Schellenberg Wittmer and DLA Piper's reports, and 21 September 2010 in the case of the KPMG report.

49. The Schellenberg Wittmer report describes Soto and its subsidiaries as "overindebted".

50. The key points emerging from the DLA Piper report are as follows:

    i) The report identifies the preferential rights of holders of B shares in Valsa: their consent is required before the payment of dividends out of the proceeds of the sale of the golf courses; they are entitled to 50% of the value of the liquidated assets in the case of a winding up of Valsa; and their approval is needed for Valsa's debt to exceed 50% of its share capital and reserves.

    ii) The report notes the preferential acquisition rights of RCV to acquire the golf course and the trade marks under the Framework Agreement.

    iii) The report notes the letter of complaint sent by members of RCV to FOP as chairman of RCV regarding the charges over the golf course to secure borrowings made by Valsa.

    iv) The report notes the "existing conflictive relationship" between Soto and JOP, and RCV/the holders of the B shares in Valsa, and the risk of future litigation if the transaction proceeds. It refers to the possibility that a court might regard the transaction as a "fraud of law" designed to prevent the B shareholders and RCV from exercising their rights.

v) The report notes: the pledge of class A, C and D shares as security for personal loans; the mortgages of the golf course and other assets of Valsa and Vesa as security for loans to Valsa and Vesa; and the debts owed by Valsa and Vesa to various banks.

vi) Valsa had a negative working capital in its 2008 accounts and its 2009 accounts, and could be insolvent.

51. The KPMG report also identified the need for restructuring in order to repair the balance sheets of Soto, Valsa and Vesa.

52. On 21 September 2010, JOP entered into an agreement with TSG for the sale of the shares in Soto (the "2010 SPA"). Under the 2010 SPA, TSG agreed to pay €32 million to purchase the shares in Soto on a debt-free/cash-free basis.

53. The disclosure letter in relation to the warranties and representations given in the 2010 SPA (the "2010 Disclosure Letter") refers, inter alia, to the following matters:

i) the fact that some members of RCV had expressed their intention to issue proceedings if the transaction contemplated in the 2010 SPA proceeded on the grounds that it would breach their preferential rights under the Framework Agreement; and

ii) that the approval of the holders of B shares in Valsa was required if the indebtedness of Valsa (including any guarantees given to support other borrowings) exceeded 50% its share capital and reserves and no such approval was obtained in relation to the loan of €16 million by Banif to JOP dated 30 December 2009 or loans of €3.5 million made to V07 dated 7 May 2010 and 3 August 2010 (all of which were secured on assets of Valsa).

54. As I have described below, the other terms of the 2010 SPA form the basis of the subsequent agreement with MGI in 2012. I will deal with those terms later in this judgment when I set out the terms of the 2012 SPA.

***Delays in completion of the 2010 SPA***

55. At the time at which the 2010 SPA was signed, the aim was for TSG to raise funds for the acquisition from investors through an investment fund managed by TSG. TSG produced an investment memorandum for issue to shareholders. The investment memorandum assumes that returns will be generated for investors through the development of land (not including the golf course) for luxury apartments and villas, from the exploitation of the trade marks and, at the end of the term of the fund (which was expected to be in five years) by the sale of Soto (holding an indirect interest in the golf course).

56. TSG had difficulties in raising the funds to complete the purchase of shares in Soto. The date for completion of the 2010 SPA was deferred on several occasions. The 2010 SPA was varied by agreements on 15 December 2010, 7 July 2011, 26 August 2011, 30 August 2011 and 21 October 2011.

57. During this period, relations with the members of RCV did not improve. In April 2011, FOP stood down as President of RCV. He says that he did so for family reasons. It would appear that it was around this time that members of RCV became aware of the level of the indebtedness in Valsa and the possibility that its assets had been used to secure the borrowings of third parties. On 20 June 2011, in advance of a general meeting of Valsa that had been convened for 29 June 2011, the holders of the B shares wrote to JOP in his capacity as Chairman of the board of Valsa demanding further information on the level of the indebtedness of Valsa and the extent to which its assets had been used to secure the borrowings of third parties.

58. In a letter dated 28 June 2011, JOP wrote to the B shareholders setting out the debts of the company and details of the circumstances in which Valsa's assets had been used to support loans to himself and other companies controlled by him. At the general meeting on 29 June 2011, it was also confirmed that the board of Valsa had approved the grant of security over the company's assets to support the personal loan from Banif to JOP.

59. Throughout this period, JOP's financial position and that of the Valderrama Companies continued to deteriorate. An arrangement under which TSG had agreed to pay the interest on certain of the debts of Soto and its subsidiaries came to an end in October 2011. No interest was paid on the bank loans after December 2011.

60. Perhaps most importantly, JOP defaulted on the personal loan from Banif, following which Banif refused to extend the loan beyond its initial term of March 2012. By this time, the amount outstanding was in excess of €18 million. In April 2012, JOP informed Banif that he wanted the personal debt to be assumed by a buyer of the Valderrama Companies. In May 2012, Banif sent JOP a letter setting out the steps that it proposed to take to recover the debt. However, Banif did not take further action whilst it waited for JOP to negotiate a sale of the companies. The Claimant's witnesses, in particular FOP and Mr Davila, acknowledged that Banif's refusal to reschedule JOP's debts put him in a perilous financial position.

61. As regards the other bank loans, the evidence is less clear. In his evidence, Mr Collantes insisted that no formal foreclosure proceedings had commenced at the time of the sale of the shares in Soto and Campo to 2012. However, he acknowledged that demands for repayment had been made and that it is likely that the banks deferred taking action on the assumption that JOP was negotiating

a sale of the companies to a purchaser who might take on the debts. Other evidence points to some formal foreclosure proceedings having been initiated by some of the banks. What is clear is that JOP was, in effect, a forced seller of the shares in the Valderrama Companies.

62. In addition to the bank debts, JOP and the Valderrama Companies had outstanding debts for fees due to a number of providers of professional services. These included debts due to Mr Collantes, Mr Morey and Mr Davila, some of which had been outstanding for a considerable time.

63. As I have mentioned, TSG was also having difficulty raising the required funds to complete the 2010 SPA. Mr Spencer approached Mr Moxon with a proposal for Mr Moxon to form a fund, which would raise funds from investors on the Channel Islands Stock Exchange ("CISX") to make investments in golf-related assets. At this stage, the proposal was that the fund would then acquire shares in Soto from TSG once TSG had completed the transaction with JOP. For this purpose, Mr Moxon incorporated MGI on 13 March 2012. Mr Moxon was one of the two founder directors. He began work on preparing listing particulars for a proposed listing of shares in MGI on CISX.

64. As it became clear that TSG would be unable to finance the acquisition of assets from JOP, in the Summer of 2012, Mr Spencer put a proposal to Mr Moxon under which MGI would agree to acquire any assets directly from JOP and TSG would act as the local asset manager following their acquisition by MGI. Mr Spencer became a director of MGI on 28 August 2012.

## The sale of Soto and Campo to MGI

### *Arrangements with Banif*

65. Mr Spencer proceeded to negotiate arrangements which included not only an acquisition of the shares in Soto, but also an acquisition of the shares in Campo, and the settlement or compromise of JOP's debts to Banif. This negotiation was principally with Banif, as JOP's major creditor. Whilst Mr Moxon was involved in some of the negotiation, principally in relation to the restructuring of the debts with Banif, Mr Spencer led the negotiations on MGI's behalf and acted as MGI's representative in respect of most of these arrangements. Whilst these negotiations were on-going, Banif refrained from further steps to recover amounts due from JOP on the basis that an agreement was being brokered to restructure the debts of both JOP and the Valderrama Companies. Banif insisted on confidentiality during the negotiations. This requirement effectively

prevented MGI from marketing its shares in advance of the closing of the transaction.

66. On 25 September 2012, Banif, MGI and JOP entered into several agreements relating to the Valderrama Companies, their debts and JOP's debts. These agreements included the following three documents.

i) The first was a formal offer letter from MGI to Banif pursuant to which MGI offered to acquire the benefit of Banif's creditor rights in relation to the loan made by Banif to JOP, which was expressed to be outstanding in the amount of €18,137,701, and the loan made by Banif to V07, which was expressed to be outstanding in the amount of €3,505,984, after setting off against those debts the various deposits with Banif, understood to be in the amount of €8,941,986, and cash in Valsa's bank account with Banif, understood to be in the amount of €1,100,000.

That net amount is referred to in the offer letter as the "net debt position". It would appear that the net debt position is treated as an amount due from JOP to Banif. That would suggest that the set-off that I have described above resulted in the discharge of the debt due from V07 to Banif.

Under the offer letter:

a) MGI agreed to procure the discharge of the debt due to Barclays, which was secured on the golf course;

b) MGI agreed to pay an amount to Banif equal to 35% of the net debt position;

c) an amount equal to 65% of the net debt position was treated as an interest-bearing loan from Banif (as lender) to MGI (as borrower) to be secured on the income from the lease of the golf course;

d) MGI agreed to pay €800,000 to Banif as a non-refundable deposit.

ii) The second was a "private credit assignment promise contract" (which I will refer to as the "loan assignment") made between Banif, MGI and JOP, which gave effect to the assignment of the creditor rights in relation to the loans made by Banif to JOP and V07 set out in the offer letter.

iii) The third was a "side letter" entered into by MGI and JOP pursuant to which:

a) JOP agreed to transfer the shares in Soto and Campo to MGI on or before 22 October 2012, subject to an agreement on the part of MGI to transfer the shares back to JOP if the loan assignment was not completed;

b) JOP agreed to pay €800,000 to MGI if he did not complete the transfer of the shares in Soto and Campo or if the loan assignment was not completed for reasons attributable to JOP.

67. All of these documents were signed by Mr Moxon on behalf of MGI.

68. I infer that the loan assignment was intended to take effect as and when the final terms for the transfer of the shares in Soto and Campo to MGI were agreed. It is, however, instructive, and indicative of the position in which JOP found himself, that the arrangements to compromise and settle the debts due to Banif were agreed in advance of the agreement of the terms of the transfer. The arrangements were being controlled by Banif as JOP's main creditor. As can be seen from the structure for the transfer of the shares, the arrangements were put in place at some considerable speed: the transfer of the shares in Soto and Campo was effected for the most part by a novation of, and amendment to, the 2010 SPA; and MGI did not undertake significant due diligence in respect of the acquisition but, for the most part, relied upon the due diligence undertaken by TSG in relation to the 2010 SPA. JOP had little bargaining power.

***The Novation and Amendment Agreement***

69. I shall now turn to the terms of the transaction for the sale of shares in Soto and Campo, which form the basis of the claims before this court.

70. The agreement for the sale and purchase of the shares in Soto and Campo was signed on 18 October 2012. It took the form of a "Novation and Amendment Agreement" made between JOP, TSG and MGI under which the 2010 SPA was novated so that MGI "stood in the shoes" of TSG as purchaser of the shares in Soto. The terms of the 2010 SPA were also amended in various respects, including the extension of the agreement to include a sale by JOP of the shares in Campo. A copy of the resulting agreement between JOP and MGI (to which I will refer as the "2012 SPA") was attached as an annexure to the Novation and Amendment Agreement. The Novation and Amendment Agreement was signed by Mr Spencer on behalf of both TSG and MGI.

71. The Novation and Amendment Agreement is expressed to be governed by the laws of Switzerland "without regard to the principles of the conflicts of laws thereof". The parties also agreed that any dispute arising in connection with the agreement would be subject to the exclusive jurisdiction of the courts of Geneva "save for a possible appeal to the Swiss Supreme Court in Lausanne".

***The 2012 SPA***

72. I have set out below some of the key terms of the 2012 SPA to which I shall refer in the course of this judgment. In the 2012 SPA, Valsa is referred to as "Valderrama", Vesa as "Valderrama Estates", V07 as "Valderrama 07", Soto as "Holdco" and Campo as "Campo Alto". References to the "Seller" are to JOP, and references to the "Purchaser" are to MGI.

73. Under clause 1.1 of the 2012 SPA, JOP undertakes to sell the shares in Soto and Campo to MGI "free and clear of any liens, charges and encumbrances".

74. The consideration for the sale is set out in clause 1.2(a). It provides:

> (a) Subject to the satisfaction or, to the extent permissible by law, waiver of all of the Conditions Precedent, the consideration for the transfer by the Seller to the Purchaser of the Shares shall be an amount equal to the aggregate of the following:
>
> (i) the Net Banif Debt Amount;
>
> (ii) plus any amount payable to the Seller under the Profit Sharing Agreement ("Profit Share Consideration"),
>
> (such aggregate amount being the "Consideration"), which will be subject to the adjustment provided in Section 1.3.

75. The "Net Banif Debt Amount" is defined later in the agreement as the sum of "€13,549,080.39 calculated as… the gross debt owed by [JOP] to Banco Banif SA minus the funds frozen in the account of [Valsa]". Although the figures have moved slightly from the figures used in the offer letter of 25 September 2012, Mr Knox KC submitted – and I did not understand Mr Blaker KC to disagree – that this amount was equivalent to the "net debt position" as referred to in the offer letter (adjusted to reflect further accruals of interest over time).

76. The second part of the consideration referred to in clause 1.2(a) is the "Profit Share Consideration" which comprises amounts payable under the PSA. I will refer to this element of the consideration later in this judgment. It is this element of the consideration that forms the basis of the claims in this case.

77. Clause 1.2(b) then provides that the consideration has been determined on the basis that the Valderrama Companies are free of third party debt with the exception of two classes of liabilities referred to as the "Completion Debt" and the "Assumed Debts". It is in the following form:

> (b) The Consideration has been agreed by the Parties on the basis that Holdco, Valderrama Estates, Valderrama, Campo Alto and Valderrama 07 would be free of third party loans, including all bank loans, facilities and overdrafts, including interest,

> interest for delayed payment, court costs and early redemption penalties and fees and any loans other than:
>
> (i) the Completion Debt (as defined in Section 1.6); and
>
> (ii) the Assumed Debts (as defined in Section 1.3(d)A);
>
> (such debts being hereafter collectively referred to as "Debts").

78. The reference to clause 1.3(d)A in clause 1.2(b) is incorrect. The definition of the Assumed Debts is found in clause 1.3A.2.

79. Clause 1.3 includes provisions (in paragraphs (a) and (b)) for the preparation and agreement of completion balance sheets. Clause 1.3(d) then provides for the aggregate amount of the Completion Debt and the Assumed Debt to be paid by JOP to MGI either in cash or by set-off against amounts due under the PSA (after taking out of account debts due to JOP and other Valderrama Companies that have been assigned to MGI before completion of the agreement). Mr Knox KC submitted that, in fact, no effect was given to clause 1.3(d). I did not understand Mr Blaker KC to disagree with that submission and indeed it would appear to be inconsistent with the other provisions of agreement to which I refer below. (I can only conclude that clause 1.3(d) was a legacy of the 2010 SPA which was not properly amended or removed.)

80. Clause 1.3A.1 provides that MGI has agreed to assume the Assumed Debts and to procure that the relevant company discharges each of the Assumed Debts on its due date. Clause 1.3A.2 then sets out (in paragraphs (i) to (xii)) details of the Assumed Debts, including in paragraph 12, a reference to a list of "bank debts, third party unsecured debts and intercompany balances" of Valsa, Vesa and V07 "due and/or overdue up to 30 September 2012" set out in Schedule 1.2.2 to the agreement.

81. The Assumed Debts that are listed in paragraphs (i) to (viii) of clause 1.3A.2 are debts of Valsa or Vesa due to various banks, all of which are secured on real estate assets of Valsa or Vesa. They amount in total to €7,059,130 (including accrued interest). Paragraph (ix) refers to an unsecured debt (including accrued interest) of €18,792 due to Banco Santander and does not identify the debtor company. Paragraph (x) refers to a debt (including accrued interest) of €904,805 "in connection with the repayment of outstanding loans of [Vesa] with Hacienda Valderrama SA". Paragraph (xi) refers to the debt of V07 to La Caixa in relation to the Castellar land at the time in the amount of €8,847,502 (including accrued interest)

82. Schedule 1.2.2 in fact shows the various debts and liabilities of the Valderrama Companies as at 19 October 2012 rather than 30 September 2012. Schedule 1.2.2 to the 2012 SPA is broken into three parts.

i) The first part of the Schedule is a list of debts of Valsa, Vesa and V07 to various banks, showing the principal and interest due on those loans as at 19 October 2019. The bank debts shown in this part of the Schedule include all the debts that are referred to in paragraphs (i) to (ix) and (xi) of clause 1.3A.2. It shows Vesa as the debtor company of the €18,792 debt due to Banco Santander. The first part of Schedule 1.2.2 also includes the debts due from Valsa to Barclays Bank Plc (secured on the golf course) and from Valsa to La Caixa (secured on Patio Home 12), to which I refer below, and which, as drafted, together form the "Completion Debt" referred to in the 2012 SPA.

   This part of Schedule 1.2.2 does not materially expand the definition of Assumed Debts as all the bank debts are either expressly referred to in clause 1.3A.2 or specific provision is made for them elsewhere in the 2012 SPA.

ii) The second part of Schedule 1.2.2 is a list of unsecured third party debts of Valsa, Vesa or V07 as at 19 October 2019, primarily due to tax authorities or to providers of services to the companies. The liabilities of Valsa and Vesa listed in this part of the Schedule amount in total to €398,521; the debts of V07 amount in total to €494,984.

iii) The third part of Schedule 1.2.2 is mainly a summary of intercompany debts due from one of the Valderrama Companies to another of the Valderrama Companies. It also includes:

   a) a reference to a debt of €3,566,474 due from V07 to JOP, which would appear to be a payable (together with a small amount of additional interest) which I assume is dealt with in the set-off arrangements with MGI and Banif, to which I refer above, which resulted in the discharge of the debt due from V07 to Banif;

   b) some debts due to and from JOP, from and to Valsa, Vesa and V07, the net effect of which is a payable from JOP to the group of €162,931;

   c) a debt of €904,805 (including accrued interest) due from Vesa to Hacienda Valderrama SA, which would appear to be the debt referred to in paragraph (x) of clause 1.3A.2;

   d) a debt of €1,533,252 due from V07 to Putter Srl (which relates to the "Putter Loan" to which I refer below).

83. The definition of "Completion Debt" is found in clause 1.6. It is in the following form:

> 1.6 The Completion Debt to be paid by the Purchaser comprises:
>
> (a) the sum of Euro 921,651, plus Euro 8,097 (early cancellation fee) plus Euro 3,000 (estimate cancellation expenses) being the principal amount plus all accrued interest, early repayment fees and any other sums required to be paid in full and final satisfaction of such debts up to and including 5 November 2012 owing to La Caixa by Valderrama such facility being secured on the Patio Home 12 and repayable on 1 January 2022; and
>
> (b) all amounts owing to Barclays Bank Plc amounting to approximately Euro 3,150,114.56 plus Euro 4,500 (estimate cancellation expenses) being the principal amount plus all accrued interest, early repayment fees and any other sums required to be paid in full and final satisfaction of such debts up to and including 29 October 2012 such facility being secured on the Valderrama Golf Course and repayable on 12 January 2019;
>
> together the "Completion Debt".

84. As drafted, the Completion Debt therefore comprised two debts: one to La Caixa, which was secured on Patio Home 12 (JOP's personal residence), and one to Barclays, which was secured on the golf course. The provisions of the 2012 SPA were, however, amended by a variation agreement, also dated 18 October 2012, the effect of which was that the debt due to Barclays, which is referred to in clause 1.6(b), was treated as an Assumed Debt within clause 1.3A.2.

85. Clause 1.5(a) sets out the manner in which the consideration was to be settled. It provides, in clause 1.5(a)(i), for the Net Banif Debt Amount to be settled by the assignment by Banif to MGI of the benefit of the right to receive the amounts due from JOP under the loan agreements with Banif (i.e. pursuant to the loan assignment) and then for a set-off of that obligation of JOP against the right of JOP to receive the Net Banif Debt Amount under the 2012 SPA. The set-off between JOP and MGI is recorded in a short set-off agreement. Clause 1.5(a)(ii) provides for the Profit Share Consideration to be settled pursuant to the terms of the PSA.

86. Clause 1.5(b) provides for the remaining Completion Debt to be settled by MGI procuring that Valsa paid the amounts due by banker's draft delivered to La Caixa on 5 November 2012. (The debt was not, in fact settled in this way, but I will address that issue later in this judgment.)

87. Clause 2 of the 2012 SPA contained provisions regarding the conditions precedent to the closing of the sale and purchase of the shares in Soto and Campo, details of the events that were to take place at the closing of that transaction and details of the debt assignment events to which I have referred

above. The conditions precedent to MGI's obligations included provision (in clause 2.2(a)(i)) that the representations and warranties of JOP in clauses 2.5 and 4 of the 2012 SPA "shall be true and correct as of the Effective Date and as of the Closing Date in all material respects". The Closing Date is defined in clause 2.4(e) of the 2012 SPA by reference to the date on which the transfer of shares in Soto and Campo is "consummated". The evidence was not clear on precisely when between 18 October 2012 and 30 October 2012, the transfers took place, but nothing turns on that point. (I have also assumed that the Effective Date was the date on which the parties became subject to the 2012 SPA following the novation of the 2010 SPA, that is on 18 October 2012.) The closing events included provisions (in clause 2.4(f)) to give effect to the set-off in clause 1.5(a) and (in clause 2.4(g)) for the payment of the Completion Debt.

88. Clause 2.5 dealt with post-closing events and provided for JOP to provide assistance to MGI in relation to the preparation of accounts for periods prior to closing of the transaction. It was in the following form.

> The Seller will, following Closing, provide all reasonable assistance to the Purchaser in relation to the completions of the 2011 annual accounts for Valderrama, Valderrama Estates, and Valderrama 07 and will procure that the persons who were directors of the aforementioned companies prior to Closing will sign such accounts and do all necessary acts in relation to the finalization and signing of such accounts as is necessary and the Seller will indemnify the Purchaser in respect of any loss it may suffer as a result of the breach of this Section 2.5.

89. Clause 3 contained representations in relation to the Swiss companies, Soto and Campo. The representations were expressed to be made "Except as fully and fairly disclosed in the Seller's Disclosure Letter" and to be given "as of the Effective Date and as of the Closing Date" (clause 3.1(a)).

90. The only representation in clause 3 which is of significance for the purpose of this case was contained in clause 3.8(a)(ix). It was as follows:

> 3.8 **Absence of Changes**
>
> (a) Except as disclosed in the Seller's Disclosure Letter or as otherwise contemplated or permitted by this Agreement, since December 31, 2010 and through the date hereof:
>
> …
>
> (ix) neither Holdco nor Campo Alto has incurred any liability (whether prospective, contingent or otherwise and whether arising on or after Closing), including, but not limited to any liability to any advisor, agent or other Person which was not settled prior to Closing by the Seller;

91. Clause 4 contained representations in relation to the Spanish companies, Valsa, Vesa and V07. The representations were again expressed to be made "Except as fully and fairly disclosed in the Seller's Disclosure Letter…" and to be given "as of the Effective Date and as of the Closing Date" (clause 4). The representations in clause 4 which are of significance for the purpose of this case were contained in clause 4.8(a)(ix), clause 4.9(l) and (n), and clause 4.14. They were in the following form:

> 4.8 **Absence of Changes**
>
> (a) Except as disclosed in the Seller's Disclosure Letter or otherwise contemplated or permitted by this Agreement and in particular under Section 4.7, since December 31, 2010 and through the date hereof:
>
> …
>
> (ix) Neither Valderrama, Valderrama Estates nor Valderrama 07 has incurred any liability (whether prospective, contingent or otherwise and whether arising on or after Closing), including, but not limited to any liability to any advisor, agent or other Person which will not be settled prior to Closing by the Seller, or any additional debt;
>
> …
>
> 4.9 **Owned real property, licences, permits, authorizations, urban development, planning and zoning**
>
> …
>
> (l) Except as disclosed in the Seller's Disclosure Letter, Valderrama, Valderrama Estates and Valderrama 07 have all the licences, permits and authorisations required for the construction and performance of their activity as currently carried out and any and all assets owned by Valderrama, Valderrama Estates and Valderrama 07 and have complied with all terms and conditions of those licences, permits and authorizations. Furthermore, nothing has been or is agreed by this Agreement to be done or omitted which might prejudice in any manner whatsoever the continuation or renewal of any of those licences, permits and authorizations or result in any of those licences, permits and authorizations being revoked, modified or temporarily withdrawn or suspended.
>
> In particular Valderrama, Valderrama Estates and Valderrama 07 have every licence, permit and authorization required for the assets they own, (commercial establishments, fire protection, health and safety at work and those which could affect the performance of the business) or required by the applicable

> planning and zoning laws and regulations for carrying out their real estate development business in the Properties.
>
> …
>
> (n) Additionally, no planning permission has been modified or revoked and the Seller is not aware of any circumstance that may result in such planning permission being modified or revoked. No application for planning permission is awaiting decision.
>
> …
>
> 4.14 **Legal Proceedings**
>
> As of the Effective Date, there are no legal proceedings or investigations which are pending or, to the knowledge of the Seller, threatened against Valderrama, Valderrama Estates or Valderrama 07, or which involve any of their respective shares, assets or properties, by or before any Authority.

92. The remaining operative provisions of the 2012 SPA are not in issue in these proceedings with the exception of clause 10.3, which provided, so far as relevant, as follows:

> Save as otherwise set out in this Agreement, all fees and expenses incurred in connection with this Agreement and the Transaction shall be borne by the Party incurring the fees or expenses…

93. The 2012 SPA is again expressed to be governed by the laws of Switzerland "without regard to the principles of the conflicts of laws thereof". The parties agreed in the 2012 SPA that any dispute arising in connection with the agreement will be subject to the exclusive jurisdiction of the courts of Geneva "save for a possible appeal to the Swiss Supreme Court in Lausanne".

94. In summary, the overall effect of the arrangements with Banif, the Novation and Amendment Agreement and the 2012 SPA was therefore as follows.

i) JOP sold the shares in Soto and Campo to MGI.

ii) As consideration for the sale of the shares, MGI agreed to pay to JOP the Net Banif Debt Amount and to make the payments due to JOP under the PSA.

iii) MGI's obligation to pay JOP the Net Banif Debt Amount was discharged by a set off against JOP's liabilities to MGI which were derived from his and V07's liabilities to Banif and arose from the arrangements with

Banif that I have described above, and which also took effect at closing of the sale and purchase.

iv) It was agreed that, at closing of the sale and purchase, the Valderrama Companies would have various debts and other obligations to third parties, being those referred to in the 2012 SPA as the Assumed Debts and the Completion Debt, which at completion amounted in aggregate to approximately €20.02 million, of which €11.17m was attributable to Soto and its subsidiaries (Valsa and Vesa) and €8.85m was attributable to Campo and its subsidiaries (V07). The deal therefore valued the Valderrama Companies with an enterprise value (i.e. debt-free/cash-free) of approximately €33.5m.

v) MGI agreed to procure that Valsa would make a payment to La Caixa on 5 November 2012 to settle JOP's debt to La Caixa (referred to in clause 1.6(a)). (This was part of the settlement of JOP's debts to La Caixa, which I will describe below.) It also agreed make available a facility to provide cash to Putter Srl.

vi) MGI paid an amount to Banif under the arrangements that I have described above being 35% of the Net Banif Debt Amount and became the debtor under a loan from Banif in respect of an amount equal to 65% of the Net Banif Debt Amount.

***The Profit Sharing Agreement***

95. As I have described, the second part of the consideration set out in clause 1.2 of the 2012 SPA was an obligation on MGI to make payments under the PSA. The PSA was entered into by JOP and MGI on 18 October 2012. It was signed by Mr Spencer on behalf of MGI. It is expressed to be "supplemental" to the other agreements for the sale and purchase of shares in Soto and Campo.

96. The PSA provides for MGI to make payments to JOP on the occurrence of certain events. The key provisions are clause 3 and clause 4 of the PSA.

97. Clause 3 provides for certain payments to be made by MGI to JOP following the sale of real estate assets of the Valsa or Vesa. It provides:

> 3.1 The Purchaser agrees, as soon as possible following the Effective Date, that it will use its reasonable endeavours to identify third party buyers for any and all of the real estate assets owned by Valsa or Vesa ("Real Estate Assets") at the best saleable price.
>
> 3.2 If, after the Effective Date, any Real Estate Asset is sold to a third party unconnected to the Purchaser on an arms' length

basis, the Purchaser shall pay the Net Profit attributable to any such sold Real Estate Asset in the following proportions:

3.2.1 a sum in cash equal to 91% of the Net Profit to the Purchaser; and

3.2.2 subject to the right of set-off contained in clause 6.2, a sum in cash equal to 9% of the Net Profit to JOP.

3.3 For the purposes of clause 3.2, the "Net Profit" attributable to a sold Real Estate Asset shall be calculated by deducting from the price paid for the relevant Real Estate Asset by the third party the following items:

3.3.1 bank facilities or other financing secured on, or utilised in relation to, such Real Estate Asset whether such security is by way of mortgage, charge or similar security;

3.3.2 any sales commission relating to the relevant Real Estate Asset;

3.3.3 any taxes relating to or arising from the sale of the relevant Real Estate Asset or relating to or arising from the distribution of the Net Profit to the Purchaser;

3.3.4 any legal, accounting or other professional fees incurred in connection with the relevant Real Estate Asset;

3.3.5 any direct costs associated with the development or enhancement of the relevant Real Estate Asset, including but not limited to any infrastructure costs.

3.4 The Net Profit calculated pursuant to clause 3.3 shall be paid by Purchaser in cash by telegraphic transfer of funds to accounts nominated by each of the Purchaser and JOP within 30 days of Valsa or Vesa receiving in clear funds the full purchase price relating to the sale of each relevant Real Estate Asset from the relevant third party buyer.

3.5 Save as set out in in clause 3.6, the obligations under this clause 3 are not transferrable.

3.6 The obligation to pay 9% of the Net Profit to JOP pursuant to this clause 3 is transferable on JOP's death to:

3.6.1 JOP's son - Carlos Ortiz-Patino ("COP" ); and/or

3.6.2 any of COP's children ("JOP Grandchildren" and each a "JOP Grandchild")

> provided that the Purchaser's right of set off pursuant to clauses 6 and 8 shall apply notwithstanding any transfer pursuant to this clause.
>
> 3.7 No amounts shall be payable in accordance with this clause 3 in the event that the Purchaser reorganises the Purchaser Group, so that any Real Estate Asset is transferred within the Purchaser Group or to any company in any way connected or associated to the Purchaser. If, however, following any such reorganisation any Real Estate Asset is subsequently transferred to a third party buyer, the provisions of this clause shall apply and JOP (or any of his assignees as the case may be) shall be entitled to any amounts payable in accordance with this clause 3.7. For the purposes of this clause, transfers of any Real Estates Asset shall include any asset transfers as well as any share transfers of the company owing any such Real Estate Asset.
>
> 3.8 JOP shall be punctually notified in writing of any Real Estate Assets transfer and he shall be duly informed of the details of each specific transaction.

98. The "Effective Date" is defined in the PSA by reference to the date of the completion of the new facility arrangements between MGI and Banif under which MGI assumed debts of JOP to Banif.

99. Clause 4 provides for certain payments to be made by MGI to JOP following the sale of any trade marks owned by Valsa, Vesa or V07. It provides:

> 4.1 If, after the Effective Date, Valsa, Vesa or Valderrama 07 receives any payment in relation to:
>
> 4.1.1 the sale of any Valderrama Trade Mark to a third party unconnected to the Purchaser on an arms' length basis; or
>
> 4.1.2 any licence fee relating to the use of any Valderrama Trade Mark by a third party unconnected to the Purchaser on an arms' length basis,
>
> ("Trade Mark Fee"),
>
> the Purchaser shall pay the Net Profit attributable to the Trade Mark Fee in the following proportions:
>
> 4.1.2.1 a sum in cash equal to 91% of the Net Profit to the Purchaser; and
>
> 4.1.2.2 subject to the right of set-off contained in clause 6.2, a sum in cash equal to 9% of the Net Profit to JOP.

4.2 For the purposes of clause 4.1, the "Net Profit" attributable to a Trade Mark Fee pursuant to:

4.2.1 clause 4.1.1 shall be calculated by deducting from the price paid by the third party purchaser any amounts attributable to the relevant Valderrama Trade Mark purchased by the third party including, without limitation, the following:

4.2.1.1 any agency, consultancy and other professional fees and disbursements;

4.2.1.2 any on-line and hard copy advertising and/or sponsorship costs;

4.2.1.3 any on-going maintenance fees, including but not limited to renewal fees and oppositions filed against later conflicting applications; and

4.2.1.4 any brand development fees;

4.2.2 clause 4.1.2 shall be calculated by deducting from the annual royalty fee payable by the third party purchaser, to the extent they are not already covered in any licence agreement entered into between the third party and Valsa or Vesa (as relevant), any amounts attributable to the relevant Valderrama Trade Mark licensed to the third party including, without limitation, the following:

4.2.2.1 any agency, consultancy and other professional fees and disbursements;

4.2.2.2 any on-line and hard copy advertising and/or sponsorship costs;

4.2.2.3 any on-going maintenance fees, including but not limited to renewal fees and oppositions filed against later conflicting applications; and

4.2.2.4 any brand development fees.

4.3 The Net Profit calculated pursuant to clause 4.2 shall be paid by Valsa or Vesa (as appropriate) (and the Purchaser shall procure that such payments are made) in cash by telegraphic transfer of funds to accounts nominated by each of the Purchaser and JOP within:

4.3.1 in the case of any Trade Mark Fee payable pursuant to clause 4.1.1 within 30 days of Valsa or Vesa (as appropriate) receiving in clear funds the full purchase price relating to the relevant Valderrama Trade Mark;

> 4.3.2 in the case of any Trade Mark Fee payable pursuant to clause 4.1.2, within 30 days of Valsa or Vesa (as appropriate) receiving in clear funds the payment of the royalty fee by the third party pursuant to any licence agreement.
>
> 4.4 The obligation to pay a sum equal to 9% of the Net Profit to JOP pursuant to this clause 4:
>
> 4.4.1 shall terminate on 30 June 2050; and
>
> 4.4.2 save as set out in in clause 4.5, is not transferrable.
>
> 4.5 The obligation to pay 9% of the Net Profit to JOP pursuant to this clause 4 is transferable:
>
> 4.5.1 by JOP to COP; and / or
>
> 4.5.2 to any JOP Grandchild. Any JOP Grandchild may further assign the right to receive amounts payable under this clause to any of their children
>
> provided that the Purchaser's right of set off pursuant to clauses 6 and 8 shall apply notwithstanding any transfer pursuant to this clause.
>
> 4.6 No amounts shall be payable in accordance with this clause 4 in the event that the Purchaser reorganises the Purchaser Group, so that any Valderrama Trade Mark is transferred within the Purchaser Group or to any company in any way connected or associated to the Purchaser. If, however, following any such reorganisation any Valderrama Trade Mark is subsequently transferred to a third party buyer, the provisions of this clause shall apply and JOP (or any of his assignees as the case may be) shall be entitled to any amounts payable in accordance with this clause. For the purposes of this clause 4.6, transfers of any Valderrama Trade Mark shall include any asset transfers as well as any share transfers of the company owing any such Valderrama Trade Mark.

100. Clause 5 contains provisions which apply on a sale of shares in Campo or V07, or on a sale of the Castellar land. It provides:

> 5.1 Subject to clauses 5.5 and 5.6, if, after the date of this agreement, the Purchaser:
>
> 5.1.1 sells all of its shares in Campo ("Campo Alto Shares"); or
>
> 5.1.2 (through Campo) sells all of its shares in Valderrama 07 ("Valderrama 07 Shares"); or

5.1.3 (through Valderrama 07) sells the Castellar development as an asset sale ("Castellar Development");

to a third party unconnected in any way to the Purchaser for an amount equal to or greater than €16,000,000 (net of all fees, costs and expenses associated with the sale and any development costs associated to Valderrama 07 and/or the Castellar Development), the Purchaser shall procure that the net sale proceeds after such deductions are apportioned as follows:

5.1.4 the first €16,000,000 shall be paid to the Purchaser. The Purchaser shall ensure that such sale proceeds paid to it are applied in discharging the mortgage over the Castellar property owned by Valderrama 07; and

5.1.5 secondly, the net sale proceeds after the payment pursuant to clause 5.1.4 above shall be applied in settlement of any unpaid outstanding invoices due to Lenz & Staehelin as set out in a settlement agreement entered into between JOP and Lenz & Staehelin on 18 October 2012, and JOP hereby irrevocably instructs the Purchaser to inform Lenz & Staehelin of such sale and to make such payment to Lenz & Staehelin; and

5.1.6 thirdly, subject to the right of set-off contained in clause 6.2, the balance of the net sale proceeds after the payments made pursuant to clauses 5.1.4 above and 5.1.5 above shall be paid to JOP.

5.2 The right of JOP to receive any amounts payable under this clause 5 is transferable:

5.2.1 by JOP to COP; and / or

5.2.2 to any JOP Grandchild. Any JOP Grandchild may further assign the right to receive amounts payable under this clause to any of their children

provided that the Purchaser's right of set off pursuant to clauses 6 and 8 shall apply notwithstanding any transfer pursuant to this clause.

5.3 No amounts shall be payable in accordance with this clause 5 in the event that the Purchaser reorganises the Purchaser Group, so that either of the Campo Alto Shares, Valderrama 07 Shares or the Castellar Development are transferred within the Purchaser Group or to any company in any way connected or associated to the Purchaser. If, however, following any such reorganisation the Campo Alto Shares, Valderrama 07 Shares or the Castellar Development are subsequently transferred to a third party buyer, the provisions of this clause shall apply and JOP (or

any of his assignees as the case may be) shall be entitled to any amounts payable in accordance with this clause. For the purposes of this clause 5.3, transfers of the Castellar Development shall include any asset transfers as well as any share transfers of the company owning the Castellar Development.

5.4 For the avoidance of doubt, no amounts shall be payable in accordance with this clause 5 in the event of a transfer of: (i) the Campo Alto Shares; (ii) the Valderrama 07 Shares; or (iii) the Castellar Development (whether by way of an asset transfer or share transfer), within the Purchaser Group.

5.5 If:

5.5.1 the Purchaser receives an offer from a third party to purchase either the Campo Alto Shares, the Valderrama 07 Shares or the Castellar Development ("Third Party Offer"); and

5.5.2 the Third Party Offer is for an amount equal to or less than €30,000,000 (net of all fees, costs and expenses associated with the sale and any development costs associated to Valderrama 07),

the Purchaser shall notify JOP of the Third Party Offer and JOP shall have 10 days from receipt of notification of the Third Party Offer to make an offer to the Purchaser on equivalent or better terms than the Third Party Offer ("Matching Offer"). If a Matching Offer is not made in 10 days or JOP informs the Purchaser of its intention not to make a Matching Offer, the Purchaser shall, subject to clause 5.7 be able to accept the Third Party Offer.

5.6 In the event a Matching Offer is made, the Purchaser shall:

5.6.1 be obliged to accept the Matching Offer and decline the terms of the Third Party Offer; and

5.6.2 procure that the net sale proceeds after all deductions have been applied are apportioned as follows:

5.6.2.1 the first €16,000,000 shall be paid to the Purchaser. The Purchaser shall ensure that such sale proceeds paid to it are applied in discharging the mortgage over the Castellar property owned by Valderrama 07; and

5.6.2.2 subject to the right of set-off contained in clause 6.2, any amounts in excess of €16,000,000 shall be paid to JOP it being acknowledged by the Parties that

JOP shall retain any amounts payable to the Purchaser in excess of €16,000,000 in satisfaction of the Purchaser's obligation under clause 5.1.5.

5.7 If a Third Party Offer is made for an amount equal to or greater than the aggregate of:

5.7.1 €16,000,000; and

5.7.2 any amounts drawn down by JOP under the Credit Facility and the Putter Loan; and

5.7.3 all fees, costs and expenses associated with the sale and any development costs associated to Valderrama 07 and/or the Castellar Development,

and JOP does not make a Matching Offer pursuant to clause 5.5, the Purchaser shall be under an obligation to accept such Third Party Offer and procure that payments of the net sale proceeds are made in accordance with clause 5.6.2.

5.8 If either: (i) the Campo Alto Shares or, (ii) the Valderrama 07 Shares or (iii) the Castellar Development are not sold to a third party buyer by 30 June 2013, the Purchaser shall increase the amount of the facility under the Putter Loan to cover any additional deferred taxes payable by JOP as the owner of Putter SRL.

5.9 JOP shall be entitled to identify third party buyers for the Campo Alto Shares, the Valderrama 07 Shares or the Castellar Development, as well as to take any measures and steps in order to obtain the best saleable price.

101. Under clause 6 of the PSA, MGI undertook to make available to JOP two loan facilities.

i) Under the first of these loan facilities (referred to as the "Credit Facility"), MGI agreed to provide to JOP:

a) a loan of up to €2 million for "working capital purposes" (the "Working Capital Facility"); and

b) a loan of €932,748 (referred to as the "Patio Homes Debt") to refinance a debt due from Valsa to La Caixa, which was secured on JOP's private residence, Patio Homes 12.

ii) Under the second facility (which is referred to as the "Putter Loan"), MGI agreed to provide to JOP:

a) a loan of €450,000 (the "Initial Loan"), which was to be used to refinance part of a debt due from V07 to Putter S.r.l ("Putter"), a Spanish company indirectly owned by JOP, which would enable Putter to pay taxes due to the Spanish tax authorities;

b) a further loan (the "Additional Loan") to enable Putter to discharge taxes which may become due if, on or before 30 June 2013, MGI had not sold the shares in Campo, or Campo had not sold the shares in V07, or V07 had not sold its assets to a third party.

102. Clauses 6 and 7 of the PSA also included provisions under which JOP agreed to draw down the Patio Homes Debt (under the Credit Facility) and the Initial Loan (under the Putter Loan) on 5 November 2012 and for MGI to make payments using the funds drawn down directly to La Caixa and the Spanish tax authorities at the direction of JOP to discharge the mortgage on Patio Homes 12 and the tax debt due from Putter.

103. The PSA also included provisions allowing for the set off against consideration due under the PSA of amounts due under the Credit Facility and the Putter Loan (clause 6.3) and amounts due in respect of other claims under the 2012 SPA (clause 8). Clause 8.1 was in the following form:

> 8.1 Notwithstanding the Purchaser's right to deduct amounts payable to JOP pursuant to clause 6.2, in the event that before any date on which any amounts are payable to JOP under this agreement ("Profit Share Consideration") becomes due ("Relevant Date"), the Purchaser shall have become entitled to assert against JOP any claim for breach of any provision of any of the Acquisition Documents ("Relevant Claim") the following provisions shall apply:
>
> 8.1.1 if the Relevant Claim has been settled by the Relevant Date but not satisfied in full by JOP, the Purchaser shall be entitled to deduct from the Profit Share Consideration an amount equal to the sum remaining due to the Purchaser in respect of the Relevant Claim and to treat its obligation to pay the Profit Share Consideration as being reduced pro tanto;
>
> 8.1.2 if the Relevant Claim has not been settled by the Relevant Date, the Purchaser shall be entitled to deduct from the Profit Share Consideration on the Relevant Date an amount equal to the amount claimed, which shall be a genuine pre-estimate by the Purchaser of JOP's liability in respect of the Relevant Claim. As soon as reasonably practicable following settlement of any Relevant Claims to which this clause relates, the Purchaser shall:

> 8.1.2.1 if the amount of the settled Relevant Claim is greater than or equal to the amount deducted, retain all of the money deducted; or
>
> 8.1.2.2 if the amount of the settled Relevant Claim is less than the amount deducted by the Purchaser, repay the amount in excess of the settled Relevant Claim to JOP as Profit Share Consideration,
>
> and in both circumstances the Purchaser shall be entitled to treat its obligation to pay the Profit Share Consideration as being reduced pro tanto by the amount equal to the settled Relevant Claim.

104. The PSA is expressed to be governed by the laws of England and Wales. In clause 16, the parties agree that the courts of England and Wales will have exclusive jurisdiction over disputes arising in connection with the PSA.

***Disclosure letter***

105. Also on 18 October 2012, the date of execution of the 2012 SPA, JOP provided a disclosure letter to MGI, which set out disclosures against the warranties and representations included in the 2012 SPA (the "2012 Disclosure Letter"). The main matters referred to in the 2012 Disclosure Letter were:

i) no tax returns had been filed and no taxes had been paid by either Soto or Campo for years after 2010;

ii) the approval of the B shareholders in Valsa had not been obtained (as required by the constitution of Valsa) for the arrangements under which Valsa secured the obligations of JOP under the loan agreement with Banif dated 26 March 2009;

iii) RCV's unilateral decision not to pay the community charges relating to the golf course;

iv) most of the bank facilities of Valsa, Vesa and V07 listed in schedule 1.2.2 of the 2012 SPA were already the subject of foreclosure proceedings;

v) RD Consulting (Mr Davila's firm) had announced that it would be issuing proceedings against V07 to recover €180,000 of outstanding fees for services in connection with obtaining the "declaracion de interes turistico" for the Castellar land; and

vi) V07 had not paid local taxes relating to the Castellar land for the years from 2008 to 2011 in the total amount of €50,124.44, which amount

would be increased by surcharges and default interest, and that foreclosure proceedings had started.

106. The 2012 Disclosure Letter is described as a "complement to" the 2010 Disclosure Letter entered into between JOP and TSG in relation to the 2010 SPA. There was some dispute between the parties as to whether or not the 2010 Disclosure Letter was provided to MGI in the context of the 2012 SPA so that matters disclosed in the 2010 Disclosure Letter should be treated as disclosed against the representations and warranties in the 2012 SPA.

107. In my view, it is clear that the 2010 Disclosure Letter was delivered to MGI as part of the 2012 Disclosure Letter with the intention that matters disclosed in the 2010 Disclosure Letter should be treated as incorporated within the 2012 Disclosure Letter. As I have mentioned, this treatment is reflected in the documents themselves – for example, the reference above in the 2012 Disclosure Letter to its being a "complement to" the 2010 Disclosure Letter. The 2010 Disclosure Letter is also included with the 2012 Disclosure Letter in the bible of documents for the transaction prepared by DLA. That treatment is also consistent with the surrounding circumstances. It was essential that the 2012 transactions were undertaken at considerable speed given the risk of bankruptcy and insolvency hanging over JOP and the companies at the time. MGI relied on the previous disclosure exercise as a means of shortening the process. For these reasons, in my view, the references in the 2012 SPA to the "Seller's Disclosure Letter" should be treated as a reference to the 2012 Disclosure Letter and the 2010 Disclosure Letter combined.

108. A similar point has been raised in relation to the other due diligence materials that were prepared for the 2010 SPA (including the due diligence reports from – DLA, KPMG and Schellenberg Wittmer). For similar reasons, I have concluded that the due diligence reports were made available to and relied upon by MGI in the context of the 2012 transactions. That conclusion is consistent with the commercial need for the transactions to be undertaken quickly, the involvement of Mr Spencer, and the structure of the transaction, involving a novation of the 2010 SPA. Furthermore, Mr Moxon in his witness statement referred to advice from DLA that the due diligence reports could be assigned to, and relied upon by, MGI.

### *The loan facilities*

109. The detailed terms of the Credit Facility and the Putter Loan are set out in separate agreed documents. Those documents repeat the provisions for the drawdown of the Patio Homes Debt (under the Credit Facility) and the Initial Loan (under the Putter Loan) on 5 November 2012 to which I have referred above.

110. The Credit Facility also includes a provision under which JOP instructs MGI to make payments to Lenz & Staehelin of €200,000 on 5 November 2012 and of €125,000 on 1 February, 1 May, 1 August and 1 November thereafter until certain invoices due from JOP to Lenz & Staehelin have been settled. These amounts are then treated as drawdowns under the Working Capital Facility.

111. The invoices to which this provision refers relate to fees due to Lenz & Staehelin for work done over a period from October 2010 to the time of the 2012 SPA. It was Mr Vermeuil's evidence, which I accept, that the outstanding amount of fees due to Lenz & Staehelin from the Ortiz-Patino family at this time was of the order of CHF922,000. Lenz & Staehelin reached a settlement in respect of these invoices with the estate of JOP for CHF600,000 in July or August 2013. No payment was ever made by MGI to Lenz & Staehelin under the Credit Facility.

## Events following the sale of Soto and Campo to MGI

112. Following the completion of the 2012 SPA, JOP resigned from the boards of all relevant companies. Mr Spencer was appointed as the sole director of Vesa and V07. He was also appointed as the President of Soto and Campo and President and managing director of Valsa. The precise dates of Mr Spencer's appointments vary because of the differing formalities in each case. Mr Spencer took charge of the day to day running of all of these companies.

### *Relations with RCV*

113. As I have set out above, relations between the golf club and the Valderrama Companies were at best strained. Many members of RCV were opposed to a takeover of Valsa to which Mr Spencer was to any extent a party. They were also aggrieved at the use of the assets of Valsa to support personal loans to JOP and loans to companies controlled by JOP. It is Mr Moxon's evidence that, following the completion of the 2012 SPA, RCV stopped paying the rent on the golf course with effect from November 2012. FOP's evidence is that this was not the case, but that the rent was paid into an "escrow account". I accept FOP's evidence. However, the rent due on the golf course was not available to Valsa at this time.

114. Furthermore, shortly after the completion of the 2012 SPA, on 7 December 2012, the B shareholders in Valsa, primarily the members of RCV, issued a "querela" to the examining magistrate of the court of Madrid alleging fraudulent application of the assets of Valsa to support loans made to JOP and other directors. The defendants were JOP, other directors of Valsa and Mr Spencer and Mr Moxon. The querela also alleged various criminal irregularities in the governance of Valsa including the increase of Valsa's debt burden above the

limit of 50% of the company's capital without the approval of the holders of the B shares in Valsa contrary to the company's bye-laws.

***MGI fails to make payments to JOP under the facilities***

115. Under the terms of the Credit Facility and the Putter Loan, payments were due to be made to settle the liabilities of JOP to La Caixa and to the Spanish tax authorities on 5 November 2012.

116. It was Mr Moxon's evidence that he had had a discussion with JOP in November 2012. Following that discussion, JOP understood that any advance from MGI under any of the facilities was subject to MGI securing a listing for its shares on the Channel Islands Stock Exchange, which could only take place in early 2013. JOP sent a letter to Mr Spencer and Mr Moxon on 20 December 2012 complaining about breaches of the 2012 SPA and in particular the failures by MGI to make the payments provided by it. Mr Spencer responded stating that MGI was just awaiting "the finalizing of the Fund Management Agreement and the Shareholders Agreement" after which the fund could be registered.

117. JOP died on 3 January 2013. His estate was governed by Swiss law. JOP's rights under the 2012 SPA and the PSA passed to COP.

118. JOP's complaint about MGI's failure to make payments under the 2012 SPA and the related facilities was subsequently taken up by his executors. There is, however, no evidence that any sums were ever advanced under either of the two facilities.

***The proposed listing of MGI shares on CISX***

119. Throughout this period, MGI was preparing to list its shares on CISX. A draft of a prospectus was filed with CISX on 3 January 2013. The main points that I derive from the draft prospectus are:

    i) the prospectus suggests that the intention was to raise sums of up to €250 million to invest in golf-related assets;

    ii) a company referred to as The Stripe Group (Guernsey) Limited is described as the asset manager; MGI (Guernsey) Limited as the fund manager;

    iii) Mr Spencer is listed as one of the directors;

    iv) the prospectus describes the acquisition of shares in Soto and Campo and the strategy for the exploitation of their assets, which includes:

        a) the maximization of revenue from the golf course;

b) the exploitation of the trade marks;

c) the residential development of plots adjacent to the golf course;

d) the disposal of the Castellar land;

v) the prospectus includes a valuation of the assets of Soto and Campo at approximately €65 million, which is allocated as to approximately €15.6 million to lease of the golf course, €18.4 million to the other real estate assets of Valsa and Vesa, €15 million to the Castellar land, and €16 million to the trade marks .

120. There is no explicit statement of the exit strategy in relation to the golf course. However, Mr Moxon explained in his evidence that the aim was to sell the golf course, subject to the lease at the end of the term of the fund, probably through a sale of shares in Soto. There was no intention to sell the golf course during the life of the fund as it was regarded as a key asset. I have accepted this evidence as it is consistent with the prospectus and with TSG's earlier proposals.

121. MGI also entered into an agreement with TSG relating to the management of the Valderrama Companies and the golf course. Mr Moxon resigned as a director of MGI to avoid conflicts in his role as a fund manager of the fund.

122. The proposed listing of shares in MGI on CISX, did not, however, proceed much further. It is MGI's case that this was for various reasons – including the worsening position in relation to liabilities of the Company (to which I refer below) and the ongoing litigation with the golf club – but also because MGI was not able to secure access to the historic books and records of the various companies.

***Access to books and records***

123. Under the terms of the 2012 SPA, JOP was obliged to make available the books and records to MGI. However, it is MGI's case that this was never done and that as a result, MGI was unable to obtain relevant opinions which were required in order to list its shares on CISX.

124. The books and records fall into two groups: those relating to the Swiss companies and those relating to the Spanish companies. It was Mr Moxon's evidence that the books and records were not provided to MGI on completion and, despite various attempts to retrieve them, the books and records were never recovered. The records and accounts then had to be reconstituted on the basis of available information in order to prepare for the sale of the shares in Soto and Campo to Zagaleta in 2015. I have accepted that evidence.

125. In relation to the Swiss companies, it is Mr Vermeuil's evidence that Lenz & Staehelin retained the books and records (but not the accounts) of Soto and Campo for a period whilst awaiting settlement of their fees. However, Lenz & Staehelin did not retain the books and records of the Spanish companies. The books and records relating to Soto and Campo were released to the Ortiz-Patino family or JOP's executors at some point in 2013 following the settlement of Lenz & Staehelin's fees.

126. The other evidence also supports Mr Moxon's account. There is documentary evidence to support his assertion that attempts were made to recover the books and records of all the companies, including correspondence with the executors of JOP's estate in 2013 and subsequently correspondence with FOP in 2014 (at the time of the discussion of a possible sale of some of the companies back to the Ortiz-Patino family). My conclusion is that the books and records were not provided to MGI. They were retained by the Ortiz-Patino family.

***Other difficulties in listing MGI shares***

127. In addition to the on-going legal proceedings under the querela and the difficulties obtaining the relevant books and records, MGI's plans to list its shares on CISX were also hampered by various other matters.

    i) The company had no income in order to service its debts as the golf club had not released the rental payments in respect of the golf course to it.

    ii) Various banks brought foreclosure proceedings in relation to debts of the Valderrama Companies. These included La Caixa, which began foreclosure proceedings in relation to JOP's former home, Patio Home 12 in 2013.

    iii) The companies were faced with various unforeseen bills from service providers who had been engaged by JOP including bills from Mr Collantes and Mr Morey's firms. (Mr Morey acknowledged that his fee of £127,667 was settled by MGI in July 2014. Mr Collantes acknowledged that his fee of €100,000 in respect of work done prior to the 2012 SPA was settled in May 2016.) In addition, Mr Davila's firm RD Consulting issued a writ of attachment against V07 for unpaid fees on 20 February 2013.

    iv) Various unpaid taxes also came to light. These included a liability in respect of the fee for the *interes turistico* in relation to the Castellar land; and a liability for unpaid local council taxes (IBIS), real estate taxes, outstanding community charges and outstanding VAT.

128. The evidence of the Claimant's witnesses (in particular, FOP and Mr Davila) was that MGI was, to an extent, the author of its own misfortune in this respect

as it failed properly to engage with the golf club, in relation to the dispute underlying the querela, with local banks or with local authorities. Mr Moxon disputes that evidence, but, given that on his own admission, the day-to-day management of the Valderrama Companies during this period was left largely in the hands of Mr Spencer, he could not speak directly to the point. For the most part, therefore, I accept the Claimant's evidence in this respect.

***Offers for shares in Soto and Campo***

129. MGI's strategy in relation to the investments in Soto and Campo changed from late 2013 to early 2014. It decided to seek purchasers for the companies and it engaged selling agents for this purpose.

130. As it became clear that MGI would not be able to pursue its initial strategy, a disagreement arose between MGI and TSG. The precise details of that dispute are not relevant to this case. However, the dispute was settled by agreement in June 2014, and the asset management arrangements with TSG were terminated. In the same month, Mr Spencer was removed as a director of MGI. Mr Moxon became a director with effect from 17 June 2014. He also became a director of the Valderrama Companies at or about the same time.

131. MGI received various indications of interest from a large number of potential buyers. However, approximately 15 potential buyers proceeded to do any significant due diligence. Of these, five submitted indicative offers. They included:

    i) GreenOak Real Estate Advisors LLP ("GreenOak") made an indicative offer subject to further due diligence dated 22 April 2014. This offer included an upfront cash payment of €32 million subject to further adjustments together with a share in the profit of any sale of the Castellar land to the extent that the price achieved was in excess of €15 million. This offer was made on a "debt-free/mortgage-free basis". At the time the estimated debts of the Valderrama Companies were €29.6 million;

    ii) Sunshine Insurance Group ("Sunshine") made an indicative offer of €54 million, subject to due diligence, for 80% of the shares in Soto and Campo free of all encumbrances. This offer was received at some time before March 2015. It was also on a debt-free/cash-free basis;

    iii) Diamond Living Limited ("Diamond Living") made an indicative offer reflected in a letter dated 14 April 2015 of €50 million for the shares in Soto and Campo subject to detailed due diligence. It is not expressly stated, but once again the assumption must be that this offer was also on a debt free/cash free basis.

132. Other offers were made by the Carlton Group and the David Lloyd Group.

133. Throughout this period, MGI, through Mr Moxon, was also engaged in discussions with the Ortiz-Patino family, in particular FOP, and their representatives regarding the possibility of the family purchasing some of the assets of Soto and Campo. An initial approach appears to have been made in July 2014 by the family through Mr Titus Kendall, one of JOP's executors. A non-disclosure agreement was signed on 19 October 2014. There were several meetings and discussions over the following months, involving at times FOP and COP. These discussions and correspondence included information about the valuation of assets and the progress of other offers and continued into 2015. The discussions did not lead to a formal offer being made.

134. Most of the indicative offers did not progress. Mr Moxon's evidence is that the bidders fell away for various reasons: Sunshine because an embargo had been put on its acquisition of further assets outside China by the Chinese Government; Diamond Living because it was put off by state of the relationship with RCV, which was reflected in the on-going proceedings under the querela; GreenOak because its offer was regarded as too contingent on future payments. Mr Moxon's evidence particularly in relation to the offer from Sunshine and Diamond Living was challenged. Although there is no documentary evidence to support it directly, I am prepared to accept his evidence in relation to Diamond Living. The querela proceedings were continuing at this time and it is natural that some bidders would be concerned about the process. As regards, the other offers, the only fact that I take from the evidence is that they were not pursued.

## The sale of Soto and Campo to Zagaleta

### *The Zagaleta offer*

135. On 20 August 2015, MGI also received an indicative offer from Zagaleta of €39.1 million for the shares in Valsa, Velsa and V07. It would appear from the short offer letter that this indicative offer was made after at least some due diligence. The offer was broken down as to €26.7 million for the shares in Valsa, €1.1 million for the shares in Vesa, and €10.3 million for the shares in V07. MGI accepted this offer.

136. Mr Moxon's evidence, which I accept, is that Zagaleta had some connections with members of RCV. The offer therefore held out the prospect that the difficulties arising from the continuing proceedings under the querela could be overcome. Mr Moxon also stated in his witness statement that MGI valued this offer at over €50 million for the shares in Soto and Campo. I cannot accept that evidence. Mr Moxon asserted in response to cross-examination that the Zagaleta offer was a "debt-free" offer. The offer extended only to the shares in Valsa, Velsa and V07. But the only assets of Soto and Campo were the shares in Valsa, Velsa and V07. On that basis, it is difficult to see that the offer is

worth anything more than its face value of €39.1 million, when translated into an offer for the Soto and Campo shares.

***The 2015 SPA***

137. After due diligence, MGI entered into an agreement with Zagaleta on 30 November 2015 (the "2015 SPA") for the sale and purchase of the shares in Soto and Campo.

138. In the following paragraphs, I have summarized some of the key provisions of the 2015 SPA.

139. The shares were sold "free of charge, encumbrance, and rights of third parties". It was a condition precedent to the sale and purchase of the Soto and Campo shares that debts due to MGI were released or extinguished (clause 1, clause 2.1, clause 3.1(iv), 2015 SPA).

140. Before the closing of the sale and purchase, Valsa undertook to prepare its annual accounts for the years 2011 to 2014, duly audited, and Vesa and V07 undertook to have prepared, approved and lodged in the Mercantile Registry their annual accounts for the years 2012, 2013 and 2014 (clause 3.1(iii)).

141. The consideration for the sale of the shares in Soto is expressed to be €20,639,025.90 and the consideration for the sale of the shares in Campo is expressed to be €1. The purchase price for the sale of the Soto shares was to be increased if Zagaleta or a third party exercised building rights on certain plots within 10 years of the date of contract (clause 4.1).

142. The purchase price for the Soto shares was to be paid as follows:

    i) €1,250,000 was paid either in advance or at the time of contract (clause 4.2.1(a));

    ii) €5,987,450.60 in cash at closing "by delivery of the bank cheques naming the payees which are listed in Annex 4.2.1(b)" (clause 4.2.1(b)). (The payees listed in Annex 4.2.1(b) are three creditors who had provided services to Soto, and MGI.);

    iii) €4,137,614.16 in cash at closing to MGI but retained "for the purposes of clause 8.1" in an escrow account operated by the notary (clause 4.2.1(c));

    iv) €8,863,941.14 is satisfied on closing "by means of the taking over by [Zagaleta] of the MGI Debt in accordance with and for the purposes of… clause 8.2" (clause 4.2.1(d));

v) €400,000 is to be paid within 5 years "by means of the handover of completed works of the Castellar Project at market price" and "subject to formal confirmation from Caixabank that the debt to that entity does not exceed €9,500,000" (clause 4.2.1(e)). (This amount is reduced if the debt to Caixabank exceeds €9,500,000.)

143. Clause 4.3 deals with adjustments to the purchase price as a result of debts of the companies (being Soto, Campo, Valsa, Vesa and V07).

i) The bank debt of the companies "with the exception of the Caixabank debt referred to in paragraph (e) of clause 4.2.1" (being the debt in relation to the Castellar land) was assumed to be €5,945,236.77, and any variation in the amount of this debt at closing gave rise to an upward or downward adjustment to the purchase price (clause 4.3.1).

ii) The non-bank debt of the companies "excluding the debts to RD Consulting, Arquitecto Tecnico and Castellar Municipality" was assumed to be €2,317,308.87, and any variation in the amount of this debt at closing gave rise to an upward or downward adjustment to the purchase price (clause 4.3.2).

iii) the debts to RD Consulting, Arquitecto Tecnico and Castellar Municipality were assumed to be €1,707,943.05, and any variation in the amount of this debt at closing gave rise to an upward or downward adjustment to the purchase price (clause 4.3.3).

144. In clauses 5.1 and 5.2 of the 2015 SPA, MGI makes various representations and gives various warranties in relation to the sale of the shares in Soto and Campo both at the time of contract and at the time of closing. The representations and warranties themselves are contained in Annex 5.1 to the 2015 SPA. It includes the following representations and warranties:

> 4.4. The books of account (i) are up to date: (ii) are maintained correctly and uniformly in accordance with the applicable Law; and (iii) contain complete and accurate data for all information which it is compulsory under the law to record therein.
>
> …
>
> 5.1 The capital of the Companies has been validly issued, taken up and totally paid up. The Seller is the owner of the SOTO Shares and the CAMPO ALTO Shares and indirectly of the VALSA Shares, the VESA Shares and the Valderrama 07 Participations, free of any charge, encumbrance or rights of third parties, except as provided in this Contract.
>
> …

10.1 Appendix 10.1 contains a precise and complete description of all the immovable property owned by the Companies ("Owned Immovable Property") and of the situation thereof. The Companies are not lessees of any immovable property whatsoever.

…

10.3 The items of Owned Immovable Property are free of charges and encumbrances, except as provided in Appendix 10.1. The said Appendix 10.1 also indicates the debt associated, at the date of the present Contract, with the charges and encumbrances on Owned Immovable Property.

…

10.4 Except as provided in Appendix 10.1, there are no suits or actions pending or possible in relation to the Owned Immovable Property. Except as provided in Appendix 10.1, the Owned Immovable Property is not subject to any enforcement or expropriation procedure nor has the commencement of any enforcement or expropriation proceedings such as to affect the Owned Immovable Property been considered. Appendix 10.4 contains an exact and complete description of all the items of immovable property which were owned by the Companies but the said ownership was lost in connection with proceedings for the enforcement of charges and encumbrances. The said Appendix 10.4 contains details of the debt which was paid in connection with the enforcement and of the part of the debt which the said enforcement did not cover and regarding which, at the date of the present Contract, the Companies and the relevant creditors are engaged in pending proceedings.

…

10.26 The rents under the Lease Contract have been paid to date; all the conditions and obligations contained in the Lease Contract or in any licence, permit or other document supplementing the Lease Contract, affecting either the lessor or the lessee, have been fulfilled and put into effect to date, with the exception of anything apparent from the Financial Statements and/or the present Contract and the Annexes thereto; there has been no waiver of any right of action deriving from any infringement and each Lease Contract is valid and fully effective. The lessee has an IBI debt which it has not paid. It has recognised this orally and a claim is being proceeded with. There is also a dispute as to who has to pay EUC Parques de Sotogrande. If the Seller makes the payment in advance but it is then recovered from the Lessee, that payment must be made over to the Seller, without any possibility of retention on any basis. The Company has the certificates recording exemption from

> retention regarding the lessees of immovable property for the financial years 2014 and 2015; nevertheless, the Club de Golf Valderrama effected a retention of EUR 45,095.17 in the financial year 2014; that sum, which was subject to retention, is free and totally recoverable by the Company from the tax authorities.
>
> …
>
> 12.1 Except as indicated in Appendix 12.1, the Companies are not party to or the subject of any litigation, arbitration proceedings, administrative or criminal proceedings, or process commenced by any regulatory body or autonomous body nor any other type of proceedings, either as plaintiff or as defendant or in any other capacity, and there is not in progress, nor is the commencement foreseen or imminent of any litigation, arbitration proceedings, administrative or criminal proceedings, or process commenced by any regulatory body or autonomous body nor any other type of proceedings initiated by or against the Companies and no fact or circumstance exists which might give rise to any of the actions mentioned or the commencement of proceedings against any director or employee (present or past) of the Companies as a result of any act or omission by them for which the Companies might bear subsidiary liability.
>
> …
>
> 21.1 Appendix 21 includes a true and complete list and a description of the indebtedness of the Companies (including that of VALSA, VESA, Valderrama 07 and the Swiss Companies) as at the date of the present Contract, including, with respect to each debt instrument, the total amount which must be paid thereunder for or on behalf of the Companies in order to comply with such debts. With the exception of the details given in Appendix 21, the Companies are not a party to or subject to any instrument which evidences any type of indebtedness.
>
> 21.2. Except as indicated in Appendix 21 or is otherwise apparent from this Contract, annexes, or the bank financing documents, the Companies are not guaranteeing or insuring any obligation or liability of the Seller or of any other person, and they do not have an express or implied obligation to assume joint and several or subsidiary liability in relation to third parties.

145. Clause 8.2 contains the provisions under which Zagaleta agrees to assume the liability for the "MGI Debt" in satisfaction of part of the purchase price. It is in the following terms:

> The Purchaser [Zagaleta], on the Date of Closing, shall take over the debt as regards principal, interest of any kind and commissions existing between the Seller and Banco Santander,

> S.A. (previously Banco Banif, S.A.) by virtue of the instrument recording a loan with a mortgage guarantee executed before the Notary of Madrid, Carlos Ruiz-Rivas Hernando, on 29 October 2012, under number 2129 of his protocol, which amounts to a total of EUR 8,863,961.14 (as recorded in the certificate issued by Banco Santander S.A., which is attached as Annex 8.2.1) ("MGI Debt"). The said taking over shall fully release the Seller…

The MGI Debt is therefore the debt of MGI originally due to Banif arising on MGI's acquisition of the shares in Soto and Campo in 2012. Annex 8.2.1. includes a certificate from Banco Santander listing debts due from MGI, Valsa and Vesa, which includes the MGI Debt.

146. The 2015 SPA is expressed to be governed by and to be interpreted in accordance with "ordinary Spanish law, without prejudice to any formalities which may have to be completed for the valid transfer of the shares of the Swiss Companies". The parties agree that any disputes that cannot be resolved by agreement "shall be submitted to the exclusive jurisdiction of the competent courts of the City of Madrid".

147. The Appendices to the 2015 SPA contain additional information. Some of these Appendices operate as disclosures against the various warranties and representations. For example:

i) Appendix 6 contains financial statements for all the companies.

ii) Appendix 10.1 lists the properties owned by the companies and the mortgages on them. These properties include the golf course, the two plots at Calle Colon, the Plot I complex, the two plots at Soto Alto and the Castellar land.

iii) Appendix 10.4 lists properties transferred as a result of mortgage foreclosure proceedings. It includes the transfer of the villa at Calle Fondo, 28 to Ruval SA and the transfer of properties at Calle Ebro Caixabank.

iv) Appendix 12 lists ongoing disputes and litigation. It includes: in relation to Vesa, the mortgage foreclosure proceedings brought by Banco Sabadell relating to the properties located on the Plot I complex; and, in relation to V07, the mortgage foreclosure proceedings brought by Caixabank relating to the Castellar land.

v) Appendix 13.4 lists the tax debts of the companies, which amount in aggregate to €398,858.22 owed by Valsa, €251,419.20 owed by Vesa, and €337.50 owed by V07.

vi) Appendix 21 lists the debts "Assumed by the Buyer". Although there are some discrepancies, the details of the debts in the Appendix are for the most part consistent with the amounts of the assumed debts in clause 4.3 with the addition of the various tax debts.

148. The 2015 SPA completed in December 2015 or early January 2016. The transaction was announced by Zagaleta on 7 January 2016.

149. The transaction with Zagaleta therefore valued the shares in Soto and Campo at approximately €40.12 million on a debt-fee/cash-free basis. MGI claims that the price paid by Zagaleta has been further reduced by payments for various contingent liabilities. There was no evidence of those payments before the court.

150. In 2017, the members of RCV agreed to purchase the A, C and D shares in Valsa from Zagaleta for €28 million. The sale and purchase of the shares was completed in 2018.

## THE VALUATION EVIDENCE

151. In support of his claims, the Claimant produced expert valuation evidence of the valuation of the real estate assets owned by Soto and its subsidiaries at the time of the agreement between MGI and Zagaleta for the sale and purchase of the Soto shares on 30 November 2015. The real estate valuation was produced by Mr James Allwood of Gesvalt.

152. The Claimant also produced expert valuation evidence of the valuation of the trade marks owned by Soto and Campo and their subsidiaries as at 30 November 2015. The trade mark valuation was produced by Mr Robert Sharp of Valuation Consultants Limited.

### The real estate valuation

153. Mr Allwood's valuation dealt separately with the land comprising the golf course and the land that was available for development.

154. Mr Allwood valued the land comprising the golf course on three different bases.

i) The first was a valuation of the fair value of the underlying real estate. Mr Allwood approached this valuation by applying a profits method of valuation on the basis that the land forming the golf course should be valued by reference to its trading potential. On this basis, Mr Allwood ascribed a valuation of €27.4 million to the real estate comprising the golf course as at 30 November 2015.

I have treated this basis of valuation as irrelevant for present purposes except to the extent that it demonstrated that the business of operating the golf course was sufficiently profitable that the operator of the golf course (RCV) would be able to pay the rent due under the lease. Valsa's interest in the land was not unencumbered. Valsa held the real estate subject to the lease in favour of RCV. Valsa was in no position to realize the trading potential from the land. RCV had the rights to do so.

ii) The second was a valuation of the fair value of the real estate subject to the lease to RCV, but on the assumption that RCV was the relevant purchaser. On this basis, Mr Allwood valued the real estate comprising the golf course at 30 November 2015 at €28.165 million.

Once again, I have treated this valuation as largely irrelevant for present purposes. Mr Allwood accepted in his report that this value was "totally hypothetical" in that it reflected RCV's position and the value to RCV of marrying together all the relevant interests. It did not reflect an amount that RCV would actually pay or that MGI could realistically hope to obtain on a sale.

iii) The third was a valuation of the fair value of the real estate subject to the lease to RCV, but on a sale to a third party purchaser. On this basis, Mr Allwood valued the real estate comprising the golf course at 30 November 2015 at €22.598 million.

I have treated this basis as most relevant for current purposes.

155. Mr Allwood approached this third basis of valuation by applying a discounted cash flow (DCF) approach to the rental payments due under the RCV lease. At the time of the transaction, the lease had 35 years unexpired and the rent was €855,200 per annum increasing each year by reference to the consumer price index. On that basis, he valued the remaining cash flows at €13.752 million. However, Mr Allwood increased this amount by a premium of €9.307 million to reflect the fact that the income stream was very secure. After an adjustment for transaction costs, he arrived at a fair value of €22.598 million.

156. Mr Knox KC criticised this basis of valuation. He referred to two other valuations that were in evidence: a report by KPMG which had been commissioned by MGI in preparation for the sale to Zagaleta in 2015; and a report prepared by CBRE in 2012 for MGI at the time of the 2012 SPA. The KPMG report valued the golf course subject to the RCV lease on a DCF basis at €13.339 million. The CBRE report had valued the golf course subject to the RCV lease at €13.46 million. He questioned why a third party purchaser would pay more than the fair value of the discounted cash flows as demonstrated by these valuations in order to acquire the land subject to the lease.

157. Mr Allwood defended his valuation vehemently. In short, he justified the premium that he applied to a simple DCF valuation on the basis that RCV was a good quality covenant (given the composition of its membership) and, given that RCV had paid a significant premium to acquire the lease and the on-going rent was significantly below the market rent, RCV was unlikely to default. This made the remaining income stream very secure, with a profile more equivalent to a secured bond.

158. I have accepted Mr Allwood's valuation of €22.598 million as a fair value of Valsa's interest in the golf course. The total of the remaining payments under the lease assuming no discount and without the increase by reference to indexation was well in excess of €29 million. Given the relatively low interest rates at the time and the application of indexation to rental income, I found his explanation credible in the absence of other expert evidence.

159. The second part of Mr Allwood's valuation related to the individual plots of land held by Valsa and Vesa that may have been available for development. Mr Allwood valued these plots on the basis of their residual value, that is the residual value that could be obtained by deducting anticipated development costs from comparable values for developed properties at the time. He attributed a fair value of €12.373 million to these plots as at 30 November 2015.

160. Mr Allwood's valuation extended to 10 plots of land, being the plots referred to in Appendix 10.1 of the 2015 SPA (excluding the golf course) with the addition of a plot referred to as plot number 680 which was at Loma de la Cierva y la Guillena. This plot was owned by V07 and so should not have been included in a valuation, which was intended to reflect the provisions of clause 3 of the PSA. He attributed a fair value of €1.977 million to this plot. So Mr Allwood's valuation of the interests of Valsa and Vesa was, in fact, a fair value of €10.396 million.

161. Once again, Mr Knox KC criticised the basis of Mr Allwood's valuation. He pointed to evidence that it was only possible to build one property on two of the plots, Calle Colon 1 and Calle Colon 3. He also referred to evidence from Mr Moxon that several of the plots – on Mr Moxon's evidence, up to five – were the subject of foreclosure proceedings at the time and the remaining plots were subject to mortgages which were taken on by Zagaleta under the 2015 SPA.

162. Mr Allwood accepted that, if only one villa could be built on the combined plots at Calle Colon 1 and Calle Colon 3 as the evidence showed, the value of that land would be reduced. Mr Allwood suggested that a discount of 35% might be applied to their combined value. Such an adjustment would reduce the overall valuation by €0.772 million to a fair value of €9.624 million for Valsa and Vesa's real estate interests (excluding the golf course). As regards, Mr Knox KC's other criticisms of the valuation, I have dismissed them. Mr Allwood was

instructed to value the real estate. His valuation did not take into account the associated liabilities of Valsa or Vesa or any other contractual limitations imposed on Valsa or Vesa in relation to them. Mr Knox KC's other criticisms of the valuation may affect the usefulness of the valuations for the purpose of this case – a point to which I will return later in this judgment – but they are not valid criticisms of Mr Allwood's valuation itself.

163. I therefore accept Mr Allwood's valuation, subject to the adjustments to which I have referred above. That valuation would suggest that the combined fair value of Valsa and Vesa's real estate interests as at 30 November 2015 was of the order of €32.222 million.

## The trade mark valuation

164. Mr Sharp valued the trade mark assets of Valsa, Vesa and V07 as at 30 November 2015 between €3.5 million and €4.6 million. He reached this valuation by taking the anticipated cash flows from the business plan prepared by TSG in 2011, extrapolating these cash flows forward to 2024, and deriving a net present value of the marks (as at November 2015) by discounting those cash flows at an appropriate discount rate.

165. Mr Knox KC noted that at an earlier stage in the process, Valuation Consulting had produced a valuation of the trade marks in the range of €1.6 million to €2.1 million. There were two key changes in the method of valuation between that initial report and the final report.

i) The first was that the initial report excluded 50% of the anticipated royalties based on the projections in TSG report on which the valuation was based. Mr Sharp explained that this was simply an error in the initial report, which was derived from various assumptions in the TSG report as to how the brand would be exploited.

ii) The other was that in testing the reasonableness of the royalty rates that were used in the TSG report, Mr Sharp had referred in his final report to a report prepared by MBLM for MGI in 2012 for the purpose of supporting its attempts to market to investors. The MBLM report suggested that a value of approximately €15 million could be placed on the brand, assuming a projected enterprise value of €55.6 million. The MBLM report suggested that the brand value could be approximately 27% of the enterprise value of the business. Mr Sharp had used the conclusions of the MBLM report in his final valuation, in part, to justify an increase in the ratio of the brand value to enterprise value from 8% to 15% used in the final report to check the results of his valuation based on the royalty rates.

166. Mr Knox KC suggested that the MBLM report was not a sound basis for the changes that were made in the preparation of the final report. I accept that criticism. The MBLM report lacks substance. However, the MBLM report was only used by Mr Sharp as part of his testing of his conclusions derived from the anticipated cash flows. The other comparables used by Mr Sharp showed brand values on average in the region of 20% of enterprise value. So Mr Sharp's use of 15% as his measure was already at a discount to that shown by his comparables. The real difference between the valuation in the initial report and that in the final report is the exclusion of 50% of the anticipated royalties in the initial report. I accept Mr Sharp's explanation that this was not justified and was corrected in his final valuation.

167. Mr Knox KC raised various other criticisms of the valuation.

    i) First, he attacked the use of the TSG report as the basis for the valuation. The TSG report was prepared for the benefit of potential investors. The cash flows shown in the report were largely aspirational.

    ii) Furthermore, the other brands used as comparables in the report were not true comparables: they were derived from businesses operating in very different sectors from the golf course market; and they were taken from established businesses. There was no track record for the exploitation of the Valderrama brand. Except for a short period when Mr Davila had been chief executive of the company (in the late 1990s and early 2000s), Valsa had not sought to exploit the brand.

    iii) Finally, the valuation did not take into account the restrictions on the use of the brand in the Framework Agreement and, in particular, the pre-emption rights in favour of RCV.

168. There is some merit in Mr Knox's criticisms. However, as Mr Sharp explained, he had little or no other information on which to base his valuation. The brand had not been previously exploited so there were no reliable cash flows on which to base his valuation and there were few publicly available comparable brands. He was, however, confident that appropriate adjustments had been made in the valuation to reflect these uncertainties and that the anticipated royalties on which the valuation was based were achievable. In the absence of other expert evidence, I accept his explanations.

169. Mr Sharp did accept that his valuation did not take into account the effect of the pre-emption rights in the Framework Agreement. In his view, it was not necessary for the pre-emption rights to be reflected in a brand valuation. I accept his evidence in terms of a simple valuation of the underlying asset although – as I believe Mr Sharp accepted – the existence of the pre-emption rights would have an effect on the value that Valsa could realistically expect to

achieve and to retain from any dealing in the marks (which would be taken into account on a sale of shares in Soto).

170. The other issue that I should note in relation to Mr Sharp's valuation is that he values not just the marks owned by Valsa and Vesa, but also those owned by V07. This is clear from the main body of Mr Sharp's report, and also from one of the Appendices to the report (Appendix E) which lists 67 trade marks owned by the Valderrama Companies, 19 of which are expressed to be owned by V07. This is not surprising given that, as I have described, clause 4 of the PSA (in contrast to clause 3) extends to payments received by V07 as well as payments received by Valsa and Vesa.

171. Subject to those issues, however, I accept Mr Sharp's valuation that the fair value of the trade marks owned by the Valderrama Companies as at 30 November 2015 was in the range of €3.5 million and €4.6 million.

**The relevance of the valuations**

172. I shall turn next to outline the claims brought by the Claimant in this case. Before I do, I should note that the expert valuation evidence is relevant to the Claimant's claims, to which I refer below, that he is entitled not only to a payment of 9% of the Net Profit that was achieved on a sale of shares in Soto and Campo, but also to 9% of the Net Profit could have been achieved but for MGI's breach of certain obligations – to which I will also refer later in this judgment – to maintain the value of the assets and obtain full value for them.

173. The Claimant's claims relate to the price paid for the shares in Soto and Campo. They are not formulated by reference to the price paid or the value of the underlying assets. A well-advised purchaser of the shares in Soto and Campo would take into factors other than the value of those assets in determining the price that it was prepared to pay for those shares including the liabilities of the companies and their subsidiaries and their rights and obligations under relevant agreements, such as the Framework Agreement. As both Mr Allwood and Mr Sharp accepted, their valuations did not reflect those factors.

**THE CLAIMS**

174. The Claimant makes the following claims based on breaches of the PSA.

    i) First, the Claimant claims that MGI is in breach of clauses 3.2.2 and 4.1.2.2 of the PSA in that MGI has failed to pay to the Claimant a sum equal to 9% of the Net Profit (as defined for the purposes of the PSA) resulting from the sale to Zagaleta in 2015 of the real estate assets owned by Valsa and Vesa and the trade marks owned by Valsa and Vesa and V07.

ii) Second, the Claimant claims that, in breach of clause 3.1 of the PSA, MGI failed to use reasonable endeavours to identify third party buyers for any and all of the real estate assets owned by Valsa or Vesa at the best saleable price.

iii) Third, the Claimant claims that MGI acted in breach of an implied term of the PSA by failing to take reasonable care to ensure that relevant loans were serviced and maintained, and the maximum values of the assets of, and share prices in, Soto, Campo, Valsa and Vesa were otherwise maintained.

175. In relation to the breach of contract referred to at [174(i)] above, the Claimant claims that he is entitled to 9% of the Net Profit actually achieved by MGI on the sale to Zagaleta. In relation to the breaches of contract referred to at [174(ii)] and [174(iii)] above, the Claimant claims that he is entitled to damages in the amount of 9% of the Net Profit that would have been achieved by MGI, but for the breach by MGI of those terms. The Claimant put forward the expert valuation evidence in support of this claim. The Claimant also asserts that MGI is not entitled to claim any deduction in computing the amounts due to the Claimant under the PSA to the extent that those deductions arise from MGI's own breach of that implied term.

176. MGI contests each of the Claimant's claims. Even if the claims have some substance:

i) MGI alleges that a number of valid deductions fall to be made from the sale price in computing the Net Profit under clauses 3 and 4 of the PSA;

ii) MGI asserts that it is entitled to set-off amounts against the Claimant's claims under clause 8.1 of the PSA as a result of misrepresentations and breaches of warranty by JOP in connection with the sale of shares in Soto and Campo to MGI in 2012.

177. At one stage in these proceedings, MGI also asserted that the Claimant was estopped from arguing that the assets of the Valderrama Companies were worth more than price offered by FOP in 2014. This argument was not pursued. MGI also claimed that that it was entitled to set-off amounts advanced under the Credit Facility and the Putter Loan against payments due under the PSA. No amounts were advanced under these facilities and so I have not addressed this argument further.

## THE CLAIM FOR 9% OF NET PROFIT ON SALE TO ZAGALETA

178. I will begin with the basic claim for 9% of the Net Profit actually achieved on the sale of the shares in Soto and Campo to Zagaleta.

179. The first question that I must address is the construction of the contract and whether the provisions of clause 3 and clause 4 can extend to an indirect sale of the relevant assets through, in the case of real estate assets, a sale of shares in Soto or, in the case of trade marks, a sale of shares in Soto and/or Campo.

## Clause 3.2 of the PSA

180. I will address the application of clause 3 in the first instance.

181. I have set out the provisions of clause 3 in full above. In summary, clause 3.2 of the PSA applies where "any Real Estate Asset" is sold to a third party "on an arm's length basis". In those circumstances, clause 3.2 (and, in particular, clause 3.2.2) requires MGI to account to JOP for 9% of "the Net Profit attributable to any such sold Real Estate Asset".

    i) "Real Estate Asset" for these purposes is defined in clause 3.1 as "any and all of the real estate assets owned by Valsa and Vesa". The definition does not therefore extend to the Castellar land, which was owned by V07.

    ii) The "Net Profit" attributable to a sold Real Estate Asset is determined by deducting from "the price paid for the relevant Real Estate Asset" the permitted deductions set out in clause 3.3 for (a) financing secured or used in relation to the "Real Estate Asset"; (b) sales commission relating to it; (c) taxes arising from the sale of the Real Estate Asset or the distribution of the profit to MGI; (d) professional fees incurred in connection with the relevant Real Estate Asset; and (e) direct costs associated with the development or enhancement of the relevant Real Estate Asset.

### *The parties' submissions*

182. Mr Blaker KC, for COP, submits that it is clear that clause 3.2 is intended to apply to any direct or indirect sale of the real estate assets of Valsa and/or Vesa and so would extend to a case in which the ultimate ownership of real estate assets of Valsa and Vesa is transferred to a third party (Zagaleta) through a sale of the shares in Soto.

183. He makes the following points.

    i) Mr Blaker KC says that the PSA does not distinguish between the sale of an underlying asset and the sale of the entity owning such an asset. He refers in particular to the final sentence of clause 3.7, which provides "For the purposes of this clause, transfers of any Real Estate Asset shall include any asset transfers as well as any share transfers of the company owning any such Real Estate Asset." (Similarly, in relation to the trade

marks, clause 4.6 provides "transfers of any Valderrama Trade Mark shall include any asset transfers as well as any share transfers of the company owing any such Valderrama Trade Mark.")

ii) The parties would not have included a provision in the PSA which could be circumvented by MGI simply selling the shares in Soto. There is no evidence that the parties intended such an artificial distinction. This is particularly the case given that the companies in this case held no assets other than their interests in the real estate assets and the trade marks.

iii) MGI acknowledged in the draft listing particulars that the golf course was an anchor asset and would not be sold. There would have been serious practical difficulties in splitting up the land owned by the companies. The parties did not contemplate that the real estate itself would ever be sold. The parties would not have included a provision under which no payment would ever be due.

iv) Mr Blaker KC places some weight on the obligation on MGI, in clause 3.1 of the PSA, to find potential purchasers for "any and all" of the real estate assets of Valsa and Vesa. This must include the golf course. As a commercial matter, and as both parties were aware, the only practical means of selling the golf course was to sell the shares in Soto.

a) MGI would never have considered selling the key real estate asset, the golf course, other than by selling the shares in a holding company because of the existence of the pre-emption rights over the golf course in favour of RCV.

b) In any event, a sale of the land itself was commercially unfeasible. The golf course was owned by Valsa. Soto owned only 94% of the shares in Valsa, the remaining 6% being owned by RCV. Any sale by Valsa of the golf course would have likely involved a dispute between the majority and minority shareholders, given the antipathy between RCV's members and Mr Spencer.

c) It was equally unfeasible for Soto to sell its 94% shareholding in Valsa because RCV also enjoyed preferential rights to purchase those shares.

d) It must have been clear to the parties (including Mr Spencer, who was intimately familiar with the Valderrama Companies) that it would have been commercially unworkable and unrealistic to transfer a significant number of residential assets themselves rather than the entire shareholding of Soto and Campo. The

Valderrama golf development was a package as a whole. A sale of certain assets themselves to a myriad of different buyers who would use them their own purposes would wreck the whole development and destroy its overall value.

v) MGI treated the transfer of the shares in Soto as a transfer of the real estate assets in its own documents and for the purpose of the proceedings.

a) The Interim Management Agreement between MGI and TSG refers in the recitals to "The Business (via the transfer of 100% of the shares of Soto), has on this date been transferred from its previous ultimate owner and beneficiary (Mr Jaime Ortiz Patino) to [MGI]". The "Business" clearly includes the real estate assets.

b) MGI treated the transfer of the shares in Soto as a transfer of the real estate assets in its response to the Claimant's Request For Information in these proceedings.

c) In a letter dated 26 April 2019, the MGI's solicitors, having taken "detailed instructions" provided a lengthy response to the Claimant's solicitors as to why no sums were payable under the PSA without any reference to the argument that clause 3.2 could not apply to a transfer of shares in Soto.

184. Mr Knox KC for MGI submits that the wording of clause 3.2 is plain and unambiguous. JOP's (and therefore COP's) right to any payment under clause 3.2 applies only on the sale of a real estate asset itself. There is no room for any other interpretation of the plain words of the contract.

185. He makes the following additional points:

i) Both parties were professionally advised. This is a professionally drawn contract, forming part of the documentation for a complex transaction. The wording is a deliberate choice by a draftsman who was clearly aware of the difference between sales of shares and of underlying assets.

ii) The PSA itself distinguishes between a sale of shares in a company and a sale of the underlying assets. Clause 5.1, which provides for payments to be made on a sale of Campo, V07 or the Castellar land, deals separately with what is to happen in the case of a sale of shares in Campo, or shares in V07, or the assets owned by V07.

iii) The distinction is also recognized in clause 3 of the Putter Loan (which was an annexure to the PSA and referred to in clause 6.1 of the PSA).

iv) The other provisions of clause 3 do not naturally apply to a sale of shares in Soto.

a) The formula for determining the "Net Profit" attributed to a sold Real Estate Asset does not apply easily to a sale of shares – it does not even give a deduction for the price that MGI paid for the shares. The deductions in clause 3.3 are drafted in a manner which relates to the underlying assets.

b) The obligation on MGI to identify buyers in clause 3.1 makes little sense if applied to shares in Soto, an asset which MGI had just acquired.

c) Clause 3.4 refers to payments being made following the sale of "each relevant Real Estate Asset", which can only apply to sales of the underlying real estate assets.

v) Clause 3.7, on which the Claimant relies, is dealing only with internal reorganizations within the Soto group. It is a "boiler plate" clause (which is repeated in the context of other assets in clause 4 and clause 5). It is designed to prevent the artificial avoidance of the obligation to make a payment by the transfer of real estate assets to subsidiaries which could then be sold. The existence of clause 3.7 demonstrates that the primary obligation in clause 3.2 is limited to asset sales.

vi) There is good commercial rationale for this construction. MGI is under an obligation to "identify" third party buyers for the real estate assets at the best saleable price in clause 3.1. Although there was no obligation on MGI to sell if it did not want to do so, JOP gained an obligation on MGI to look for buyers, which might lead to sales and might lead to payments under clause 3.

## ***Discussion***

*Case law*

186. Both parties referred me to the judgment of Lord Neuberger in *Arnold v Britton* [2015] UKSC 36 ("*Arnold*"). They both argued that their construction of the PSA was consistent with the principles of contractual construction set out by Lord Neuberger in that case. The case concerned the construction of the provisions of a lease. Lord Neuberger said this (at [15]).

> 15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood

> them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words… in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions…

187. In addition to the matters identified at [15] of his judgment, Lord Neuberger went on to list seven factors, which he took into account in that case. The last of those factors was specific to the construction of the clause relating to service charges in that case. The remaining factors to which Lord Neuberger referred related primarily to reliance upon "commercial common sense" and the "facts and circumstances known or assumed by the parties" as aids to the interpretation of a particular provision (*Arnold* [17]-[22]). I have set them out below.

> 17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances (e.g. in *Chartbrook*, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.
>
> 18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in *Wickman Machine Tools Sales Ltd v L Schuler AG* [1974] AC 235 , 251 and Lord Diplock in *Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios)* [1985] AC 191 , 201, quoted by Lord Carnwath at para 110, have to be read and applied bearing that important point in mind.

20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

21. The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.

22. Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is *Aberdeen City Council v Stewart Milne Group Ltd* [2011] UKSC 56, 2012 SCLR 114 , where the court concluded that "any … approach" other than that which was adopted "would defeat the parties' clear objectives", but the conclusion was based on what the

parties "had in mind when they entered into" the contract (see paras 17 and 22).

188. I have been referred by the parties to various other authorities on the principles of contractual construction – in particular, the Supreme Court decisions in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 and *Wood v Capita Insurance Services Limited* [2017] UKSC 24, and the Court of Appeal decision in *Britvic plc v Britvic Pensions Limited* [2021] EWCA Civ 867. I have taken those authorities into account, but there was nothing in the judgments in those cases to suggest that I cannot, for present purposes, safely confine myself to references to the principles as set out by Lord Neuberger in *Arnold*.

189. In accordance with those principles, in construing the provisions of clause 3, I am required to identify the objective meaning of the language that the parties have chosen to express their agreement or, as Lord Neuberger put it, "the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean". I am required to focus on the meaning of the words that the parties have used "in their documentary, factual, and commercial context".

190. Having done so and having reflected upon the principles as articulated by Lord Neuberger and the additional factors listed by him in *Arnold* (at [15], and [17]-[22]), I agree with Mr Knox KC that clause 3.2.2 provides for a payment to JOP following the sale of the underlying real estate assets of Valsa or Vesa. It does not apply following a sale of shares in a holding company, whether that be Soto or Valsa or Vesa, holding the real estate assets.

191. My reasons are set out in the following paragraphs.

*The natural and ordinary meaning of clause 3.2*

192. First, in my view, that construction is the natural meaning of the words of clause 3.2. The provisions of the clause are directed at sales of the underlying assets and not at the sale of shares in a company holding those assets or a sale of the shares of a holding company of the asset holding company.

    i) The definition of "Real Estate Asset" used in clause 3.2 is found in clause 3.1. It focusses on the assets "owned by" Valsa and Vesa. The provisions of clauses 3.2 and 3.3 are littered with references to the underlying assets – for example the reference to "any Real Estate Asset" in clause 3.2, and the references to "the relevant Real Estate Assets" throughout clause 3.3.

ii) The definition of "Net Profit" used in clause 3.2 is found in clause 3.3. It incorporates a formula which can only easily be applied by reference to the sale of the underlying assets.

a) As Mr Knox KC points out, the starting point for that formula is the price paid for the relevant Real Estate Asset by the third party purchaser without any deduction for the price paid for the shares in Soto by MGI.

b) The deduction permitted for bank facilities and other financing operates only by reference to debts secured or used in relation to particular Real Estate Assets and does not include any reference to the bank facilities or debts of any of the companies.

c) The permitted deduction for taxes, once again, only naturally applies to taxes on the disposal or transfer of the underlying asset. There is no reference to taxes that may be payable on the disposal of shares in one of the companies. Furthermore, the reference to taxes on the distribution of profit "to the Purchaser" (i.e. MGI) assumes that profit will be realized within the corporate structure (by Valsa or Vesa) and then distributed to MGI.

d) The reference to a deduction for development costs again focusses on the development of the underlying assets.

e) The very existence of separate provisions for deductions in calculating Net Profit for trade marks suggests that the focus is on the underlying assets themselves.

193. Whilst I accept, as Mr Knox KC did, that it might be possible to construe the provisions of this clause so that it has effect in relation to an indirect sale of real estate assets through a sale of shares in one of the companies, I cannot accept that the natural reading of the clause is to extend its provisions to such an indirect sale. The clause does not expressly refer to the possibility of an indirect sale of the assets (through a sale of one of the holding companies) and no attempt is made to deal with some of the matters that would be required to be addressed if it were to do so. For example, no adjustment is made for other assets and liabilities that may be present in any of the companies. The wider interpretation requires the court to read in other provisions (for example, in relation to the apportionment of the consideration for a sale of shares) which are simply not there. This is a professionally written contract. If the wider construction for which Mr Blaker KC argues had been intended, I would have expected such provision to have been made. I can only conclude that clause 3.2.2 was not intended to apply to an indirect sale.

*Other provisions of clause 3*

194. Mr Blaker KC focussed on the obligation that is placed on MGI by clause 3.1 of the PSA to seek third party purchasers for "any and all" of the real estate assets of Valsa and Vesa.

195. In short, Mr Blaker KC's point is that there must be some consistency between clause 3.1 and clause 3.2. Clause 3.1 extends to "any and all" of the real estate assets of Valsa and Vesa, which must include the golf course and land close to the golf course, which the evidence suggests, was needed to allow the golf course to be used as a venue for professional tournaments. There were legal and commercial difficulties, of which the parties were aware, of selling these real estate assets separately, and as a result the only practical means of realizing any value from them was to sell the shares in Soto.

196. In support of this submission, Mr Blaker KC also pointed to the fact that, following its purchase of the shares in Soto and Campo, MGI made no real attempt to develop and sell the individual plots of land owned by Valsa and Vesa. All the offers that MGI sought and received, and that are in evidence, are for the purchase of shares in Soto and/or Campo. This, says Mr Blaker KC, demonstrates that the parties themselves understood clause 3.1 to extend to a sale of shares in Soto. They must also be taken to have intended that clause 3.2 should extend to a sale by MGI of shares in Soto. If not, and the narrower interpretation of clause 3.2 was adopted, the practical effect was that a payment was only likely ever to become due to JOP under clause 3.2 in relation to sales of land by Vesa.

197. I do not agree. In my view, these points cannot overcome the natural and ordinary meaning of the words of the words of clause 3.2. This is a professionally written contract, and, in my view, the wording is clear.

198. As regards the rationale for clause 3.1, I accept Mr Knox KC's suggestion that it provided some comfort to JOP that MGI would seek to realize some value by developing and selling units promptly in a manner that may give rise to payment to JOP under clause 3.2. That explanation is not entirely satisfactory in that the obligation under clause 3.1 is wider and extends to "any and all" real estate assets – and so includes the golf course for which there was no real prospect of a separate sale – but that explanation seems preferable to the violence that Mr Blaker KC's interpretation would do the language of clause 3.2 (and other provisions of the PSA).

199. In any event, I do not accept that the facts and circumstances that arose after the sale of Soto and Campo to MGI justify the conclusion that MGI always intended to sell the Soto and Campo shares holding all the real estate assets. At the time that it entered into the 2012 SPA (and the PSA), MGI's plan as evidenced by

the draft prospectus — and similar to the draft prospectus produced by TSG before it — was to establish a fund that would generate profits, at least in part, through the development and sale of the properties on the land owned by Valsa and Vesa. That plan fell apart quickly following the completion of the 2012 SPA and the PSA and, for the reasons that I have described, MGI was forced to change strategy and to seek to sell shares in Soto and Campo. That change had the effect of rendering clause 3.2.2 (and clause 4.1.2.2) of the PSA redundant. That change may not have been anticipated by the parties in their agreements, but that is not a reason to depart from the natural and ordinary meaning of the words of the agreement. This is not a case, such as that described in Lord Neuberger's sixth point in the passage from *Arnold* that I have set out above (*Arnold* [22]), where it is clear what the parties would have intended in those circumstances. The drafting of clause 3.2 simply does not accommodate a sale of shares in Soto.

200. Furthermore, the other provisions of clause 3 support the narrower reading. Clause 3.4 refers to amounts due under clause 3.2 being paid to JOP "within 30 days of Valsa or Vesa receiving in clear funds the full purchase price". This is a reference to proceeds of disposal of the underlying assets being received by Valsa or Vesa. It does not naturally apply to a sale by MGI of shares in Soto, where the proceeds of disposal would be received by MGI.

201. I should also address Clause 3.7 specifically. I have set out the provisions of this clause above, but it will assist my explanation if I set out its provisions again. It is in the following form.

> No amounts shall be payable in accordance with this clause 3 in the event that the Purchaser reorganises the Purchaser Group, so that any Real Estate Asset is transferred within the Purchaser Group or to any company in any way connected or associated to the Purchaser. If, however, following any such reorganisation any Real Estate Asset is subsequently transferred to a third party buyer, the provisions of this clause shall apply and JOP (or any of his assignees as the case may be) shall be entitled to any amounts payable in accordance with this clause 3.7. For the purposes of this clause, transfers of any Real Estates Asset shall include any asset transfers as well as any share transfers of the company [owning] any such Real Estate Asset.

202. Clause 3.7 does two main things:

i) The first is to allow MGI to undertake an intragroup reorganization of the Valderrama Companies involving transfers of Real Estate Assets without triggering the payment provision in clause 3.2. This is the effect of the first sentence in the clause.

ii) The second is to provide for the continued operation of clause 3 (including the payment provision in clause 3.2) following such a reorganization irrespective of which company in the group then holds the assets which are subject to the clause. This is the effect of the second sentence of the clause.

203. Mr Blaker KC relies on the final sentence of clause 3.7. He says these words apply to the entirety of clause 3 so that the obligation on MGI in clause 3.2 also extends to an indirect sale of the real estate assets by virtue of a sale of the shares in Soto. I disagree. In my view, the final sentence of clause 3.7 is intended to refer only to the provisions of clause 3.7 itself for the reasons I have given below.

204. Clause 3.7 is a standard clause. It is repeated in very similar form in clauses 4 and clause 5 – the provisions which relate to sales of trade marks and the Castellar land (see clauses 4.6 and 5.3). However, allowing for the differences in the wording that are required to reflect the nature of the different assets that are dealt with in those clauses, there is one noticeable difference. In each of clause 4.6 and clause 5.3, the penultimate sentence – which deals with the application of the relevant provisions following a reorganization – ends with the words "any amount payable in accordance with this clause" (my emphasis). The final sentence of each clause begins "For the purpose of this clause 4.6…" or "For the purpose of this clause 5.3…" (again, my emphasis). In clause 3.7 on the other hand, the penultimate sentence ends "any amount payable in accordance with this clause 3.7" and the final sentence begins "for the purposes of this clause".

205. On their terms therefore, it might appear that the final sentences of clauses 4.6 and 5.3 are limited in their application to the provisions of clauses 4.6 and 5.3 themselves whereas the final sentence of clause 3.7 – despite the remainder of clause 3.7 being in fundamentally the same terms as the other two clauses – applies to the entirety of clause 3. In my view, the different drafting of clause 3.7 is simply an error – and an error which "has no relevance to the issue of interpretation" that I am asked to resolve (*Arnold* [18]).

206. The penultimate sentence should end with a reference to "this clause" – as it is referring to the payment obligation in clause 3.2 and there is no payment made "in accordance with clause 3.7". The final sentence should begin "For the purposes of this clause 3.7" in a manner that is consistent with the equivalent provision in clauses 4.6 and 5.3 so that the application of the final sentence is limited to the provisions of clause 3.7.

207. I am confirmed in this view by the remainder of the drafting of the provision. The final sentence in clause 3.7 refers to "transfers of any Real Estate Assets". The only references to Real Estate Assets being transferred in clause 3 are in

clause 3.7 and clause 3.8 (the notification provision). The provisions of clauses 3.2 and 3.3 refer instead to Real Estate Assets being "sold" to third party buyers; clause 3.4 refers to the "sale" of relevant Real Estate Assets.

208. I conclude therefore that the final sentence of clause 3.7 is limited in its application to the provisions of clause 3.7 and is not of a wider application. Furthermore, that construction makes commercial sense. As I have mentioned, one of the effects of clause 3.7 (second sentence) is to extend the provisions of clause 3 – including the payment obligation in clause 3.2 – to transactions involving the Real Estate Assets "following [a] reorganization". The purpose of the final sentence is to prevent MGI from circumventing the provisions of clause 3, and in particular the payment provision in clause 3.2, by parcelling Real Estate Assets into companies and selling the shares in those companies to third party buyers without triggering the payment obligation in clause 3.2. The existence of clause 3.7, if anything, demonstrates that the focus of clause 3.2 is on the disposal of the underlying assets themselves and not on a disposal of shares in Soto.

*Other provisions of the PSA and related documentation*

209. The other provisions of the PSA and related documentation also tend to support the narrower view.

    i) Clause 5 of the PSA provides for payments to JOP relating to disposals of the Castellar land. It contains specific provisions which deal separately with a sale of shares in Campo, a sale of shares in V07 and sales of the assets of V07 (i.e. the Castellar land itself).

    ii) The provisions of the Putter Loan, which was executed as part of the same transaction, refer separately to the sale of shares in Campo, the sale of shares in V07, and the sale of the assets of V07 to a third party.

    These documents were all drafted at the same time and intended to be coherent. If the draughtsman of clause 3.2.2 had intended its provisions to apply to an indirect sale of real estate assets through a sale of shares in Soto, Valsa or Vesa, the provisions would have been drafted similarly to those in clause 5 or in the Putter Loan specifically to accommodate that possibility.

*The factual and commercial context*

210. The commercial context also supports the narrower reading of the clause. The PSA has to be seen against the backdrop of the facts and circumstances at the time of the contract. At that time, MGI's intention was to list its shares on CISX. The draft prospectus for the listing of those shares discloses that the intention was that the fund would last for approximately five years, in the course of which the Valderrama golf course and its rent would be retained by MGI, but that MGI

would develop the various plots of land which Valsa and Vesa held next to or near the golf course into villas or residential apartments. The development of the plots would yield the return for the investors. The land owned by Campo would be "land banked" and sold within three or four years.

211. JOP and his advisers would have been well aware of these proposals as the financing of the transaction with JOP was dependent upon it. Indeed, in his evidence, Mr Collantes acknowledged that he and JOP were aware of the proposals. The purpose of clause 3.2 was to allow JOP to participate (alongside the investors in MGI) in the profits from the development of the plots of land held by Valsa and Vesa next to or near the golf course. The same approach was taken with the other assets of the group that were largely unexploited at the time of the sale. JOP was given separate rights to participate in the exploitation of the trade marks (under clause 4) and a right to participate in the profits of the Castellar project (in clause 5), in the latter case, whether or not that profit was realized on a sale of one of the companies or the land itself. The provisions of the PSA were, in effect, an "anti-embarrassment clause" designed to allow JOP to participate in profits made from those assets.

212. As Mr Blaker KC pointed out, as a practical matter, given the existence of the pre-emption rights in favour of RCV, the sale of the golf course could only be undertaken through a sale of the shares in Soto. The effect of the construction that I have placed on the provisions of clause 3.2 is that JOP did not have an effective right to participate in the potential sale of the golf course at the end of the life of the fund. However, the golf course was a very different asset. It was not going to be sold during the life of the fund. Its value was largely fixed by reference to the value of the rent payable under the lease of the golf course to RCV, which would for the most part be used to finance the debt which MGI took on to finance the acquisition. It was unlikely to increase significantly over the life of the fund as a result of the rights in favour of RCV.

*Commercial common sense*

213. Mr Blaker KC made various points, many of which go to the underlying commercial rationale of the PSA. In short, he says that it does not make commercial sense that a payment is not due to JOP in relation to a sale of the shares in Soto, which directly involves a transfer of the ultimate ownership of the real estate assets.

214. It may be that some criticism could be made of the commercial consequences of the transaction for JOP. However, it has to be remembered that at the time of the transaction, JOP was in a perilous financial position. He was in a poor bargaining position. He had to sell even if the terms may not have been particularly favourable to him.

215. Even if this was a "bad deal" for JOP as some of the Claimant's witnesses suggested, it is not the role of this court to save commercial men and women from the consequences of the deals that they have done. Unless there is some mitigating factor — for example, a mistake or duress, none of which is pleaded in this case — the function of this court is to give effect to the contracts that they have made. JOP was a businessman. He was advised by a plethora of professional advisers. In my view, on this point, the terms of the contract are unambiguous and the court's job is to apply them.

## Clause 4.1 of the PSA

216. Similar issues arise in relation to the claim for payment under clause 4.1.2.2 of the PSA and my conclusion is the same. I will deal with it briefly.

217. I have set out the provisions of clause 4 in full above. In summary, clause 4.1 of the PSA applies where Valsa, Vesa or V07 receives any payment in relation to the sale of "the Valderrama Trade Mark" to a third party "on an arm's length basis". In those circumstances, clause 4.1.2.2 requires MGI to account to JOP for 9% of the "Net Profit" attributable to the payment.

218. The Net Profit attributable to the payment is determined in accordance with clause 4.2.1 by deducting from the price paid by the third party any amount attributable to the "relevant Valderrama Trade Mark" including "without limitation" any amounts in respect of (a) professional fees and disbursements, (b) advertising and sponsorship costs, (c) on-going maintenance fees, and (d) brand development fees.

219. The wording of clause 4 is to a material extent similar to that of clause 3 and the submissions of the parties in relation to the construction of clause 4 were similar to those in relation to clause 3: Mr Blaker KC argues that it extends to an indirect sale of the marks through a sale of shares in Soto; Mr Knox QC submits that it can only apply to a sale of the marks themselves. For similar reasons to those that I have given in relation to the claim under clause 3.2.2, in my view, clause 4.1.2.2 does not apply on a sale of the shares in Soto.

220. I would note the following specific points in relation to the drafting of clause 4.

    i) Clause 4.1 only applies where Valsa, Vesa or V07 receives any payment in relation to the sale of a relevant trade mark, which supports the construction that I have placed on clause 4.1.2.2.

    ii) Although the wording is not the same – clause 3.3 is limited to the specific expenses that are in the sub-clauses whereas the opening words of clause 4.2.1 allow a deduction for any costs attributable to the trade marks including "without limitation" – the general words governing the

deductions that are allowed in computing Net Profit (as defined in clause 4.2.1) still betray a focus on the underlying trade marks. The specific deductions from the payment that are to be taken into account in determining the Net Profit once again more naturally apply to the sale of the marks themselves.

iii) The timing of any payment to JOP under clause 4.1 is set out in clause 4.3.1. It requires payment to be made "within 30 days of Valsa or Vesa (as appropriate) receiving in clear funds the full purchase price". It is only apt to apply to a sale by Valsa or Vesa of relevant trade marks and not to a sale of shares in Soto by MGI.

## Conclusions

221. For the reasons that I have given, JOP is not entitled to a payment under clause 3.2.2 of the PSA or clause 4.1.2.2 of the PSA in relation to a sale of shares in Soto. The Claimant's claim for such a payment fails.

## CLAIMS FOR 9% OF THE UNDERVALUE

222. The Claimant's claim for 9% of the Net Profit that would have been achieved on a sale of shares in Soto and Campo at fair value is formed on two bases.

i) The first is that MGI is in breach of its obligation under clause 3.1 of the PSA to use its reasonable endeavours to identify third party buyers for the real estate assets owned by Valsa or Vesa "at the best saleable price".

ii) The second is that MGI is in breach of an implied term of the PSA requiring MGI to take reasonable care to service and maintain the loans to the business, and otherwise maintain the maximum value of the assets and the shares of Soto, Valsa, Vesa, Campo, and V07.

223. These claims did not involve any assertion that MGI would or could have obtained a better price by selling the individual properties or trade marks, or that, by selling the shares in Soto and Campo, MGI was acting in breach of the 2012 SPA or the PSA. They were based on the assertion that, but for the breach of either or both of these obligations, MGI would have obtained a higher price for the shares in Soto and Campo and that the Claimant would have been entitled to a greater payment under clause 3.2 or clause 4.1 of the PSA.

224. The Claimant's claims for 9% of the Net Profit that would have been achieved on a sale of shares in Soto and Campo at fair value are therefore dependent, in the same way as the basic claim, upon the application of clause 3.2 and clause 4.1 of the PSA to a sale of the shares in Soto and Campo to Zagaleta. As I have

come to the view that the basic claim fails, it follows that these claims too must fail.

225. I have, however, heard full argument on these matters and, in case the matter proceeds further, I have recorded below my conclusions on these issues albeit briefly. In doing so, I should also record that my explanation reflects the fact that the parties' arguments in relation to these claims proceeded on the assumption that the obligations in clauses 3.2 and 4.1 extended to a sale of shares in the holding companies. For the reasons that I have given above, in my view, that is not a permissible construction of the contract.

## Breach of clause 3.1 of the PSA

### *The parties' submissions*

226. In relation to the obligation under clause 3.1 of the PSA, Mr Blaker KC argues that the obligation in clause 3.1 goes beyond an obligation to use reasonable endeavours to identify third party buyers, but extends to an obligation on MGI to pursue sales to the potential buyers.

227. In summary, Mr Blaker KC's submissions are as follows:

i) The obligation to use "reasonable endeavours" required MGI to continue using endeavours to obtain the best possible sale price for the assets until all reasonable endeavours had been exhausted (*Yewbelle Limited v London Green Developments Limited* [2006] EWHC 3166 (Ch) at [123]);

ii) MGI had failed to do so. Several buyers were identified, but their offers were not pursued. MGI did not obtain the best sale price; the price on the sale to Zagaleta was £8 million less than the price achieved by Zagaleta on the subsequent sale of Valsa alone to RCV and also less than the arms' length price at 2015 as determined by the expert reports.

228. Mr Knox KC for MGI says that MGI's obligation under clause 3.1 was limited to search for buyers as soon as possible and at the best saleable price. Having identified buyers in 2013 and 2014, there was no obligation to sell the real estate assets to any of them. MGI was entitled to sell to Zagaleta without regard to the PSA. There was no reason for MGI not to seek the best saleable price for the sale of shares in Soto and Campo.

### *Discussion*

229. I have set out my views on the construction and purpose of clause 3.1 in the context of my analysis of the claim for 9% of the "Net Profit" actually achieved by MGI on the sale to Zagaleta in 2015. I acknowledge that, in that context,

there is no evidence of MGI having taken any steps to identify buyers for the underlying real estate assets of Valsa and Vesa. Those plans, which were part of its plans to list its shares on CISX, fell apart in 2013.

230. That having been said, on the assumption that the reference in clause 3.1 to identifying buyers of the "Real Estate Assets" can be read as Mr Blaker KC contends i.e. as extending to identifying buyers not only for the assets themselves but also for the shares in a holding company (such as Soto) that directly or indirectly holds those assets, as regards the scope of the obligation in clause 3.1, I agree with Mr Knox KC. The obligation on MGI was to use reasonable endeavours to identify buyers as soon as possible and at the best saleable price. There was no obligation on MGI under clause 3.1 to sell the assets.

231. That construction accords with the natural meaning of the words of clause 3.1. It is also consistent with the commercial background. JOP was in a weak bargaining position and was not in a position to insist upon some control over the manner in which the assets were to be managed after the sale as Mr Blaker KC's interpretation would suggest. The provision provided JOP with some limited comfort that MGI would follow through with its plans to sell the assets.

232. In any event, in my view, MGI was not in breach of that obligation. The precise extent of the obligation to use "reasonable endeavours" has to be determined by reference to what was reasonable in the circumstances of MGI's business (see, for example, *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7 at [41]). The extent of the obligation therefore has to take into account the context in which this obligation was intended by the parties to operate.

    i) Following the completion of the 2012 SPA, MGI took steps to pursue its plan to list its shares on CISX. Those plans, which were understood by all the parties including JOP, involved raising funds from investors and using those funds to develop the properties. It would always have taken some time to list the shares, raise the funds, develop the properties, and sell them. JOP would have understood that was the case at the time of the 2012 SPA.

    ii) Little more than one year after completion of the 2012 SPA, MGI took the decision to drop its plans to list its shares on CISX. It decided instead to search for buyers for shares in Soto.

    iii) MGI took active steps to pursue those plans. It appointed several agents to identify buyers of the business. (Indeed, one of the Claimant's complaints is that MGI appointed too many agents and incurred excessive fees in doing so.) Several potential buyers expressed an

interest in the purchase of the shares. MGI pursued various options for the sale, but was left with the option of the sale to Zagaleta.

## Breach of an implied term of the PSA

### *The parties' submissions*

233. In summary, Mr Blaker KC submits that it is necessary to imply a term into the PSA requiring MGI to take reasonable care to service and maintain the loans and otherwise maintain the maximum value of the assets of the Valderrama Companies.

234. Mr Blaker KC says that such a term should be implied on the grounds that it was necessary to give the contract business efficacy (*Marks & Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited* [2015] UKSC 72 ("*M&S*")) for the following reasons.

i) It was always envisaged that MGI would be a temporary owner of the assets. It was for this reason that the PSA included the obligation in clause 3.1 for MGI to identify buyers as soon as reasonably possible at the best saleable price.

ii) JOP had a continuing interest in the business through his right to a payment under clause 3.2 of the PSA. This was the reason for the obligation on MGI in clause 3.8 of the PSA to notify JOP punctually following the transfer of any real estate asset.

iii) In the circumstances, it was contrary to commercial common sense to allow MGI to permit the assets to deteriorate as it would undermine the commercial rationale of the PSA.

iv) MGI's position, following the completion of the 2012 SPA, was equivalent to that of a mortgagee in possession; MGI was obliged to preserve the assets and sell them at the best possible price (*Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349 and *AIB Finance Limited v Alsop* [1997] 4 All ER 677).

235. The effect of MGI's breach of the implied term was that:

i) JOP (and therefore the Claimant) was entitled to damages in an amount equal to the amount of the payment which would have been due to him under clause 3.2 of the PSA but for the breach (i.e. 9% of any undervalue arising on the sale to Zagaleta) calculated by reference to the value given by the expert reports;

ii) MGI was not entitled to any deduction in the calculation of the "Net Profit" for the purposes of clause 3.2 of the PSA arising from its own breach of the implied term.

236. Mr Knox KC submits that no such term can be implied.

i) The obligation placed on MGI under the PSA was deliberately limited. MGI acquired the assets. It was entitled to manage those assets as it saw fit and in its own interests.

ii) There was no need for an implied term. The contract makes commercial sense without the need for any implied term. MGI had no interest in allowing the value of the assets to deteriorate.

iii) The valuations imposed by the expert reports took no account of the position in which MGI found itself. The assets produced no income, other than the rent on the golf course, and MGI had to sell in order to limit the losses that it was making in 2015.

***Discussion***

237. Mr Blaker KC referred me to the judgment of Lord Neuberger in *M&S*, in which Lord Neuberger (*M&S* [18]) referred to the summary of the conditions that must be met for a term to be implied into a contract that is found in Lord Simon's judgment in the Privy Council case of *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 52 ALJR 20 ("*BP Refinery*"). In that case, Lord Simon said (at page 26):

> [F]or a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

238. Having referred (*M&S* [19]-[20]) to Sir Thomas Bingham MR's comments in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 ("*Philips*") and in *The APJ Priti* [1987] 2 Lloyd's Rep 37 – in which Sir Thomas Bingham counselled courts to resist the temptation, with the benefit of hindsight, "to fashion a term which will reflect the merits of the situation as they then appear" noting that "it is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it" (*Philips*, p482) – Lord Neuberger went on to set out (*M&S* [21]) six observations on the application of the tests as set out by Lord Simon in the *BP Refinery* case:

> First, in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408 , 459, Lord Steyn rightly observed that the implication of a term was "not critically dependent on proof of an actual intention of the parties" when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting. Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Fourthly, as Lord Hoffmann I think suggested in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 , para 27, although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied. Fifthly, if one approaches the issue by reference to the officious bystander, it is "vital to formulate the question to be posed by [him] with the utmost care", to quote from *Lewison, The Interpretation of Contracts* 5th ed (2011), para 6.09. Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence.

239. The other members of the Supreme Court agreed with Lord Neuberger's summary of the principles. Lord Carnwath expressed a different view of the implications of the Privy Council decision in *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, but the distinction is not relevant here. It is clear from *M&S* that the process of implying terms into a contract is subject to different and more stringent rules than the process of construing the meaning of the words used by the parties in the contract. The approach of the courts to the implication of terms remains highly restrictive.

240. In this case, in my view, there is no case for an implied term of the kind suggested by Mr Blaker KC. It cannot be said that the business efficacy requires

the introduction of the term or that contract lacks commercial or practical coherence without the implication of the term.

i) Whilst I accept that JOP had a continuing interest in the assets maintaining or increasing in value as a result of his payment rights under the PSA, the fact that his right to deferred contingent consideration might be prejudiced if the assets were to fall in value and as a result MGI might not achieve a profit on their future realization does not justify the implication of a contractual term that imposes positive obligations on MGI to maintain the value of the relevant assets and to continue to service the related debts. The contract gave JOP a right to payments calculated by reference to the proceeds of future sales of the assets as part of the consideration for the sale of the Soto and Campo shares. It did not give JOP a right to a payment even if MGI made a loss. MGI had sufficient interest in the maintenance of the value of the assets without the need to impose any additional contractual obligation.

ii) Even if – contrary to the view that I have expressed above – clause 3.2 should be interpreted so that a payment obligation can arise on the sale of shares in Soto, the fact remains that the 2012 SPA was a contract for the sale of the shares in Soto and Campo. As part of the consideration for the sale of those shares, JOP received a right to payments calculated by reference to the proceeds of future disposals of the assets, but he had no continuing say in the management of the assets. The PSA is not a "quasi-partnership" as Mr Blaker KC submitted in argument. It provided for certain contingent payments by way of additional consideration for the shares in 2012. All that is required to give business efficacy to those payments is a provision defining the conditions under which the payment obligation arises (clause 3.2), a provision to define the quantum of the payment (clause 3.3) and a provision specifying the date of payment (clause 3.4). Nothing further is required.

241. I regard Mr Blaker KC's submissions that MGI should be regarded as in a similar position to a mortgagee in possession in a similar light.

242. For these reasons, I reject Mr Blaker KC's submission that a term should be implied into the PSA requiring MGI to take reasonable care to service and maintain the loans and otherwise maintain the maximum value of the assets of the Valderrama Companies.

## DEDUCTIONS FROM NET PROFIT

243. I should now turn to the arguments relating to possible deductions from any amount due in respect of the claims. These arguments took up a significant part of the hearing.

244. As a starting point, I should note that both clause 3.2.2 and clause 4.1.2.2 of the PSA permit a set-off against any payments due under those clauses for amounts due to MGI under clause 6.2 of the PSA. That is a reference to amounts still outstanding under the credit facilities which were to be made available by MGI to JOP under the terms of the 2012 SPA. No amounts were in fact advanced under those facilities and so the only deductions from the payments due under clause 3.2.2 and clause 4.1.2.2 are those set out in clauses 3 and 4 themselves.

## The parties' submissions

245. On the assumption that the claims for payment under clause 3.2.2 and clause 4.1.2.2 of the PSA can extend to the proceeds of disposal of shares in Soto, Mr Knox KC, on behalf of MGI, argued that MGI was entitled to deduct significant amounts from the amount received by MGI on the sale of shares in Soto and Campo to Zagaleta in computing the "Net Profit" for the purposes of those clauses. Mr Knox KC asserts that these deductions are of such an amount that, in any event, MGI made a net loss on its investment in the Valderrama Companies and so no amount is due to JOP under clause 3 or clause 4.

246. MGI claims that various expenses fall within clause 3.3.1 of the PSA as "bank facilities, or other financing, secured on, or utilised in relation to" any real estate asset.

    i) Within this category, MGI claims a deduction for all debts incurred by MGI to acquire shares in Soto and Campo. This includes not just the bank debts and facilities included within the "Assumed Debts" and the "Completion Debt" as defined in the 2012 SPA, but also the other third party debts listed in Schedule 1.2.2 to the 2012 SPA to which I referred earlier. Mr Knox KC argues that all of these debts should be included in their entirety notwithstanding that a lot of them relate to the shares in Campo which does not hold indirectly any "Real Estate Assets" as defined in the PSA because those shares were acquired as part of the same deal as the acquisition of the Soto shares. As I have described above, these debts amount in total to approximately €20.2 million.

    ii) MGI also claims to be able to deduct any amounts paid to Banif and to JOP to discharge the debts of JOP in order to acquire the shares in Soto and Campo under clause 3.3.1. These amounts include the loan facility from Banif (of approximately €8.86 million) and the amount paid to JOP to enable him to settle the balance of the debts due to Banif (of approximately €3.5 million), which together form the Net Banif Debt Amount of approximately €12.45 million.

iii) MGI also claims to deduct within this category the debt due at the time of the sale of Soto and Campo shares to Zagaleta in 2015. In this category, MGI includes:

a) debts which, under the 2015 SPA, MGI was obliged to discharge from the sale proceeds;

b) the debts of the Valderrama Companies which were assumed to be due at the time of the 2015 SPA and are recorded in Appendix 21 to the 2015 SPA and referred to in clause 4.3.1 of the 2015 SPA (amounting in aggregate to €15,445,236.77, of which €5,945,236.77 related to debts of Valsa and Vesa and €9,500,000 related to debts of V07); and

c) the debt of MGI to Santander referred to in clause 4.2.1(d) and clause 8.2 of the 2015 SPA which was assumed by Zagaleta in satisfaction of part of the purchase price (being the remainder of the debt incurred by MGI from Banif to acquire the Soto and Campo shares in the amount of €8,863,961.14).

There is an element of double-counting in some of these claims. As I understand it, at least as far as these debts represent the same amounts, in effect, as those assumed or incurred by MGI as part of the acquisition of the Soto and Campo shares in 2012, MGI does not seek to deduct those amounts again. However, MGI does assert that all of these debts should be allowed as a deduction if the correct time at which to take into account liabilities in computing Net Profit is the time of the transaction with Zagaleta rather than the acquisition of the shares from JOP. The total amount of all the debts in this category is €24,309,197.91.

247. MGI also makes various claims for deductions from the computation of "Net Profit" under clauses 3.3.4 and 4.2.1.1 of the PSA for professional fees incurred "in connection with" a relevant real estate asset or "attributable to" a relevant trade mark.

i) In this category, Mr Knox KC includes legal and accounting fees, due diligence costs and other professional fees relating to the acquisition of Soto and Campo, such as fees from DLA, Schellenberg Wittmer, KPMG and Grant Thornton, in total amounting to approximately €721,000, and costs of property valuations undertaken by KPMG and CBRE, amounting to €121,440.26.

ii) Mr Knox KC includes the professional costs incurred during the period in which MGI held the Soto and Campo shares such as: costs of €90,000 for a trade mark valuation undertaken by MBLM for the proposed listing

of MGI shares on CISX; fees paid to TSG as asset manager being in total €762,898 (including a settlement amount of €500,000 paid under the consent order with TSG); and listing fees paid to CISX in the amount of €352,349.18.

iii) Mr Knox KC also includes professional costs incurred in relation to the sale of the Soto and Campo shares to Zagaleta in 2015. These include: costs of sales agents (€1,450,000); costs of transaction accountants (€139,600); the costs of a real estate tax report (€10,600) and legal fees on the sale of shares in Soto and Campo to Zagaleta (€844,850).

The total deductions within this category amount to approximately €4.49 million.

248. In addition, MGI claims to deduct the following expenses:

i) various expenses which it says are attributable to the companies at the time of the acquisition of the shares in Soto and Campo from JOP, many of which are included in Schedule 1.2.2 to the 2012 SPA. These include fees to Mr Davila's company, fees due to Mr Collantes, fees of Mr Morey, various architects' fees, as well as fees of other professionals which MGI says it has had to bear and which, Mr Knox KC submits, fall within clause 3.3.4 or clause 4.2.1 of the PSA;

ii) taxes due to several Spanish authorities, including VAT, IBIS (property tax), community charges and planning charges attributable to the *interés turístico* designation for the Castellar land, most of which are attributable to periods before the acquisition of the Soto and Campo shares by MGI, which Mr Knox KC submits are "taxes relating to… the relevant Real Estate Asset" within clause 3.3.3 of the PSA;

iii) Swiss stamp taxes due on the sale of shares in Soto and Campo to Zagaleta in 2015 (€355,000), which Mr Knox KC submits also fall within clause 3.3.3 of the PSA.

249. The Claimant accepts that MGI is entitled to claim some deductions under clause 3.3 and clause 4.2.1 of the PSA in calculating "Net Profit". Mr Blaker KC argues that the total amount of those deductions, other than in relation to bank debt, should be €937,615.02. He raises objections to many of the deductions claimed by MGI on one or more of the following grounds.

i) A deduction should not be allowed for expenses that are not properly evidenced.

ii) A deduction should only be given for expenses that have been incurred by or suffered by MGI. No deduction should be available for debts or

expenses that, for example, have been assumed by Zagaleta pursuant to the 2015 SPA.

iii) A deduction can only be claimed for expenses that fall within the descriptions in clauses 3 and 4 of the PSA. No deduction is therefore available for costs attributable to Campo, V07 or the Castellar land because Campo and V07 do not hold directly or indirectly any relevant assets and the Castellar land is not a "Real Estate Asset" as defined for the purposes of the PSA. For similar reasons, no deduction should be available for costs that are attributable to MGI itself, such as, listing fees paid to CISX.

iv) No deduction should be allowed for fees and expenses incurred in relation to the acquisition of shares in Soto and Campo. This is because clause 10.3 of the 2012 SPA provides that each party should bear its own fees and expenses incurred in connection with the 2012 SPA. For this reason, for example, due diligence costs relating to the 2012 SPA should not be deductible.

## Discussion

250. As I have mentioned, in my view, the provisions of clause 3.3 and clause 4.2.1 of the PSA do not naturally apply to an indirect sale of relevant assets through a sale of shares in Soto. However, if I am wrong on that point and the sale of any "Real Estate Asset" of the "sale of any Valderrama Trade Mark" can encompass an indirect sale, I agree with Mr Knox KC that clause 3.3. and clause 4.2.1 have to be read in manner that is consistent with that construction. But that does not mean – as Mr Knox KC appears to suggest – that any and all expenses incurred or to be incurred by MGI or the Valderrama Companies can be taken into account for the purposes of determining "Net Profit" under those clauses.

251. I will begin with some of Mr Blaker KC's more general points on the application of clause 3.3 of the PSA.

i) I agree with Mr Blaker KC that a deduction should not be allowed for expenses that are not properly evidenced.

ii) I also agree with Mr Blaker KC that these provisions cannot extend to costs that are attributable to Campo, V07 or the Castellar land. Clause 3.3 (and clause 3 more generally) only relates to a sale of "Real Estate Assets". The only "Real Estate Assets" were owned by Valsa and Vesa. "Net Profit" in clause 3.3 is defined by reference to costs attributable to "Real Estate Assets"; the types of expenses that can be taken into account (in sub-clauses 3.3.1 to 3.3.4) are described by reference to

"Real Estate Assets". The same applies to the definition of "Net Profit" in clause 4.2.1. The Valderrama Trade Marks were owned by Valsa and Vesa. Although the wording of the individual categories of expenses in sub-clauses 4.2.1.1 to 4.2.1.4 does not refer specifically to the Valderrama Trade Marks, it is clear from the opening wording that the clause refers only to costs attributable to those trade marks.

iii) For similar reasons, I agree that no deduction should be available for costs that are attributable to MGI itself.

iv) Although this is less clear from the wording of the PSA itself, I also agree with Mr Blaker KC that, if clause 3.3 is to make any commercial sense in this context, the relevant costs have to be borne by MGI or by one of the Valderrama Companies during MGI's period of ownership. In particular, clause 3.3 cannot extend to costs or expenses which remain with the Valderrama Companies and are assumed by a purchaser (Zagaleta) on the sale of the Soto shares. Those costs would be reflected in a reduction in the price of the Soto shares themselves and to allow a deduction for them in the calculation of "Net Profit" would, in economic terms, allow them to be taken into account twice in the computation.

252. I will now turn to the scope of the specific provisions of clauses 3.3. and 4.2.1.

253. Sub-clause 3.3.1 is perhaps the most unclear in this context. For the reasons that I have given, in my view, this provision (together with the other sub-clauses) cannot extend to financing which is a liability of one of the Valderrama companies and which remains in place after the sale of the Soto shares to Zagaleta. However, subject to that point, if a wider reading of clause 3.2 is required as Mr Blaker KC contends, I agree with Mr Knox KC that a similarly broad interpretation needs to be given to the sub-clauses of clause 3.3 where their wording permits. That having been said, I cannot accept Mr Knox KC's attempts to shoehorn all outstanding liabilities of the Valderrama Companies into the scope of 3.3.1. The sub-clause relates to bank debts and financing costs and not to outstanding liabilities to service providers, such as professional advisers.

254. As regards financing costs, sub-clause 3.3.1 most naturally applies to financing secured on relevant Real Estate Assets which was discharged out of the proceeds of sale of those assets (through the sale of Soto shares to Zagaleta). However, there is nothing in the wording of this sub-clause that requires a distinction to be made between financing that was in place before the acquisition of the Real Estate Assets by MGI (through the purchase of the Soto shares) or that was put in place for the purpose of the acquisition of the Real Estate Assets (through the purchase of Soto shares) or for that matter financing incurred during the period that MGI held the Soto shares. All those costs may fall within

the description of financing "secured on or utilized in relation to" Real Estate Assets. Furthermore, given that the only assets held by the Soto sub-group in the period in question were real estate assets and trade marks, the presumption must be that all financing costs incurred by Soto and its subsidiaries in this period fall within sub-clause 3.3.1 unless the costs are assumed by Zagaleta under the 2015 SPA or specifically relate to assets that are not sold under the 2015 SPA. A similar approach would have to be taken to financing costs incurred by MGI except for those costs that are incurred solely for the purpose of financing MGI itself or the proportion of its financing costs that are attributable to its holdings in Campo and V07, and the Castellar land.

255. Sub-clause 3.3.2 (sales commissions) is limited in its application to the costs incurred in selling the Real Estate Assets. However, I do not accept Mr Blaker KC's suggestion that a deduction is only available for the costs of one selling agent. There is no such limitation on the face of the wording.

256. Clause 3.3.3 (taxes) on the other hand appears to be limited on its wording to tax costs arising on the sale of relevant Real Estate Assets or costs of distributing the proceeds of such sale to MGI. Even if the provision can, on a wider reading of clause 3.3, be taken to include, for example, transfer taxes payable on the transfer of shares in Soto, it does not extend to on-going tax costs incurred by the companies (such as local property taxes or VAT).

257. Clause 3.3.4 (professional costs) and clause 3.3.5 (development costs) are not so limited and would appear to extend to costs incurred throughout MGI's ownership as well as, in some cases, costs incurred by the Valderrama companies prior to MGI's ownership which have been discharged during that period.

258. Once again, adopting a broad reading, the wording of sub-clause 3.3.4 can encompass professional costs incurred for the purpose of the acquisition of the Real Estate Assets (through the purchase of Soto shares) as well as costs incurred during the period that MGI held the Soto shares. Mr Blaker KC says, however, that such an interpretation would be contrary to clause 10.3 of the 2012 SPA which provides that all fees and expenses incurred by in connection with the 2012 SPA and "the Transaction" (i.e. the sale and purchase of the Soto and Campo shares) shall borne by the party that incurs those fees or expenses.

259. I do not accept Mr Blaker KC's submission. Clause 10.3 of the 2012 SPA is dealing with the question as to which party bears the immediate costs of the sale and purchase of the Soto and Campo shares in 2012. It provides that those costs should lie where they fall. Clause 3.3 of the PSA is determining the amount of an element of the consideration for the sale and purchase of the shares. It is not, to my mind, inconsistent with clause 10.3 of the 2012 SPA for sub-clause 3.3.4 of the PSA to allow MGI a deduction in computing its "Net Profit" for the costs

that it has had to bear, in particular, if I am adopting a broad interpretation of clause 3.3, as I am.

260. In the above analysis, I have concentrated on the principles underlying the specific provisions in clause 3.3. The parties adopted the same approach and, for the most part, did not argue their cases by reference to clause 4.2.1. In passing, I note, however, that all the sub-clauses of clause 4.2.1 appear to extend on their wording to the entire period of ownership of the Soto shares by MGI.

261. I have set out in an Appendix to this judgment a table showing the costs and expenses for which MGI claims to deduct amounts under clauses 3.3 and 4.2.1. These costs and expenses are taken from a schedule produced by Mr Knox KC. I have to say that the amounts of these costs and expenses, or indeed whether they were capable of being claimed at all, changed several times during the course of the hearing. Mr Knox KC produced several versions of his schedule. I have identified in the Appendix the amounts which I understood to be the final amounts as claimed by MGI. Amounts which MGI claimed at some point in the proceedings but later withdrew are identified as "Not claimed".

262. The table also shows the amounts accepted by the Claimant as valid deductions from the computation of "Net Profit" in clauses 3.3 and 4.2.1 and the amounts which, adopting the principles that I have set out above, I would allow to be taken into account for the purpose of determining the amount of "Net Profit". I have also included in the table very brief notes to identify the basis on which any amounts would be allowed as a deduction (by reference to the relevant sub-clause of clause 3.3) or the reasons why any amount would not be allowed. There are several costs or expenses shown in the table that are attributable to both Soto and Campo. In those cases, where the cost is otherwise in principle deductible, I have simply allowed a deduction for 50% of the relevant costs in the absence of any other basis for making an appropriate apportionment.

263. On that basis the total amount allowed as a deduction would be €11,706,518.64 (including bank debts). This is on the assumption that clause 3 and clause 4 of the PSA can be read to require a payment on an indirect sale of the Real Estate Assets and Valderrama Trade Marks through a sale of shares in Soto. This amount does not include any set-off that would be available in respect of MGI's claims for misrepresentation or breach of warranty, to which I will now turn.

## MISREPRESENTATIONS AND BREACHES OF WARRANTY

264. The remaining issues that were argued before me focussed on MGI's various claims to set off amounts against the Claimant's claims under clause 8.1 of the PSA in respect of misrepresentations which MGI asserts were made by JOP prior to the 2012 SPA and/or breaches of warranties contained in the 2012 SPA.

## MGI's claims in outline

265. I have set out the provisions of clause 8.1 of the PSA above. In summary, it allows MGI to set any liability of JOP for breach of any provision of the transaction documents against any liability of MGI to make a payment under the PSA. In a case where JOP's liability has been quantified or agreed, MGI is entitled to deduct the relevant amount from the amount due under the PSA. In a case where JOP's liability has not been quantified or agreed, MGI is entitled to deduct "a genuine pre-estimate" from the amount due under the PSA and provision is then made for adjustment payments when the precise amount is determined.

266. As with the claims for deductions, MGI's position fluctuated during the hearing and some its claims for set-off were withdrawn. At the time of the hearing, MGI's remaining claims were:

    i) first, that JOP acted in breach of clause 2.5 of the 2012 SPA (the obligation to provide "all reasonable assistance" to MGI in relation to the completion of the 2011 annual accounts of Valsa, Vesa and V07) by failing to provide MGI with access to the books and records of the companies;

    ii) second, that in breach of the representation and warranty in clause 4.14 of the 2012 SPA (legal proceedings), JOP failed to disclose that investigations were on-going at the time of the 2012 SPA which would lead to the issue of the querela, the existence of which, MGI say, was in part the cause of MGI's inability to list its shares on CISX;

    iii) third, that in breach of clause 4.9(l) and (n) of the 2012 SPA (licences and authorizations), JOP failed to disclose that a fee was payable to the town of Castellar for planning consents granted in relation to Castellar land, which would become payable if and when V07 sought to develop the Castellar land;

    iv) fourth, that in breach of clause 3.8(a)(ix) and 4.8(a)(ix) of the 2012 SPA (additional liabilities), JOP failed to disclose various additional actual and contingent liabilities including but not limited to the fee payable to the town of Castellar for planning consents granted in relation to Castellar land.

267. I will summarize the parties' arguments on those claims and the issues arising from them in some more detail below, but first I will address the Claimant's arguments on the application of Swiss law to the claims for set-off under clause 8.1 of the PSA.

## Application of Swiss law

268. As I have explained above, clause 8.1 of the PSA permits a set-off of amounts claimed or entitled to be claimed under the other transaction documents. MGI relies on a set-off for claims or potential claims under clauses 2.5, 3 and 4 of the 2012 SPA by way of set-off.

269. The 2012 SPA is governed by Swiss law and claims under the 2012 SPA are subject to the exclusive jurisdiction of the courts of Geneva. The potential application of Swiss law is referred to in the pleadings in this case. In its Amended Reply, the Claimant pleads, in relation to the claims for set-off, that "the allegations are not a defence to this claim, should have been brought in the courts of Geneva, would have been statute barred and would have been governed by Swiss law".

270. The potential application of Swiss law was also addressed at the costs and case management conference before Deputy Master Glover on 22 June 2021. In his order following the costs and case management conference, Deputy Master Glover provided for the parties to consider whether it was necessary to instruct an expert in Swiss law and, if they considered it was necessary, to make an application on or before 20 July 2021 for permission to call an expert. The parties did not make an application to call an expert in Swiss law.

271. No evidence has been led by either party on matters of Swiss law. The Claimant says that it was for MGI to prove its claim for the set-off and it has failed to do so. MGI's failure to lead any evidence of Swiss law is fatal to its case that any set-off should be allowed for matters within clause 8 of the PSA. Mr Blaker KC says that, if a party has pleaded that foreign law applies, it is the court's duty to apply the foreign law. It would be unlawful for this court to apply English law in default of any evidence of that foreign law. Mr Blaker KC pointed to various issues in this case that would have to be determined by Swiss law: the timing at which any claims could be brought; the extent to which any claim was affected by the due diligence undertaken by MGI or the disclosures made by JOP; questions of causation; and whether or not the matters subject of the claim give rise to any loss. All these issues are governed by Swiss law and without evidence of these issues MGI's claim for any set-off must fail. In this respect, Mr Blaker KC relies on the judgment of Lord Leggatt in *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45 ("*Brownlie*") at [116]-[117].

272. Mr Knox KC for MGI argues that the claims for set-off under clause 8.1 of the PSA do not rely on the application of English law by default but instead rely on the presumption of similarity between Swiss law and English law. He says that the relevant issues in this case, which concern the interpretation of commercial contracts, are matters on which Swiss law is likely to be similar to English law. It is appropriate to rely upon the presumption of similarity in such a case. He

also refers to the judgment of Lord Leggatt in *Brownlie* (at [122]-[124]) in support of his position.

273. I have decided this case on the basis of MGI's arguments in relation to the extent of clause 3 and clause 4 of the PSA. I do not need to determine these questions in order to determine this case. I do not do so. In case this matter proceeds further, I have set out below some comments on the evidence in relation to the various claims raised by MGI and the party's arguments on them.

274. Before I turn to those issues, I should also comment briefly on the questions of jurisdiction that have been raised by the Claimant. Mr Blaker KC submits that all these matters concern the application of the 2012 SPA and are subject to the exclusive jurisdiction of the courts of Geneva. He says that these claims for set-off cannot be asserted in the courts of England and Wales by way of claim or by way of defence to another claim.

275. I challenged Mr Blaker KC on this point in the course of his closing argument as it seemed to me that addressing MGI's claims for set-off does not require the court to determine a claim under the 2012 SPA. Any set-off is made under clause 8.1 of the PSA, a contract which is governed by English law and disputes in relation to which are agreed to be subject to the exclusive jurisdiction of the courts of England and Wales. The set-off is for an amount that has been separately determined under the 2012 SPA by applying Swiss law or, as in this case, an estimate of the amount that would be determined under the 2012 SPA by applying Swiss law. It does not require this court to determine the claim. In those circumstances, it did not seem to me that any question of jurisdiction arose. However, once again, I do not need to resolve that issue for the purposes of my decision, and I do not do so.

**Books and records**

276. I have found as a fact that the Ortiz-Patino family failed to provide MGI with the books and records of the companies after completion of the 2012 SPA. MGI says that this failure was a breach of the obligation contained in clause 2.5 of the 2012 SPA to provide reasonable assistance in the preparation of the 2011 annual accounts of the Spanish companies and that as a consequence of that failure MGI was not able to proceed with its listing on CISX. Mr Knox KC at one point asserted that the failure to provide this assistance had led to losses of over €1 million. In closing, however, he conceded that the items for which an indemnity was claimed under clause 2.5 of the 2012 SPA did not relate to the failure to provide the books and records. In the absence of any specified amount that is claimed under this provision, I conclude that this claim is not made out.

## The querela

277. MGI's claim under clause 4.14 of the 2012 SPA relates to the issues underlying the querela brought against JOP, and Mr Moxon and Mr Spencer by the members of RCV. In essence, those issues are: that JOP procured that Valsa provided security for loans made to JOP personally and to companies controlled by JOP (principally Vesa and V07); and that JOP managed the affairs of Valsa such that the indebtedness of Valsa exceeded 50% of its capital and reserves in breach of the restriction contained in the Framework Agreement, in each case, without the knowledge and consent of the B shareholders in Valsa.

278. Although the querela itself was issued on 7 December 2012, after the closing of the 2012 SPA, MGI's case is that JOP knew of the potential for legal proceedings arising from these matters, at the latest, by the time of his receipt of the letter from the shareholders of 20 June 2011. The proceedings under the querela or investigations in relation to it were therefore "threatened" against one or more of the companies or involving "any of their respective shares, assets or properties" for the purposes of clause 4.14 of the 2012 SPA and should have been disclosed.

279. Mr Knox KC argued that MGI would not have proceeded with the purchase of the Soto and Campo shares if it had been aware of the threat of the querela and that the existence of the querela was part of the reason for MGI's inability to proceed with the listing of its shares. On that basis, he submitted that either MGI was entitled to a complete cross-indemnity against any liability under the PSA or MGI should be entitled to set costs and expenses relating to the aborted listing amounting to approximately €1.75 million against any liability to make a payment under the PSA.

280. The opening words of clause 4.14 suggest that the representation contained in clause 4.14 is made only at the Effective Date. However, Mr Knox asserted that clause 4.14 must be read in the light of the words at the beginning of clause 4 which suggested that the representation was made as at the Effective Date and as at the Closing Date subject to any disclosures made in the disclosure letter. I did not understand Mr Blaker KC to contest that assertion and I have accepted it on that basis.

281. Mr Blaker KC did, however, raise various objections to this claim.

282. Mr Blaker KC's first objection is that JOP had disclosed that there was a threat of legal proceedings from RCV. He points to the due diligence report prepared by DLA, and to the 2010 Disclosure Letter and the 2012 Disclosure Letter in this respect.

283. As I have mentioned above, I agree that the due diligence materials prepared in the context of the 2010 SPA, which included the DLA report, were made available to MGI. However, the representation in clause 4.14 is only qualified by reference to matters contained in the 2012 Disclosure Letter and not the due diligence materials. In any event, the DLA report does not refer to the issues that underlie the querela. It refers only to the possibility of litigation in relation to the sale of the shares in Soto as a means of avoiding the application of the pre-emption rights over Valsa shares by RCV or the B shareholders.

284. As regards the disclosures made in the disclosure letters, I agree with Mr Blaker KC that the 2010 Disclosure Letter is effectively incorporated in the 2012 Disclosure Letter for the purposes of the 2012 SPA and so the matters contained in the 2010 Disclosure Letter as well as those referred to in the 2012 Disclosure can be treated as disclosed against the representations in clause 4.14. However, the only disclosure of any threat of litigation relates to the issues surrounding the application of the pre-emption rights and appears in the 2010 Disclosure Letter. There is no disclosure of a threat of litigation in relation to the matter that underlie the querela in either of the disclosure letters.

285. The 2010 Disclosure Letter contains a disclosure in relation to a representation relating to encumbrances on the rental payments from the golf course to the effect that the rental payments have been pledged as security for a loan from Banif lease, but that states that this security will be cancelled at closing. It also contains a disclosure that approval has not been obtained from the B shareholders in connection with the various loans and guarantees given by Valsa giving rise to indebtedness in excess of the limits provided for in the Framework Agreement and under Valsa's bye-laws.

286. The 2012 Disclosure Letter also contains a disclosure that approval has not been obtained from the B shareholders in connection with the various loans and guarantees given by Valsa giving rise to excess indebtedness; and a disclosure to the effect that the rental payments have been pledged as security for the loan to JOP from Banif of 26 March 2009 and the Barclays Bank loan of 12 January 2007. But none of these disclosures is made specifically against the representation in clause 4.14 and none of them refers to any threat of litigation. Accordingly, if I were required to decide this point, and subject to the Swiss law issues to which I refer below, I would find that there was no disclosure for the purposes of clause 4 of the threat of the proceedings in the form of the querela.

287. That having been said, I would accept Mr Blaker KC's other objections to this claim. He says that the querela is a personal action brought against the directors. It does not involve proceedings or investigations "threatened" against one or more of the companies or involving "any of their respective shares, assets or properties". Mr Moxon and Mr Spencer were named as parties to the querela because the acquisition of the Soto shares was financed with debt and some of

the issues described in the complaint continued after the acquisition of the Soto shares by MGI. Furthermore, there is no evidence before the court to support Mr Moxon's assertion that the existence of the querela was a cause of the failure of MGI to list its shares on CISX or the additional costs of which it complains.

## The interes touristico

288. MGI also claims a set-off under clause 8.1 of the PSA in respect of the fee due to the community of Castellar in relation to the grant of the *interes touristico*. I have set out the facts surrounding this liability earlier in this judgment. The liability was ultimately assumed by Zagaleta under the 2015 SPA, where it is expressed to be in the amount of approximately €1.42 million.

289. MGI's case for a set-off is based either on a breach of the warranties contained in clause 4.9(l) or (n) of the 2012 SPA, which relate to regulatory consents and approvals, or under clause 4.8(a)(ix), which relates to undisclosed liabilities. The liability was not referred to in the 2012 Disclosure Letter or the 2010 Disclosure Letter.

290. The Claimant says that there was no breach. The liability had not arisen at the time of the 2012 SPA. The amount of the fee remained to be negotiated by V07 with the relevant authorities and did not have to be paid until a building licence was required for the development. In any event, MGI knew or should have known of the potential liability as it was recorded on publicly available documents, including the *plan especial* for the town of Castellar.

291. Mr Knox KC says the fact that the potential liability was recorded in publicly available documents is not a defence to the breach of warranty or misrepresentation claim (*Redgrave v Hurd* [1881] 20 Ch. D 1). The potential liability should have been disclosed.

292. Of the various provisions of the 2012 SPA to which MGI refers, it seems to me that clauses 4.9(l) and (n) are least likely to be applicable. The evidence was that the fact that the fee had not been paid did not give rise to a risk that the planning status would be affected or be revoked. It was simply that V07 could not commence the development without a building licence and the fee would have to be paid before a building licence would be granted.

293. There is no dispute, however, that a contingent liability had arisen. The most relevant provision for MGI's claim for a set-off is clause 4.8(a)(ix) as a "prospective" or "contingent" liability. Subject to the matters of Swiss law to which I have referred above, I would agree with Mr Knox KC that it is no defence to that claim that the potential liability was recorded in publicly available documents. However, that claim is subject to the Swiss law issues to which I have referred above.

## Financial liabilities

294. MGI also claims a set-off in respect of various liabilities of the companies which it says JOP failed to disclose at the time of the 2012 SPA in breach of clauses 3.8(a)(ix) and 4.8(a)(ix) of the 2012 SPA. Mr Knox KC produced a list of the liabilities, in addition to the liability to pay the fee to the town of Castellar in relation to the *interes touristico*, which he submitted had been borne by the Valderrama companies and fell within the scope of these representations and warranties. He submitted that liabilities of approximately €4 million fell within this category.

295. As with the claims for deductions in the computation of Net Profit that I have addressed earlier in this judgment, there was little or no evidence before the court to support some of the liabilities to which Mr Knox KC referred other than the various schedules that he produced. I would have been prepared to accept that the liabilities to Mr Collantes and Mr Morey (which they confirmed in their evidence had been settled) and certain liabilities that fall within this category and are referred to in the 2015 SPA as being assumed by Zagaleta would form a valid basis for a claim for set-off. Those liabilities amount in total to approximately €1.124 million and include: debts to Mr Collantes of €117,038 and Mr Morey of CHF100,000 (stated at €128,667 in Mr Knox's schedule), debts to tax authorities in Spain principally in relation to VAT of €647,747.79, IBIS (property taxes) of €156,212.50, and community charges of €63,751.20. These claims are subject to the Swiss law issues to which I have referred.

## DECISION

296. For the reasons that I have given, I dismiss the Claimant's claims in this case. I will ask counsel to prepare an order to give effect to my decision.

**Appendix**

## Defendant's claimed deductions

| No. | Description/creditor | Amount claimed by Defendant | Accepted by Claimant | Amount Deductible |
|---|---|---|---|---|
| 1 | RD Golf Consultancy (Ramon Davila) | €254,100 | 0 | 0<br><br>This amount is assumed by Zagaleta under the 2015 SPA. It relates to the Castellar land |
| 2 | Rafael Collantes | €117,038 | 0 | €117,038<br><br>Clause 3.3.4 PSA |
| 3 | Lopez Ibor Abogados (Lawyer) | Not claimed | 0 | 0 |
| 4 | Estudio 94 (Architect) | €17,526.64 | 0 | 0<br><br>This amount relates to the Castellar land |
| 5 | Teconopolis (Architect) (Patino Era Debt) | €24,200 | 0 | 0<br><br>No evidence to support this deduction |
| 6 | Pedro Antonio Perez (Architect) (Patino Era Debt) | €267,276.98 | 0 | 0<br><br>This amount relates to the Castellar land. It is assumed by Zagaleta under the 2015 SPA |
| 7 | Hacienda Valderrama Debt (Patino Era Debt) | Not claimed | 0 | 0 |

| | | | | |
|---|---|---|---|---|
| 8 | Land Operations (Selling Agent) | €1,210,000 | 0 | €1,210,000<br><br>Clause 3.3.2 PSA |
| 9 | Kerstin Sallows / Brookvine (Selling Agent) | €120,000 | 0 | €120,000<br><br>Clause 3.3.2 PSA |
| 10 | Jespersen Ltd (Selling Agent) | €60,000 | 0 | 0<br><br>Insufficient evidence to support this payment. |
| 11 | Sasena Ltd (Selling Agent) | €60,000 | 0 | 0<br><br>Insufficient evidence to support this payment |
| 12 | EUC Parques Sotogrande (Community Charges) | €202,648.61 | 0 | 0<br><br>Not within clause 3.3.3 PSA. Insufficient evidence to support most of this payment. The balance is assumed by Zagaleta under the 2015 SPA |
| 13 | Community Altos Valderrama (Community Charges) | €27,182 | 0 | 0<br><br>Not within clause 3.3.3 PSA |
| 14 | City Council Castellar (Planning Taxes) | €1,482,420 | 0 | 0<br><br>This amount relates to the Castellar land |
| 15 | Campos (Community Charges) | Not claimed | 0 | 0 |

| | | | | |
|---|---|---|---|---|
| 16 | KPMG (Transaction Accountants) | €379,806 | 0 | €22,326<br><br>Clause 3.3.4 PSA<br><br>Insufficient evidence for the balance. |
| 17 | Zeit Auditores (Transaction Accountants) | €36,300 | €11,979 | €11,979<br><br>Clause 3.3.4 PSA<br><br>Part of this cost is assumed by Zagaleta under the 2015 SPA. The balance is apportioned between costs attributable to Soto and those attributable to Campo. |
| 18 | Verifid (Transaction Accountants) | €10,800 | 0 | 0<br><br>This amount relates to Campo and V07 |
| 19 | Fiduciare Chavaz (Transaction Accountant) | €19,500 | 0 | 0<br><br>Part of this payment is assumed by Zagaleta under the 2015 SPA. Insufficient evidence to support the balance. |
| 20 | PWC (Transaction Accountants) | €67,000 | 0 | 0<br><br>Insufficient evidence to support this payment |
| 21 | EKA (Transaction Accountants) | €6,000 | 0 | €3,000<br><br>Clause 3.3.4 PSA<br><br>Apportioned between Soto and Campo |
| 22 | DLA Piper (Transaction Lawyers) | €343,450 | €93,341.50. | €171,725<br><br>Clause 3.3.4 PSA<br><br>Apportioned between Soto and Campo |
| 23 | Iberia Abogados (Transaction Lawyers) (Incl. Success Fee) | €554,850 | 0 | €277,425<br><br>Clause 3.3.4 PSA<br><br>Apportioned between Soto and Campo |

| | | | | |
|---|---|---|---|---|
| 24 | MH Abogados (Transaction Lawyers) | €60,500 | 0 | 0<br><br>Not within clause 3.3 PSA |
| 25 | Simmon & Simmons (Transaction Lawyers) | Not claimed | 0 | 0 |
| 26 | RHF Solicitors (Transaction Lawyers) | Not claimed | 0 | 0 |
| 27 | Schellenberg Wittmer (Transaction Lawyers) | €197,360 | €46,130.15 | €26,180<br><br>Clause 3.3.4 PSA.<br><br>The balance is assumed by Zagaleta under the 2015 SPA<br><br>Apportioned between Soto and Campo |
| 28 | Antonio Cervilla (Court Agent) | Not claimed | 0 | 0 |
| 29 | Trio Traducciones | €1,470 | €1,470 | €1,470<br><br>Clause 3.3.4 PSA |
| 30 | Polo Patent (Trademark Update) | €8,276.50 | 0 | 0<br><br>Insufficient evidence to support this payment |
| 31 | Luis Enrique Garcia Labajo (Transaction Notary) | Not claimed | 0 | 0 |

| | | | | |
|---|---|---|---|---|
| 32 | Fernando Gomez (Transaction Notary) | Not claimed | 0 | 0 |
| 33 | Swiss taxes relating to sale of shares | €355,500 | €257,748.37 | €257,748.37<br><br>Clause 3.3.3 PSA<br><br>The balance relates to the transfer of the Campo shares |
| 34 | Banking Fees Relating to the 2015 Transaction | Not claimed | 0 | 0 |
| 35 | IBIS (Property Taxes) | €156,212.55 | 0 | 0<br><br>This payment relates to the Castellar land |
| 36 | Valsa and Vesa VAT (Incl. Settlement) | €647,747.79 | 0 | 0<br><br>This payment is assumed by Zagaleta under the 2015 SPA |
| 37 | WB Nelson (Legal Fees Paid by Shareholder Towards Completion) | Not claimed | 0 | 0 |
| 38 | TINSA (Property Valuation 2015) | Not claimed | 0 | 0 |
| 39 | KPMG (Property Valuation 2012 & 2015) | €60,000 | 0 | €30,000<br><br>Clause 3.3.4 PSA<br><br>Apportioned between Soto and Campo |

| | | | | |
|---|---|---|---|---|
| 40 | CBRE (Property Valuation 2012) | €61,440.26 | 0 | €30,720.13<br><br>Clause 3.3.4 PSA<br><br>Apportioned between Soto and Campo |
| 41 | MBLM (Trademark Valuation 2012) | €90,000 | 0 | 0<br><br>Not within clause 3.3 PSA |
| 42 | Boletin Cadiz Convenio Urbanistico | Not claimed | 0 | 0 |
| 43 | The Stripe Group (Guernsey) Limited (Property Manager Valderrama Group 2012 – 2014) (Incl. Court Settlement) | €762,898 | €471,000 | €471,000<br><br>Clause 3.3.4 PSA<br><br>Insufficient evidence of payment of balance |
| 44 | Assumed Debts in 2012 Transaction | €22,040,265.22 | 0 | 0<br><br>Not within clause 3.3.1 PSA. The debts are either assumed by Zagaleta under the 2015 SPA or relating to Campo or otherwise not relating to assets sold under the 2015 SPA. |
| 45 | Payment to JOP in 2012 Transaction | €3,972.092.15 | 0 | 0<br><br>Not within Clause 3.3 PSA |
| 46 | Payment to Banco Banif | €800,000 | 0 | 0<br><br>Not within Clause 3.3 PSA |
| 47 | Valderrama Fund Manager Fees (Oct 2012 – Dec 2015) | Not claimed | 0 | 0 |

| | | | | |
|---|---|---|---|---|
| 48 | Jaime Morey (Patino Era Debt) | €128,667 | €91,946 | €91,946<br><br>Clause 3.3.4 PSA<br><br>Insufficient evidence of payment of balance |
| 49 | Lenz & Stahelin | Not claimed | 0 | 0 |
| 50 | Outstanding Shareholder Loan - WB Nelson (Jan 2013 – Dec 2015) | Not claimed | 0 | 0 |
| 51 | Outstanding Shareholder Loan – MGI (Jan 2013 – Dec 2015) | Not claimed | 0 | 0 |
| 52 | Marsh (Warranty Insurance) | €88,000 | 0 | 0<br><br>Not within Clause 3.3 PSA |
| 53 | Salary (Patino Era Debt) | €9,000 | 0 | 0<br><br>Not within Clause 3.3 PSA |
| 54 | OISA Translation Services (Valsa GSM) | €2,625.70 | 0 | 0<br><br>Insufficient evidence of this payment |
| 55 | Sanchez de Leon (Notary) (Patino Era Debt) | €13,575.47 | 0 | 0<br><br>Insufficient evidence of this payment |

| | | | | |
|---|---|---|---|---|
| 56 | Babiano (Accountants) (Patino Era Debt) | €7,200 | 0 | 0<br><br>Insufficient evidence of this payment |
| 57 | Carey Olsen (Transaction Lawyer) | €28,781.50 | 0 | 0<br><br>Insufficient evidence to support this payment |
| 58 | Willis (Directors & Officers Insurance re Valderrama Group) | €6,975 | 0 | 0<br><br>Not within Clause 3.3 PSA |
| 59 | AFS (Fund Raising Services re Valderrama Group) | €91,182.71 | 0 | 0<br><br>Not within Clause 3.3 PSA |
| 60 | Grayling (Valderrama Group PR) | €7,500 | 0 | 0<br><br>Not within Clause 3.3 PSA |
| 61 | Valderrama Group Director Fees | Not claimed by D | 0 | 0 |
| 62 | Grant Thornton (Valderrama Real Estate Tax Report) | €10,600 | 0 | 0<br><br>Insufficient evidence of this payment |
| 63 | JTC (Guernsey) Ltd (Fund Raising and CISX Listing Fees for Valderrama Group) (Court Settlement | €352,349.18 | 0 | 0<br><br>Not within Clause 3.3 PSA |

| | | | | |
|---|---|---|---|---|
| 64 | Samuel Bardi (Swiss Auditor) | Not claimed | 0 | 0 |
| 65 | Despacho de Quintos y Jiminez (Spanish Auditor) | Not claimed | 0 | 0 |
| 66 | Ogier (Legal Expenses re Stripe Settlement) | Not claimed | 0 | 0 |
| | **Total (excluding bank debts)** | | **€973,615.02** | **€2,842,557.50** |
| 67a | MGI debt to Santander: Loan no. 0049.0672.22.1030070103 | €8,863,961.14 | €0 | €8,863,961.14<br><br>Clause 3.3.1<br><br>Satisfied as part of the price paid by Zagaleta under 2015 SPA |
| 67b | Valsa debt to Santander (total – made up of (i) and (ii) below) | €4,883,333.34 | 0 | 0<br><br>Assumed by Zagaleta under 2015 SPA |
| | (i) Loan no. 0049.0672.21.1030070008 | €733,333.34 | 0 | |
| | (ii) Loan no. 0049.0672.22.1030070059. | €4,150,000 | 0 | |
| 67c | Vesa debt to Santander (total – made up of (i) and (ii) below) | €1,061,903.43 | 0 | 0<br><br>Assumed by Zagaleta under 2015 SPA |

| | | | | |
|---|---|---|---|---|
| | (i) Loan no.: 0049.0672.22.1030070009 | €733,333.34 | 0 | |
| | (ii) Loan no.: 0049.0672.22.1030069865 | €328,570.09 | 0 | |
| | **Total (including bank debts)** | | **€937,615.02** | **€11,706,518.64** |