Neutral Citation Number: **[2023] EWHC 2154 (Ch)**

Case No:CR-2021-000718

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES COURT LIST (CHANCERY DIVISION)
IN THE MATTER OF SPRING MEDIA INVESTMENTS LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Rolls Building
London
EC4A 1NL

Date: 24 AUGUST 2023

Before :

DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE RAQUEL AGNELLO KC

- -

Between :

SAXON WOODS INVESTMENTS LIMITED
(a company incorporated under the laws of the Bahamas)

Petitioner

-and-

(1) FRANCESCO COSTA
(2) FAR EAST MEDIA HOLDINGS PTE LIMITED
(a company incorporated under the laws of Singapore)
(3) GROSVENOR INVESTMENT PROJECT LIMITED
(4) HDO HOLDING LIMITED
(5) BAY CAPITAL INVESTMENTS LIMITED
(a company incorporated under the laws of Mauritius)

(6) KHATTAR HOLDINGS PRIVATE LIMITED
(a company incorporated under the laws of Singapore)
(7) SIMON POWELL
(8) SPRING MEDIA INVESTMENTS LIMITED
Respondents

Mr Jack Rivett (instructed by Stephenson Harwood) for the Petitioner
Ms Lara Hassell-Hart (instructed by Joseph Hage Aaronson LLP) for the First Respondent
Mr Peter De Verneuil Smith (on 20 July 2023)and **Mr Ravi Jackson** (on 24 July 2023)(instructed by Sidley Austin) for the Eighth Respondent

Hearing dates: 20, 24 and 25 July 2023

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

FINAL JUDGMENT

Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10.00 am on Friday 24 August 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

Introduction

1. On 20, 24 and 25 July 2023, I heard two applications seeking extended disclosure from the Petitioner (Saxon Woods or the Petitioner) and the First Respondent (Mr Costa or the First Respondent). The trial on liability issues of this section 994 petition is listed to commence in a five day window from 9 October 2023 with a time estimate of 18 days including 2 days judicial pre-reading. There is a pre trial review on 13 September 2023. In those circumstances, I sent to the parties a note of my decision on the issues arising in the two applications on Friday 28 July 2023. Counsel have produced a draft order setting out the orders made and I have approved it. This judgment is therefore my reasons for the orders made. Bearing in mind the closeness of the trial and the time

available to me, I will keep this judgment as short as possible. Although I may not set out in this judgment all the submissions of Counsel in relation to the disclosure issues (excluding the privilege issue) I have considered them alongside considered carefully the evidence filed in support and in opposition. I have as well considered and kept in mind the pleaded cases of the respective parties.

2. Since the issue of the applications and including (at my encouragement) between the dates of the hearing before me, the Petitioner and the First Respondent through their legal advisors have sought to narrow the issues before me. I will not set out what has been agreed/conceded save to note that such concessions were made without any admission that the relevant issues, such as redactions etc were in some way a breach of disclosure obligations. This judgment sets out my reasons for the orders I have made which necessitated determination before me. I have not dealt what has been agreed. I am very alive that those matters may well be relevant on costs issues, but those matters do not need to be determined or argued under a tight timetable.

Summary of case

3. I have relied on excellent skeletons of Mr Rivett and Ms Hassell Hart for this summary section. By the petition, Saxon Woods seeks (in summary) an order that Mr. Costa, who is a director and Chairman of the Company and has a substantial indirect interest in it via the Second to Fourth Respondents, purchase its shares in the Company.

4. The Second to Seventh Respondents are the other shareholders in the Company. They have not taken any part in the proceedings, save (in the case of the Fourth to Seventh Respondents) to confirm that they do not intend to do so. As is normal, the Company

was also joined to the proceedings as a nominal party. Its role is limited to giving disclosure.

5. The dispute between Petitioner (Saxon Woods) and the First Respondent (Mr. Costa) arises out of the Company's obligations under clause 6.2 of the Shareholders' Agreement, in respect of which Saxon Woods says the Company is in breach. That provision provides as follows:

> "Investment Period. The Company and each of the Investors agree to work together in good faith towards an Exit no later than 31 December 2019 (the "Investment Period"). In addition, the Company and each of the Investors agree to give good faith consideration to any opportunities for an Exit during the course of the Investment Period. In the event that an Exit has not occurred upon the expiry of the Investment Period, in addition to any rights provided by Clause 3.5(d) and Article V, the Board of Directors shall engage an investment bank to cause an Exit during the Investment Period at a valuation devised by such investment bank and on such terms as shall be consented to by the Board of Directors, which consent shall not be unreasonably withheld."

6. Clause 1.1 defines 'Exit' as:

> "the sale of all or substantially all of: (i) the issued equity share capital of the Company; or (ii) the business or assets of the Company (whether through the shares of a Subsidiary or otherwise), in each case, on arm's length terms as part of a single transaction or a series of related transactions."

7. On Saxon Woods' case, Mr. Costa was exclusively and/or principally responsible for the Company's breach of contract, having assumed responsibility for managing the Exit process within the Company and evaded scrutiny of his conduct by his co-directors (and certainly Mr. Loy). In addition, his conduct of the Exit process amounted to a breach of his duties as a director of the Company.

8. In particular, Saxon Woods alleges that Mr. Costa had no intention of disposing of his interests in the Company to an unrelated third party and/or working towards an Exit in accordance with the Shareholders' Agreement, but intended to consolidate and supplement his control over the Company and/or SSL, and that he sought to thwart and/or delay the Exit process with this (undisclosed) intention in mind.

9. It is Saxon Woods' case that the Company's breach of the Shareholders' Agreement and/or Mr. Costa's breaches of duty constitute unfairly prejudicial conduct of the

Company's affairs. By way of relief, Saxon Woods seeks an order that Mr. Costa purchase its shares in the Company, on the grounds that he is responsible for the unfairly prejudicial conduct and/or he and/or his actions are so connected to the unfairly prejudicial conduct that it would be just to grant a remedy against him.

10. Mr Costa denies that there was any breach and avers that the Company complied with its obligations under the SHA, following and relying on advice from its advisers, including Jefferies. So far as Metric was concerned (which was the purported opportunity being pushed for at the time by the Petitioner and its controlling individual (and then director of the Company, Mr Loy), it is alleged that this entity never put forward a credible offer for the acquisition of all shareholders' stakes, and in fact was in substantial separate discussions with Mr Loy, and/or the Saxon Woods to construct a transaction that was not an "Exit" of the type that Saxon Woods contends that the Company should have achieved. It was instead a proposal which preferred the interests of Mr Loy, Saxon Woods and others. Serious allegations are made against Mr Loy relating to breaches of the duties he owed to the Company as director and additionally in relation to what is alleged to be a failure to disclose his actions to the Board.

11. Mr Costa's position is that Saxon Woods is not entitled to equitable or any relief, still less in circumstances where Mr Loy and Saxon Woods were attempting to prefer and pursue their own interests in discussions with potential investors, and Mr Loy then sought deliberately to mislead the Company about the nature of those discussions. The defence and the allegations made against Mr Loy and/or Saxon Woods are denied. The Eight Respondent is the Company which take no part in this heavily contested shareholder's petition. Mr De Verneuil Smith agreed that the position of the Company in these proceedings is neutral. The Company will not be represented at the trial, but of course may well be represented at some subsequent hearing relating to relief and remedy. It is clear from this summary that there are many issues for determination at trial. The non binding estimate placed on Saxon Woods shares as at January 2020 is in the range of £29.75 million to £35.7 million.

12. The Petition was issued on 20 April 2021 with the Points of Defence being served on 23 July 2021. Both parties thereafter amended their respective pleadings around the time of the first CMC held on 9-10 March 2022 ICC Judge Burton. The DRD was sealed on 14 April 2022. Thereafter extended disclosure took place on 30 September

2022. Thereafter both parties sought to re-amend substantially their respective pleadings. Clearly disclosure provided both sides with further issues which they sought to raise as part of their pleaded cases. The re-amendments to the Petition pleaded that the period in which Mr Costa was pursing his own undisclosed intention went back to September 2017 and involved a number of others who were privy to and involved in Mr Costa's efforts to further that undisclosed intention, including Mr Alok Oberoi, another director of Saxon Woods. (amended petition paragraphs 35-6). Mr Costa's substantial re-amendments to the pleadings make some serious allegations against Mr Loy which I have summarised in paragraphs 10-11 above(Re Amended Defence at paragraph 45.1, 45.2, 88, and 139). In my judgment, the current applications which are before me seeking further disclosure must be viewed in the light of the substantial amendments which have been made by both these parties to their pleadings. It is clear that the substantial amendments to both parties' pleadings were not before ICC Judge Burton when she considered the DRD and the issues which arose at that stage.

13. This is the first time the Court has to deal with additional disclosure issues arising by reason of the substantial amendments. I am informed by both parties that attempts were made to seek to agree further disclosure consensually, but those efforts failed such that the applications are before me. The Petitioner's application seeking further disclosure orders is dated 26 May 2023 and Mr Costa's application is dated 15 June 2023. All three Counsel sought to argue in relation to disclosure orders sought against their respective clients that the trial was 12 weeks away and effectively the applications were made late in the day. This is the position of all three parties before me. For the avoidance of doubt, I have taken into account the closeness of the trial but I have also considered the disclosure applications made under the general principles that I have set out above. It does not appear to me that disclosure should not be ordered in the cases merely because of the timing of the applications. I have not spent time seeking to understand the timing of the two applications. I have concentrated upon dealing with the substance of the applications themselves. With the exception of the Petitioner's submissions in relation to my ordering the disclosure sought by Mr Costa on his new issue one, none of the parties assert that it is not possible to carry out the disclosure sought. I have considered carefully what may be of assistance to the Trial

Judge in relation to further disclosure bearing in mind the allegations made in the pleadings and the determinations which will have to be made by the Court at trial.

14. I will deal firstly with the disclosure applications with the exception of the privilege point raised by the Company. I have set out my reasons in shorter form than I would have liked because of the time constraints. However, I have considered the submissions made by the parties and I have sought to deal with these as much as possible below. Thereafter, I set out my reasons for the decision I have reached on the issue of privilege. I have set this out in some more detail. Unlike the disclosure I have directed, the privilege issue is not strictly a case management issue. It deserves more detailed reasoning to be set out including consideration of both the relevant background as set out in the letters and also to the legal principles themselves.

Relevant Law applicable to the disclosure applications

15. There was no dispute between Mr Rivett and Ms Hassell Hart as to the applicable law, albeit there were differences between them relating to whether the applications fell to be considered as being paragraph 17 PD57AD (failure to adequately comply with extended disclosure) or paragraph 18 PD57AD (varying an order for extended disclosure or making an additional order for disclosure of specific documents).

16. Again, I have made use here of their skeletons to provide a summary of the legal principles. Both Saxon Woods and Mr. Costa invoke the Court's powers under paragraphs 17 and 18 of Practice Direction 57AD. Those paragraphs provide as follows:

> "**17. Failure adequately to comply with an order for Extended Disclosure**
>
> **17.1** Where there has been or may have been a failure adequately to comply with an order for Extended Disclosure the court may make such further orders as may be appropriate, including an order requiring a party to-
>
> (1) serve a further, or revised, Disclosure Certificate;
>
> (2) undertake further steps, including further or more extended searches, to ensure compliance with an order for Extended Disclosure;

(3) provide a further or improved Extended Disclosure List of Documents;

(4) produce documents; or

(5) make a witness statement explaining any matter relating to Disclosure.

17.2 The party applying for an order under paragraph 17.1 must satisfy the court that making an order is reasonable and proportionate (as defined in paragraph 6.4).

17.3 An application for any order under paragraph 17.1 should normally be supported by a witness statement.

18. Varying an order for Extended Disclosure; making an additional order for disclosure of specific documents

18.1 The court may at any stage make an order that varies an order for Extended Disclosure. This includes making an additional order for disclosure of specific documents or narrow classes of documents relating to a particular Issue for Disclosure.

18.2 The party applying for an order under paragraph 18.1 must satisfy the court that varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate (as defined in paragraph 6.4).

18.3 An application for an order under paragraph 18.1 must be supported by a witness statement explaining the circumstances in which the original order for Extended Disclosure was made and why it is considered that order should be varied.

18.4 The court's powers under this paragraph include, but are not limited to, making an order for disclosure in the form of Models A to E and requiring a party to make a witness statement explaining any matter relating to disclosure."

17. There is a consensus between Counsel that paragraph 17 involves a two-stage procedure: first, it is necessary to identify whether there has been a failure to comply with an order for Extended Disclosure; secondly, if there has been, the Court must be satisfied that making some curative order of the type referred to in paragraph 17.1(1) to (5) is both reasonable and proportionate (see *Sheeran v. Chorki* [2021] EWHC 3553 (Ch.), at [4] *per* Meade J.). For the purposes of paragraphs 17 and 18, the meaning of 'reasonable and proportionate' is defined by paragraph 6.4 of PD 57AD, as follows:

"In all cases, an order for Extended Disclosure must be reasonable and proportionate having regard to the overriding objective including the following factors-

(1) the nature and complexity of the issues in the proceedings;

(2) the importance of the case, including any non-monetary relief sought;

(3) the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;

(4) the number of documents involved;

(5) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);

(6) the financial position of each party; and

(7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost."

18. As regards paragraph 18, the Court must be satisfied, not just that the proposed order is reasonable and proportionate, but that it is also "*necessary for the just disposal of the proceedings*" (see *Astra Asset Management UK Ltd. v Musst Investments LLP* [2020] EWHC 1871 (Ch.), at [22] *per* Chief Master Marsh).

19. Both parties referred me to passages in the judgement of Richard Salter KC in *Ventra Investments v Bank of Scotland [2019] EWHC 2058b(Comm.)* which made certain observations about the importance of disclosure in proceedings as well as the approach of the court to what is now paragraph 18 where allegations of serious misconduct are made. Both parties, the Petitioner and the First Respondent make such serious allegations in the case before me. Both Mr Loy and Mr Costa are alleged by the other party to have acted for their own hidden purposes and both are alleged to have acted in breach of their duties owed to the Company.

> *"36. In applying the principles required by PD51U I must also be on my guard to ensure that this new approach does not "create a framework for injustice" […]. In deciding under paragraph 18.2 of PD 51U what "is necessary for the just disposal of the proceedings and is reasonable and proportionate", I must bear in mind the fact that, in cases such as this, there is inevitably a very*

significant asymmetry of information between the claimant and the defendant.

37. *The process of disclosure is one of the most powerful tools available for achieving justice. That is particularly so in cases such as the present, where allegations of fraud and misconduct within the defendant organisation are in issue. It is wrong in principle to plead matters which do not support or relate to any of the remedies sought or to plead immaterial matters with a view to obtaining more extensive disclosure than might otherwise be ordered: see Charter UK Ltd v Nationwide Building Society [2009] EWHC 1002 (TCC) at [16], per Akenhead J; and Grove Park (supra) at [24]. However, the law rightly requires a claimant alleging fraud to plead its case with great particularity and precision, and not to make allegations which are not supported by credible evidence: see eg Three Rivers District Council v Bank of England [2001] UKHL 16, [2003] 2 AC 1 at [184]-[186] per Lord Millett.*

38. *In cases such as the present one, the interplay between those two principles can often create a "chicken and egg" dilemma for a claimant. It is inherent in cases such as this that it is likely to be difficult for a claimant to discover the facts and to obtain the necessary evidence, since much of the relevant material will be exclusively within the control of the defendant. Yet, if the scope of disclosure is too tightly confined by the specific facts that the claimant has already been able to plead, the claimant may simply be unable to obtain the material that it needs to plead and to make out its case. That would bring about a similar situation of injustice to that described by Maurice Kay LJ in the RBS case:*

> *.. in which one party's perception and appraisal of a case is .. handicapped by his being kept in ignorance of important material on the ground that it is only relevant to issue B but, for the moment, disclosure is only required in relation to issue A ...*

39. *PD51U is intended to serve the overriding objective of dealing with cases justly and at proportionate cost, by limiting disclosure to that which in the particular case in question is necessary for the just disposal of the proceedings and which is reasonable and proportionate. It is not intended to hinder the just resolution of substantial cases such as this by making it more difficult for claimants to get at the central documentary evidence that they need.*

40. *It seems to me that, in such circumstances, what is required from the parties and the Court is a pragmatic, flexible approach to the scope of disclosure, taking into account (as paragraph 9.5 of PD51U requires) "all the circumstances of the case, including the factors set out in paragraph 6.4 .. and the overriding objective". The Court is required to strike a practical balance, in order to decide in each particular case what specific reasonable and proportionate additional disclosure (if any) is necessary for the just*

disposal of the proceedings. In doing so, the Court is not required to shut its eyes to the practical realities of the litigation.

41. The obligation which a reasonable and proportionate order for Extended Disclosure can impose on a defendant, not merely (under Models A or B) to disclose its already "Known Adverse Documents", but also (under Models C, D or E) actively to search for documents adverse to that defendant's case or which might assist the case of the claimant can often be the only (or only realistic and/or proportionate) means that a claimant may have of obtaining the information and the evidence that it needs to plead and to make out its case. Such an order (for extended or additional disclosure) may therefore be the most practical way of dealing with the case justly."

20. Both Counsel submitted that a "*no stone unturned*" approach is inconsistent with PD57AD; see *Maher v Maher and another* [2019] EWHC 3613 (Ch) (in particular [21]). In that case, in refusing the claimant's application for specific disclosure, the Judge emphasised the important culture change introduced by the new regime, which is underpinned by principles of reasonableness and proportionality, and the need for the applicant to satisfy the court that specific disclosure is reasonable and proportionate, as defined in §6.4, PD57AD.

21. As I have already set out above the position before me is that the parties are each relying now on extensively amended pleaded cases from about December 2022 – January 2023. Those cases were not before the Judge in March 2022 when the DRD was ordered. In reality, in so far as I am dealing with the pleadings as amended in December 2022/January 2023, it seems to me that there may not have been a failure (paragraph 17) of disclosure, but instead this is additional disclosure sought by reason of the amended cases, pursuant to paragraph 18. I am not convinced much turns upon the distinction for my current purposes. I need to be satisfied that the orders sought are reasonable and proportionate in the line with what I have set out above and also necessary for the just disposal of the proceedings. I have to be alive to the issues raised the Judge in *Ventra*, but also to ensure that I do not follow a 'no stone left unturned' approach.

The Petitioner's application (save the issue of privilege)

22. The starting point in my judgment is to consider the re-amended case set out in the pleadings. As is clear from paragraphs 35 – 36 of the re-amended petition, the Petitioner pleads that the undisclosed intention of Mr Costa went back as far as September 2017 (rather than June 2018 as pleaded in the amended petition) and furthermore, that various other individuals were aware of and participated in the actions and intentions of Mr Costa in seeking to pursue his own interests to acquire the company. In particular, the role of Jefferies as pleaded in the re-amended case involved being asked to invest and/or to find investors for the proposed acquisition. In my judgment, this expands significantly what was originally pleaded, involving an increased role in relation to Jefferies and also an increased number of individuals who were aware and were privy to Mr Costa's alleged undisclosed intention. As pleaded the role of Jefferies includes seeking itself to acquire an interest and /or seeking investors.

23. Ms Hassell Hart submits that Mr Costa was seeking, as pleaded, pursuant to a discussion with Mr Loy, to find buyers for the shares held by Saxon Woods. That submission in itself does not explain some of the allegations made in the Petitioner's case in relation to the role of Jefferies at the earlier date range and the involvement of other individuals. The issues raised now are clearly important and significant matters for the trial judge to consider and determine. In my judgment, in so far as the disclosure which has occurred to date does not cover the appropriate date range for these issues, then it will need to be expanded subject to the proposed expansion and the issues to be deal with remain reasonable and proportionate and necessary for the just disposal of the case. Equally, in so far as the involvement of Jefferies as well as other individual extends beyond what was originally pleaded, the same principles apply. It is really no real objection to such disclosure that the matter was dealt with by ICC Judge Burton. The Judge did not have the substantial amendments to the pleaded cases on both sides.

24. In many instances, Ms Hassell Hart asserts that it is unlikely that the further searches proposed would result in documents which have not already been disclosed and would instead turn up a large number of irrelevant documents. She submits that what is being sought in relation to the new keywords is fishing. Having considered overall these submissions, I am not persuaded that I can simply rely on that submission of there not being in all likelihood further documents which are relevant. In particular Mr Rivett's

application seeks not only further keywords but also an extended date range for particular issues in the DRD only. I do not consider that what is being sought is fishing. It relates clearly to what is set out I the pleaded case and involved issues that Court is going to have to determine at trial.

25. Mr Rivett relies on what he asserts is evidence that Mr Costa has been deliberately withholding disclosure. I pause to note that in her application, Ms Hassell Hart also relies on what she asserts are clearly incorrect redactions which have been made to documents which give rise to suspicion on Mr Costa's side. For current purposes, bearing in mind the allegations made by the Petitioners and to an extent, Mr Costa, unless I am persuaded that it is clear that the disclosure given to date will cover what is now the re-amended case, further orders for disclosure will need to be made. Mr Rivett submitted that the disclosure had revealed the efforts made by Mr Costa to withhold information from, he submits, Mr Loy and Saxon Woods. He relies on an instruction sent to Mr Starker and Mr Di Capua (the Company's CFO) that, *'nothing discussed on this subject can be shared outside of the 3 of us and Jefferies'*. This was six days after a board meeting and additionally the email subject is *'Jefferies next steps'*. He also relied upon an email in February 2019 sent by Mr Costa which stated, *"I don't want to sit Jeffereis [sic] in front of mark [Loy] and Maurizio [Flammini] [.] They will step back immediately [.] Let's organise a meeting in London with their team the same week?*"(Re-Amended Petition paragraph 30A).

26. So I approach the application with these matters in mind. Some of the additional keywords have been the subject of concessions/agreement by Mr Costa. As to the others, Ms Hassell Hart submits that there is no reason to believe that any relevant additional documents would be captured by searching with the additional keywords which are objected to. She submits, as a whole, that these additional keywords are not necessary for the just disposal of the case. Equally, she opposes the extension of the date range. She submits that the Court considered the appropriate date range at the CMC in March 20022 and that there is no basis for any extension to what was then ordered. In my judgment, this submission fails to take into account the re-amended pleadings. There is a clear justification and it is reasonable and proportionate to extend the relevant date ranges on certain issue on the basis of what is now the pleaded case. Care needs to be taken to ensure that any further disclosure orders are of course

reasonable and proportionate and also necessary for the just disposal of the case. Bearing in mind the extended period in which the matters relied upon by the Petitioner took place and also the extended number of individuals involved and/or privy to the alleged intentions/motives, it seems to me that the additional disclosure will be necessary for the just disposal of the case at trial.

27. The allegations made are denied by Mr Costa and the Judge will need to consider the evidence in support of those allegations and this must therefore allow for a further disclosure order which covers the period now pleaded. I do not consider as a whole that the orders I have made are in some way a 'leaving no stone unturned'. The case has evolved very much along the lines of what is set out in *Ventra*. The Petitioner pleads certain allegations and then disclosure enables the Petitioner to plead further . It seems in those circumstances it would be against the overriding interest of justice to deprive the Petitioner of further disclosure providing it is reasonable and proportionate. I should also add that it is difficult to assess whether Ms Hassell Hart is correct in her assertion that further disclosure orders will not turn up relevant material. There is no more than assertion on this point by Mr Silver, acting on behalf of Mr Costa. Moreover, the material which is now relied upon by the Petitioner demonstrates, at least at this stage, serious matters and it seems to me reasonable and proportionate to grant the further disclosure.

28. Mr De Verneuil Smith, on behalf of the Company, also made submissions in relation to the disclosure and relied in his skeleton on the witness statement of Mr Andrew Fox, dated 23 June 2023, solicitor acting on behalf of the Company , a partner in Sidley Austin. I read the witness statement and considered the submissions made by Mr De Verneuil Smith as well as his skeleton. As I observed during the hearing, I was somewhat surprised at the approach taken by the Company, being a neutral party to the section 994 proceedings. I would have expected any assistance to be provided to the Court in relation to the disclosure applications (leaving to one side the privilege issue and the custodian issue which ended up being agreed between the parties) to be limited to the likely costs of the further exercise, the time it was considered the exercise would take etc. Instead, the Company sought to positively engage with the application for disclosure and object to it. I accept the submission made by Mr Rivett on this point. It really forms no part of the position of the Company to engage in such a way. As

accepted by Mr De Verneuil Smith, the Company is a neutral party. It receives and acts on advice in the interest of all the shareholders. That means it is prevented from effectively 'taking sides' in what is a dispute between shareholders and/or directors acting on behalf of those shareholders or with the interests of those shareholders in mind.

29. Accordingly, on the issues of disclosure, I have relied on the submission made by Ms Hassell Hart and I have referred to some of them above already. I place less weight on the submissions made by the Company in seeking to actively oppose the disclosure application. For the avoidance of doubt, the disclosure sought by the Petitioner certainly passes the threshold test and whether to grant it or not depends upon the issues I have set out at the start of this part of the judgment.

30. As to the specific orders which I have already made, I will take each one in the order set out in the draft order of the Petitioner, grouping some of them together where convenient and add a few additional matters beyond what I have set out above relating to the disclosure orders I have made.

(a)The email account – fc@isiholding.com

31. I have granted an order which requires Mr Costa to provide details to the relevant expert in order to see whether access to this email account can be obtained and if so to provide either confirmation that the email account was not used as from 2017 or provide disclosure of the emails in that account for the date range, being 1 July 2017 to 7 November 2018, which is when Mr Costa sent the email asking for a different email account to be used. In his witness statement dated 23 June 2023, Mr Silver asserts that Mr Costa has states that the email account was closed in around early 2017 and he is no longer able to access it and that he does not believe that it contained any communications relevant to these proceedings. Ms Hassell Hart says the explanation and the matters set out in Mr Silver's witness statement are sufficient and no further disclosure should be ordered in relation to this email account. She also submits that the emails in early November 2018 do not demonstrate that the email account was still in use.

32. In my judgment, the difficulty for Ms Hassell Hart is that the email exchange in November 2018 is a lengthy period after the alleged time (early 2017) when Mr Costa

avers (with no documentary evidence in support) that the email was closed and no longer in use. Mr Hank Uberoi, a director of the Company, is unlikely not to have communicated with Mr Costa during the period in 2017 when Mr Costa closed this account and when the email was sent to Mr Costa saying that the isholdings email was not working anymore. Equally, no evidence has been presented which confirms that it is no longer accessible. There is a difference between a 'lay person' finding that he or she can no longer access an email account and an expert, being someone who has the required technical background to being able to obtain access. Bearing in mind the re-amended petition, it is reasonable and proportionate to direct that Mr Costa take the steps set out in the order which either satisfy and support his position that the email account was no longer in use from 2017 and/or that access cannot be obtained with the assistance of an expert.

(b) additional search terms- new keywords

33. In relation to issues 3,4 and 7 to 13, the Petitioner seeks an order that both the Company and Mr Costa conduct further searches by reference to certain search terms set out in the draft order. Some of these have been agreed and I will not deal with those in this judgment. The ones objected to by Mr Costa (and in so far as relevant, by the Compnay) are Alejandro Waldman, Andres Finkielsztain, Giu Farinelli, Alok Oberoi, Jaideep Puri, and Matthew Starke. The Company objects to carrying out searches in relation to Ecosystem, Henry Gabay and the Duet Group. Mr Costa agrees to carry out those searches. The Company's objection do not appear to be such that the searches cannot be carried out, but are argued on the basis that the searches sought have not met the threshold, nor are they reasonable or proportionate. As I have already set out above, assertions relating to the terms of the original disclosure as in some way preventing further disclosure orders being made does not assist in circumstances such as here when the re-amended petition raises the issues it does. As I have already directed, the Company as well as Mr Costa will be required to provide disclosure based on the additional search terms as set out in the order. The grounds for making these orders relate to what I have set out above and also the evidence which Mr Rivett took me to in some detail.

34. Mr Rivett took me in some considerable detail to the evidence relied upon by the Petitioner to demonstrate the involvement of these individuals. He submits that the evidence demonstrates not only their involvement, but that in certain cases, there are emails between some of these individuals or addressed to these individuals which would not necessarily have been caught by the searches and disclosure already carried out. This is not a case where I can be certain that the searches carried out to date, even ignoring the extended date range which is now necessary, would have caught the material relevant to the re-amended pleaded case. There is in my judgment, a difference between the originally amended petition and the re-amended petition with reference to many more individuals and/or entities being privy to the intentions of Mr Costa and in particular, the much larger involvement of Jefferies than originally pleaded. Additionally, there is the point relating to the misspellings of Jefferies which appear.

35. In opposing these points, Ms Hassell Hart states that the additional key words are unlikely to produce further documentation. She submits that some of the alleged involvement of the individuals is really not made out and that it is not reasonable and proportionate to order disclosure based on these additional key words. In particular, Ms Hassell Hart submitted that in relation to Ms Farinelli and Mr Oberoi, the proposed terms would generate several thousands of additional documents to review. This is because of both of them being involved with Mr Costa on many different matters. She also submitted that the searches were unnecessary on the basis that the relevant documents would already have been disclosed and that these additional searches are unlikely to produce additional documents. I asked during the hearing for consideration to be given in the event I ordered disclosure, to some modifiers so as to reduce the proposed disclosure. These have been produced and commented upon (in the time available). I have adopted most of these in my order. I consider that the use of the modifiers will take into account some of the points raised by Ms Hassell Hart whilst at the same time allowing for the requested disclosure which is necessary for the just disposal of the matter at trial.

36. I have also acceded to the request that the searches relating to Mr Oberoi should cover the entirety of the issue specific date range for issue 8 as well as the core date range.

This again seems sensible and appropriate bearing in mind the pleaded case relating to the involvement of Mr Oberoi. In relation to the searches of 'Project Style', this has been agreed by Mr Costa but is objected to by the Company. I consider the disclosure reasonable and proportionate in relation to the Company. This appears to be a project name and not necessarily caught by Jefferies as a search term. In relation to the relevant date ranges for Project Style, the issue as to date ranges is dealt by me below. It seems to me that the date ranges must cover the period which are now pleaded in the re-amended petition.

37. In relation to the search word, 'Bay Capital', this is objected to by Mr Costa. Mr Rivett relies upon the evidence which he submits shows that at the time that Mr Costa was supposed to be pursuing the Exit process, he was in discussions with Bay Capital for the acquisition of its shareholding in the Company. This, submits Mr Rivett accords with the case pleaded against Mr Costa at paragraph 35. I do not accept that in some way what occurred with Bay Capital is no longer relevant. I accept that the pleaded case raises this issue and that it is relevant because again it goes to the intention of Mr Costa during the Exit Process. It is hard to judge the assertion made by Mr Silver that this search could lead to thousands of documents and the likelihood is that they will be irrelevant. Any duplicative documents can be screened out and there is of course no need to review those. Furthermore, the allegations which are raised are serious and the documents which relate to them are not in the possession of the Petitioners. It seems both reasonable and proportionate to order disclosure with this search term.

(c) Date Ranges

38. As I have set out above, the re-amended petition asserts the undisclosed intention and motives of Mr Costa from an earlier date than previously, being now 1 September 2017. Mr Rivett seeks that disclosure be ordered in relation to issues 3,4 and 13 in relation to the longer date range. I do not consider, for the reason I have given above, that I need to restrict in some way the appropriate date ranges on the basis of what was before ICC Judge Burton. I have considered why the extended date range is being sought. It clearly relates to the amendments to the petition. Accordingly, I have granted the orders sought. For the avoidance of doubt, the extended date range for those issues is necessary for the just disposal of the case at trial. Put simply, it is not in the overriding

interest of justice to restrict the disclosure to a case which has altered in terms of relevant dates. In relation to issue 13, this relates to the instructions and information given to Jefferies as well as the advice Jefferies gave. The current period for this disclosure is 1 January 2018 and the Petitioner seeks to bring this forward to 1 September 2017. In his witness statement, Mr Silver asserts that any relevant documents would have been caught by the searches already conducted in relation to other issues for disclosure. I accept that in relation to certain other issues, documents sin that new extended date range would have been caught, but I agree with Mr Rivett that disclosure relating to each issue requires a different focus and issue 13 considered in relation to the disclosure carried out for the earlier period. Accordingly, I have granted the order which relates to this point as well.

(d) Use of company funds to finance Mr Costa's defence

39. I have directed disclosure as sought on this point by the Petitioner. I start by agreeing with the Petitioner that the issue relating to the indemnity, the advice given to the Board and whether, as alleged by the Petitioner, Mr Costa was involved in this decision is of importance. The petition pleads a specific section in relation to misuse of company funds in this respect as being a further instance of unfairly prejudicial conduct. I do not accept the submissions on behalf of the Company that because the matter was the subject of a consent order, it is no longer live. I agree with Mr Rivett, that is to misunderstand the consent order and its purpose (holding the position. Between the parties pending the petition being heard at trial). In my judgment, it is clear that the issues behind the resolution are relevant and should be disclosed. That applies equally to the position taken in relation to not drawing the indemnity sums and the position taken by the company when this matter was raised by Saxon Woods with the Company and the proceedings which were issued which culminated in the consent order after filing of evidence. No privilege can be asserted in relation to this disclosure. Clearly the Company must act in the interests of all shareholders.

40. Mr Costa accept in principle disclosure on model C but seek to restrict it to communications between him and other members of the board by reference to the period between 11 June 2021 and 23 June 2021. These are the date Mr Costa asserts when he first requested an indemnity from the Company and the date when the

Company informed Mr Costa that it would provide an indemnity. I agree with Mr Rivett that this very limited period would exclude conversations Mr Costa asserts in his defence he had with the Company in the second half of 2021 concerning the payment of the indemnity. Again, it is important to note that these documents may be extremely relevant to the case. Ms Costa' defence asserts that (1) effectively he was not involved in the decision of the Company to indemnify him and (2) the Board had satisfied itself that it was appropriate to grant the indemnity including it took legal advice. I agree with Mr Rivett, the circumstances surrounding the granting of the indemnity and the denial by Mr Costa of his involvement are issues which merit the disclosure sought. It is both reasonable and proportionate.

Mr Costa's application

41. This application seeks to introduce two new issues. As both parties agreed, in seeking further disclosure, there are different ways to approach the matter. The Petitioner sought specific extensions of date ranges to particular issues and/or new search terms. There is, in my judgment, a certain amount of flexibility in relation to how to approach these types of applications for further disclosure. Before considering the two new issues raised, it is important to set them into the context of the re-amended defence. The re-amended defence makes some serious allegations against Mr Loy. It is worth setting them out in part because it is important to ensure that disclosure sought covers the appropriate date range, as well as the issues raised in the pleadings. Paragraph 45 has bene extensively amened to set out the allegations against Mr Loy and others. It is also clear that these amendments arise by reason of the disclosure which had occurred in September 2022. After a description of the communications between Mr Loy, sometimes with Mr Flammini and Metric as well as other potential purchasers, paragraph 45.1.2 states :-

'These communications included the following features: (i) Mr Loy (sometimes with Mr Flammini) being presented as the "proposer" of the sale, who would seek to retain an interest in the Company in any deal; (ii) the suggestion that the Company's other shareholders could be pressurised or forced into a sale; (iii) disclosure of the terms of the Shareholders' Agreement (which was confidential information, the disclosure of which was likely to depress the value of any offer from

*a purchaser and / or obstruct the Company's Exit process) and / or advice or ideas as to tactics for forcing the Company's other shareholders to sell; (iv) an indication that the Company was currently operating with depressed EBITDA levels and could be acquired cheaply; (v) a strategy for a subsequent exit for the remaining shareholders (including Saxon Woods as Mr Loy's vehicle and Mr Loy's "partners") for a higher sum; (vi) the suggestion that there was an opportunity to pre-empt or circumvent the Company's own Exit process and thereby obtain a better deal than if the Company's Exit process was allowed to run; (vii) disclosure of the Company's confidential information; and/or (viii) the presentation of a strategic partnership with IDEX Capital Partners Limited ("**IDEX**"), a company of which Mr Loy was and is the majority shareholder and sole director and from the involvement of which Mr Loy therefore stood to benefit.'*

'

*'45.1.3. Further, ~~it is inferred that~~ in respect of Metric specifically, Mr Loy and/or Saxon Woods initiated discussions with Metric on the explicit basis that Mr Loy and potentially Mr Flammini were seeking to take control of the Company through the assisted purchase of the other shareholders' shares (potentially with a view to selling more profitably at a later date), and ~~had~~ made agreements and/or arrangements with Metric, which were not disclosed to (and indeed were actively concealed from) the Company, in respect of (i) Metric making proposals and/or taking steps with a view potentially to acquiring the Company on that basis, including by taking steps to put pressure on the Company's other shareholders to sell to Metric, and (ii) Mr Loy's potential involvement with, and his continuing investment in, the Company following any proposed acquisition by Metric. This strategy was advanced (at least in part) in collaboration with Mr Flammini who was aware of and participated in Mr Loy's plans. Mr Loy and Saxon Woods were aware from correspondence with Metric, including an email from Mr Balfour on 8 July 2019, that the rollover formed "*an important component*" of Metric's approach to any deal.*

45.1.4. In connection with the preceding sub-paragraphs, Mr Costa will rely at trial on (amongst other things) the following matters:

PARTICULARS

(1) Mr Loy failed to exercise his powers for the purposes for which they were conferred. Instead he exercised them in a way which pursued his own sectional interests and / or those Saxon Woods and/or those IDEX and/or those Mr Flammini to those the Company and its shareholders

generally, by seeking to pre-empt, subvert or otherwise undermine the Company's Exit process with a view to benefitting from rolling over their investments and/or regaining management control the Company and/or obtaining different and better terms than those available to other shareholders and/or constructing a transaction from which Mr Loy and/or Saxon Wods and/or Mr Flammimi and/or IDEX (and therefore Mr Loy himself) could benefit

(2) Further or alternatively, Mr Loy failed to act in the way he considered, in good faith, would be most likely to promote the success of the Company for the benefit of its members as a whole, and / or had no regard or no adequate regard to the need to act fairly as between members of the Company, but instead acted in pursuit of his own sectional interests and / or those of Saxon Woods and / or those of IDEX and/or Mr Flammini to those of the Company and its shareholders generally, by seeking to pre-empt, subvert or otherwise undermine the Company's Exit process with a view to benefitting from rolling over their investments and/or regaining management control of the Company and/or obtaining different and better terms than those available to other shareholders and/or constructing a transaction from which Mr Loy and/or Saxon Woods and/or Mr Flammini and/or IDEX (and therefore Mr Loy himself) could benefit.

(3) Further or alternatively, Mr Loy failed to avoid a situation in which he had, or could have, a direct or indirect interest that conflicted, or might conflict, with the interests of the Company, and in pursuing his own sectional interests caused the Company to incur substantial and unnecessary cost as referred to at paragraph 45.1.7 above,

(4) Further or alternatively, Mr Loy failed to declare the extent of his interest in the proposed transaction or arrangement with Metric (as to which see further paragraphs 88.9 to 88.10 below), and sought dishonestly to conceal the nature and extent of his interest in the proposed transaction or arrangement with Metric and the Hut Group when asked (as particularised at paragraphs 88.9 to 88.10 below).

42. There are a further 11 sub paragraphs which provide the particulars in support of the allegations being made. I have nit set them out but they do not extend the relevant date range or the issues relating to IDEX. It is noteworthy that the date period relating to these allegations is from June 2019 until the end of November 2019. Paragraph 45.1.8 then sets out that in so acting, Mr Loy acted breached his duties to

the Company in the manner specified in that paragraph. There follows then the particulars which all relate to the matters pleaded in paragraph 45.1 save for a reference to paragraph 88 in the pleading. The paragraph sets out the allegation made against Mr Loy in relation to misleading the Board about his activities as set out in paragraph 45.1 when he disclosed them at or prior to a meeting in April 2020. I have set that paragraph out below.

Paragraph 88.9 – 88.10 states as follows:-

88.9 In 6 April 2020, Mr Loy emailed the directors and shareholders of the Company and belatedly disclosed certain dealings that he had had with Metric. In particular, he said that:

(a)It was "*common practice for existing shareholders in a target to be asked either to 'roll' their shares over or to re-invest post-acquisition*".

(b)Metric had "*asked [him] whether [he] together with other shareholders might wish to reinvest in the Company post-acquisition*".

(c)In response he had said that he was "*willing to consider some form of reinvestment if that is necessary in order to achieve the highest possible value for shareholders.*"

(d) This issue was one "*which can (and should properly) be the subject of discussion between Metric and Jefferies LLC, once Jefferies has been properly engaged to cause an Exit in accordance with clause 6.2 of the Shareholders' Agreement.*"

(e)With the exception of Metric, he had "*no interest in a sale to any of the third parties who have communicated an interest in purchasing the Company to either the Company or Jefferies. Of course, it is quite possible that they will in due course raise with Jefferies the possibility of certain shareholders reinvesting post-sale and no doubt Jefferies will keep a record of all personal interests as part of the Exit process.*"

88.10 This email was materially misleading and failed to disclose or fairly represent (and, indeed, actively concealed) the true extent of Mr Loy's interests in a potential transaction or the discussions that he had had with Metric or other parties (including the Hut Group) with which he had engaged, and it was sent by Mr Loy knowing that the contents of his email concealed from his fellow directors and

the shareholders (and was intended to mislead them as to) the true extent of his interests in a potential transaction and the discussions that he had had with Metric, without honest belief that the email represented the true position and / or reckless as to whether it represented the true position. In sending that email, Mr Loy was acting dishonestly, in that knowingly and actively concealing the true position from his fellow directors and the shareholders, intentionally misleading them as to the same, and providing that information while having no honest belief as to the true position or being reckless as to the same, is all by its nature dishonest. Paragraph 45.1 above is repeated. Without prejudice to the generality of what is pleaded therein:

88.10.1. Mr Loy's email wrongly sought to portray that the suggestion for a rollover had come from Metric when in fact, as he knew in light of his involvement in the matters pleaded at paragraphs 45.1.1 to 45.1.4 above, he had approached Metric on the basis that he and Mr Flammini would rollover their interest; further, Mr Loy did not disclose that he and Mr borating to achieve a transaction of this kind and pre-empt the Exit process (as to which paragraph 45.1 is repeated)

88.10.2 His email wrongly suggested that the basis for his willingness to rollover was to achieve the highest possible value for shareholders, when in fact, as he knew in light of his involvement in the matters pleaded at paragraphs 45.1.1 to 45.1.4 above, (1) it was to prefer his and / or Saxon Woods' and / or Mr Flammini's sectional interests (and indeed his conduct as regards Metric and other potential investors and / or purchasers was likely to depress the value that could be achieved for other shareholders), (2) Mr Loy's approach to investors was on the basis that the EBITDA was depressed and there was an opportunity to seek to pre-empt the exit process.

88.10.3. His email wrongly suggested that he had no interest in a sale to any the third parties (other than Metric) who had communicated an interest in purchasing the Company when in fact as he knew in light of his involvement in the matters pleaded at paragraphs 45.1.4(13) and 81.6 above, he had sought to make arrangements with the Hut Group as pleaded above;'

43. In my judgment, the pleaded case relates to the period essentially from June 2019 until end of November 2019. The particulars and the matters set out in paragraphs 45.1 and onwards as well as the reference to those paragraphs in paragraph 88 makes this clear. To the extent that the new issue seeks disclosure for a different date range (beyond perhaps a few months either way which the Court sometimes directs), I can

see no justification for an extended date range on the pleaded case. Ms Hassell Hart submits that caution needs effectively to be applied when the Re-Amended Defence is read because paragraph 45.1.4 expressly pleaded that Mr Costa will rely at trial on (amongst other things) the following matters. Accordingly, she submits that the particulars set out are not necessarily the entire case. I accept that those words provide a limited reservation.

44. However, no further particulars have been provided which relate to another date range. Furthermore, in my judgment, it is important, especially with serious allegations, that the other side know the case they have to meet. Ms Hassell Hart referred me to the passage I have quoted from the Judge in *Ventra*. I accept that one must be careful not to restrict disclosure in the way the Judge set out in that case, but the disclosure must relate to the pleaded case. No part of the pleaded case supports the extended date range. The 'clean hands' part of the pleading is at paragraph 165 and 166 also specifically refers to paragraph 45.1. The relevant dates for the Investment Period set out in the SHA is to the end of December 2019. Thereafter the obligations are somewhat different and relate to a reasonable period thereafter which the Petitioner asserts to be to the end of March 2020. Mr Loy resigned as a director in June 2020. I also note that the allegations in relation to IDEX relate to a strategic partnership as set out in paragraph 45.1.2 (viii).

45. New issue 1 seeks as follows:-

> *:"In relation to the steps taken by Saxon Woods and Mr Loy (and those acting on their behalf) to sell shares and/or an interest in the Company and/or otherwise explore a transaction with a view to a counterparty obtaining a direct or indirect equity stake in the Company:*
>
> a. *What were the nature and terms of any proposed transactions or possible transactions under discussion, and who were the potential investors approached or interested in investing in the Company (directly or indirectly)?*
>
> b. *What communications did Saxon Woods and Mr Loy, Mr Flammini, Ms Gerami, Mr Powell, Mr Petrow and/or IDEX (and those acting on their behalf, including any third parties engaged to assist in relation to a sale of the Company) have (as between themselves or with any third parties,*

including potential investors, financial advisors / intermediaries and the Company) in relation to any proposed or possible transactions?

c. *What was the role of IDEX and what value was to be ascribed to it in relation to any proposed transaction or possible transaction under discussion?"*

46. In the DRD, issues 26,27 and 28. Issues 26 and 28 were directed as model D with narratives and issue 27 was directed as Model C. A careful reading of those three issues indicate that essentially what is being sought in new Issue 1 duplicates these issues 26, 27 and 28.

'Issue 26, (a) was there any substance to Metric's proposals in relation to the acquisition of the Company and were they made in good faith?

(b) Did Metric or the Hut Group (or any other third party) intend to, and were they in a position complete an acquisition of the company before 31 December 2019, alternatively by 10 January 2020 or alternatively by 31 March 2020.'

Issue 27 – What communications and meetings did Mr Loy and Saxon Woods or Mr Flammini have with and what information did they provide to Metric , the Hut Group and any other potential investors in the company'

Issue 28 – What agreements or arrangements (formal or informal) did Saxon Woods and/or Mr Loy make with Metric in respect of (i) a potential acquisition of the Company or (ii) the interests of Mr Loy or Mr Flammini in the Company .'

47. In my judgment the difficulty with New Issue 1 is that is bears little resemblance to the pleaded Re-Amended Defence, but effectively duplicates the three issues identified above. Paragraph 45 sets out the particulars relied upon in relation to Metric and the Hut Group. It sets out what it pleads in relation to IDEX. These matters are covered by issue 28. Despite Mr Costa relying upon both paragraph 17 and paragraph 18, essentially the application for a new issue 1 falls into paragraph 18. The redactions of certain documentation relating to IDEX was clearly a large and significant part of the which was a matter heavily relied upon by both Ms Hassell Hart

and set out in Mr Silver's statements. An agreement was reached and I did not hear the issues relating to the redactions, although I fully understand that it was Mr Costa's case that the redactions were such that there was a failure to comply with the DRD. However, it is a long stretch to then assert that there was some further wide ranging breach of paragraph 17 by the Petitioner. That is difficult to substantiate on what is before me. This is why I refused to make any order sought under paragraph 6(ii) of Mr Costa's draft order.

48. I can understand, in a similar vein to the application made by the Petitioner, that Mr Costa wishes to seek with further keywords to be added and disclosure obtained. However that was not the application made. Instead, I have been asked to direct a new issue 1 and additionally, to cover a date range from 1 March 2019 to 30 April 2021. As I have set out above, the pleaded case relates to the period June to November 2019. Nothing in the currently pleased Re-amended Defence is capable of stretching this until 30 April 2021. The breaches relied upon of Mr Loy as a director of the Company relate to the June to November 2019 period. Ms Hassell Hart relied upon a document dated August 2020. In my judgment , any order for disclosure needs to start with a consideration of the issues which are raised in the pleaded case. That document dated August 2020 is not referred to or pleaded in the Re-Amended Defence. I was informed at the hearing that this document was produced in January 2023. No further application to amend the Re-Amended Defence has been made.

49. I have determined as set out above, that an order as sought in relation to new issue 1 is not appropriate in all the circumstances. It is in many respects, duplicative, and seeks a date range which bears no resemblance to the pleaded case and it is neither in those circumstances reasonable or proportionate. However, it does seem to me, without having heard from Mr Rivett, that I am prepared to make a different order for disclosure from the one sought. I have indicated to the parties that in my judgment it would be reasonable and proportionate to direct some further keywords to be added and be subject to disclosure in relation to issues 26,27 and 28. This would relate to the time period pleaded in the Re-Amended Defence.

50. New issue 2 which is sought states as follows:-

New Issue 2: "*Does Mr Loy have a majority interest in, or does he otherwise control, Saxon Woods?"*

51. This issue raises arises from the Re-Amended Defence and Reply. In the re amended Defence, at paragraph 8, Mr Costa pleads that Saxon Woods serves as an investment vehicle for Mr Loy's interest in the Company and is controlled by Mr Loy. This plea of control is repeated in paragraph 139. This plea is not directly replied to in the Reply. In the witness evidence served on 31 March 2023, Mr Craig Barley, the managing director of Butterfield Trust (Bahamas) Limited sets out that the shares in Saxon Woods are owned by Butterfield which hold those shares in trust for Logan 2011 Capital Trust. Mr Barley states at paragraph 16 that although Mr Loy was heading the discussions relating to the SHA and the proposed Ext, '*it was always the case that I was the only one with the authority to tale substantive decisions on behalf of Saxon Woods'* and later, '*I was the one in the driver's seat at Saxon Woods'*. Mr Loy's witness evidence states that he is the settlor of Logan 2011 Capital Trust which is the ultimate beneficial owner of Saxon Woods. He states (paragraph 31 that he moved his shareholding into Logan 2011 Capital Trust in 2014. He states he is not the sole beneficiary and that he does not control Saxon Woods.

52. The above has lead to the application for disclosure on the basis of new issue 2. That seeks on Model C, the following:

    (i) Conduct its searches over a date range of 30 September 2017 to 30 April 2021; and

    (ii) Give disclosure on the basis of Model C pursuant to the following Model C requests:

        a. All communications between or involving any of Mr Loy and Mr Barley or any employees of Butterfield / Montague East or any other director of Saxon Woods or trustee of the Logan 2011 Capital Trust relating to:

            (i) the sale of any shares in Saxon Woods or any shares held by Saxon Woods in the Company;
            (ii) any authorisation given to Mr Loy to act for or represent the interests of Saxon Woods; and

(iii) any decisions taken by Saxon Woods in relation to its shareholding in the Company.

b. Documents evidencing:

(i) the persons with a beneficial / economic interest in Saxon Woods; and/or

(ii) the manner in which their beneficial interest arose.

53. Firstly the same points which I have made above apply equally to the proposed date range in relation to Issue 2. I am not prepared to grant any disclosure order relating to the issue arising under new issue 2 with the type of date range sought. I do accept that Mr Costa has a concern relating to the matters which are set out in the witness evidence and in particular where no documentation in support has been produced. I am very aware that the 'clean hands' plea may well be extremely relevant at trial. It also forms an important part of Mr Costa's case. I agree that Mr Costa must be entitled to test the statements made and there is a lack of documentation in this respect making it difficult for the statements made to be tested. I do not accept that what is required or is reasonable and proportionate to the extent set out in the particulars to new issue 2 set out above. Instead, I have directed a more focussed disclosure which would disclose communications/emails as between Mr Loy (or those acting on his behalf) and Mr Barley during the relevant period, being the date range identified in the pleaded case. Further, it seems to me that Mr Costa is also entitled to evidence relating to the statement that Mr Loy is the not the only beneficiary of the Trust. That disclosure relating to the other beneficiaries may be placed into a confidentiality circle if necessary. I have directed that the disclosure provide details of those with an economic or beneficial interest in Saxon Woods which includes, for the avoidance of doubt, the other beneficiaries of the Trust.

54. The draft order also sought disclosure of various particular documents. I understand that these have now been dealt with between the parties. A leter of Intent which has been referred to in another document is also sought by Mr Costa. I see no real basis for that document to be disclosed. It appears to be peripheral to the issues as set out in the pleaded case and I have refused disclosure of it.

Privilege – can the Company rely upon the exception to the general principle

55. According to its disclosure certificate, the Company has withheld material from production on the grounds that it is entitled to assert privilege against Saxon Woods, a shareholder of the Company. The general rule, as recently set out in *Sharp v Blank and others [2015] EWHC 2681 (Ch)* at paragraph. 12 is that, '*no privilege can be asserted by the company against its shareholders'*. This is accepted by Mr De Verneuil Smith. He submits that the exception to the well established rule is engaged in that he submits that there is a threat of hostile litigation by the shareholder against the Company. In support of his submission, he relied upon certain letters sent either by Saxon Woods and/or by its then solicitors Mishcon de Reya to the other shareholders and/or to the company and its solicitors.

56. The disclosure certificate filed by the Company asserts that it is entitled to assert privilege '*if there are hostile proceedings between the company and the shareholder (CAS Nominees Ltd v Nottingham Forest FC Plc [2001] 1 All Er 954) Hostile proceedings were first threatened by the Petitioner on 24 September 2019. As a result the Eight Respondent asserts privilege in respect of such documents from that date'*. A letter dated 24 September 2019 from Saxon Woods to the other shareholders, and three letters dated 11 December 2019, 3 April 2020 and 15 September 2020 are relied upon by the Company as set out in the skeleton argument of Mr De V Smith. There is also reliance on a letter dated 17 July 2023, the Company's solicitors, Sidley, stated it position as follows, *'For the avoidance of doubt and without waiving privilege we confirm that after the Petitioner's letter of 24 September 2019, legal advice was given by this firm regarding an Exit under the SHA in the context of contemplated litigation by the Petitioner,*

including by means of a possible contractual claim against the Company'. It is clear that no privilege can be asserted in relation to any advice the Company received either in relation to the threatened section 994 or indeed the threatened derivative action. Equally no privilege can be asserted in relation to advice given to the Company in relation to the indemnity issue. I did not understand that those issues are objected to by Mr De Verneuil Smith on behalf of the Company. The statement in the disclosure certificate is perhaps a little unclear in that it could be read as asserting a privilege beyond the threatened hostile litigation against the Company.

57. Having considered the submissions made by Mr De Verneuil Smith and carried out an objective assessment of the letters relied upon (some of which needed to be read in the context of other letters sent), I have determined that the Company's privilege assertion on the grounds of threatened hostile litigation does not fall under the exception to the general principle. I set out my reasons below.

58. *Re Hydrosan Ltd [1991]BCC 19* confirms the established principle that a section 994 petition is not hostile litigation between the petitioner and the company. The decision of Mr Justice Harman sets out the well known principle from older cases, namely that a company is a nominal party to section 994 petitions (formerly section 459 of the Companies Act 1985) and that in substance the dispute is between the two shareholders. Equally, it is also very clear that company money should not be expended on disputes between the shareholders. (referring to *Re A & B C Chewing Gum Ltd[1975] iWLR 579 at p 592*) and *Re Crossmore Electrical and Civil Engineering Lrd(1989) 5 BCC 37 at p 38G)*). The importance of these principles is clear. Any material which will show that the company has been funding the defence of the shareholders to a

section 994 petition is a wrongful application of the company's funds. All shareholders of a company are prima facie entitled to demand to be produced matters passing between solicitors to the company and the company. The general principle arises equally between a company and its shareholders and as between a trustee and his beneficiaries. Mr Justice Harman cited and relied upon the decision of the Court of Appeal in *Woodhouse & Co Ltd v Woodhouse (1914) 30 TLR 559*.

59. The rule does not apply where the Shareholder is a plaintiff or defendant in litigation with the company. At paragraph B-C at p 21 the Judge stated, *'The emphasis must be upon 'with the company' and the question that must be considered is the general rule that all documents obtained by the company in the course of its administration of the company, or by the trustees in the course of administration of the trust, are producible to the shareholders or the beneficiaries, sometimes called cestuis que trust, but where there is hostile litigation proceeding between them that rule does not apply.'*

60. In *Hydrosan*, an attempt was made to argue that a winding up petition seeking the just and equitable winding up of the company was hostile litigation against the company. This was rejected by the Judge, who stated that not only was *Re A & BC Chewing Gum* a just and equitable winding up case, but also, at p 21E, '*The claim on a contributory's petition for a just and equitable winding up is not in truth hostile litigation by a shareholder against a company. It is in truth a claim by a shareholder based upon the wrongful acts by other shareholders or directors which have amounted to some equitable wrongdoing even within the articles as is exemplified in the case commonly referred to as Re Westbourne Galleries Ltd [1973] AC 360 which went to the House of Lords and reinstated the width of just and equitable petitions'*.

61. At p 21 F the Judge continued:-

'It is quite clear in my judgment that the nature of a petition based by a creditor against the company, which seeks the winding up of the company, is wholly different from the nature of relief where there is a just and equitable petition by a shareholder against the company, which may also lead to an order for the winding up of the company. It is quite true that if a winding-up order is made on a contributory's petition the company will suffer what I usually refer to as death, that is, its coming to an end and eventual dissolution, but the wrongs claimed and the nature of the allegations are of wrongs by those in control of the company against a shareholder rather than by the company itself in any real sense. Here in this present case if there were documents created in the course of proceedings, other than the sec. 459 petition, such as, it may well be, the claim brought by the petitioner here against the company in the Chancery Division for wrongful dismissal and also the claim in an industrial tribunal for what is nowadays called unfair dismissal, in such matters, it seems to me, the claim truly is against the company. A judgment recovered on it would make the claimant in it a creditor of the company and would found a creditor's petition for the winding up of the company. Such matters, it seems to me, are hostile litigation within the doctrine of Woodhouse & Co Ltd v Woodhouse which is an exception to the general rule, but that exception does not in my judgment have any application to documents for a member's just and equitable petition'

62. The Judge then went on to quote from *Re Kenyon Swansea (1987) 3 BCC 259* at p 265 as follows:-

"There is, however, one matter which has given me considerable concern. At a meeting of the board of directors of the company ... it was resolved to instruct solicitors to act on behalf of the company. In reliance on that resolution solicitors retained by the company have incurred considerable expense in filing evidence and instructing counsel to oppose this application. I can see no possible justification for this course. The directors concerned no doubt have very strong feelings as to the person they would like to see in control of the company and able to appoint and remove its directors including themselves. But they are not entitled at the expense of the company to take part in a dispute as to whether Mr Kenyon's shares should be compulsorily acquired by Mr Mitchell or by the company."

Plainly an order that the shares be acquired by the company would be an order affecting the company and yet the judge said - and I wholly agree with him - it could not properly be an action where the company's finances should be employed to influence the result of the claim. In my view that supports the proposition I have already enunciated that a contributory's petition for just and equitable winding up, although it does produce severe results upon the company if it succeeds, yet is not properly within the classification of Phillimore LJ and Lush J in the Woodhouse case I have already cited.

For those reasons it seems to me that all the documents concerning the solicitors acting in the earlier petition are discoverable documents and should be produced. I do not include in the category of discoverable documents those relating to any steps taken by solicitors acting in the course of the Chancery proceedings for wrongful dismissal or the Industrial Tribunal proceedings for unfair dismissal. As it seems to me completely different considerations apply to those latter sorts of proceedings.'

63. The second issue to be determined by Mr Justice Harman related to a rights issue which had been proposed by the company in May 1989. The Judge held that from the date of the circular of 26 May 1989 relating to the rights issue, the nature of the relationship between the parties was such that it was reasonably contemplated that there would be litigation arising. The privilege however would only attach to '*litigation against the company in the true sense within the doctrine.'* (page 23)]

64. In my judgment, it is therefore important to consider whether the litigation against the company is against the company in the true sense within the doctrine. Obviously, the fact that the company is a party to that ligation and even named as a defendant is not decisive or in many respects relevant. The classic examples are just and equitable winding up petitions which are only against the Company in question and section 994 petitions where the company is always a respondent even though it is accepted only a nominal defendant.

65. Equally, it is also not determinative that the relief, if granted, would have some legal effect on the company, by winding it up or causing a change in its value by reason of an ordered sale of shares etc. In my judgment, what is required is a careful analysis of what the alleged hostile litigation is (or threat thereof) and whether it really is against the company in the true sense. In many section 994 petitions, and the one before me is not exception, there are allegations pleaded which refer to breaches by the company

of a shareholders agreement or of the articles of association. Such allegations do not make the Company anything more than a nominal defendant. The reality is that those breaches of the Company of the articles and/or a shareholders agreement are attributed to the wrongdoers being the other shareholders and/or directors acting on their behalf. Allegations of wrongful exclusion of a director in breach of the articles or of terms of a shareholders agreement are classic examples. Those allegations are then relied upon as part of the unfairly prejudicial conduct of those in control of the company. Those types of allegations are not to be viewed, in general, as being hostile litigation against the company. They are clearly based on allegations of wrongdoings against either the directors acting at the direction of the majority shareholders or the shareholders themselves.

66. In *Arrow Trading and Investments Est 1920 and another v Edwardian Group Ltd [2004] EWHC 1319(Ch)*, the company, at the instigation of two independent directors, had sought to intervene in the section 994 petition and participate and oppose the petition. An injunction was granted restraining the company from participating. In a subsequent application for disclosure, Mr Justice Blackburne granted an order for disclosure and full information of all documents relating to the company's decision actively to contest the petition contrary to the customary practice of adopting a neutral position in the proceedings and also the disclosure of certain financial information. The Judge held that the principle applied that a shareholder was entitled to disclosure of documents obtained by the company in the course of the administration of its affairs, including legal advice obtained by the company on behalf of all the shareholders. There was no basis upon which the company could assert any entitlement to privilege in respect of the petitioner's claim for disclosure of the documents. The company was only a

nominal although essential defendant in the section 994 proceedings and it had no independent position in relation to the dispute between the petitioners and the chairman and his family over the issues of remuneration. The attempt by the company to participate in the section 994 proceedings had given rise, by the time of the hearing before Mr Justice Blackburne, to amended series of pleas in the petition relying upon the conduct of the company acting through its directors to act in breach of duties owed to the shareholders as a whole as well as being unfairly prejudicial conduct to the interests of the Petitioner.

67. The actions of the independent directors and the company caused the Petitioners to further lose confidence in the ability of the Company's directors for the future to comply with their fiduciary ability to act in the interests of the Company as a whole and not in the interests of some only of the shareholders of the company. As further observed by Sir Francis Ferris, the Judge who heard the successful injunction application, the improper use of the Company's resources on the instant dispute between its shareholders (i) constitutes misfeasance on the part of the Company's directors, and (ii) in and of itself constitutes conduct unfairly prejudicial to the interests of the Petitioners herein. In the amended Reply which was filed by the Petitioner, it is pleaded that the actions of the independent directors in seeking to further the interests of the company's majority shareholder is evidence of the extent to which the operation of the company in the interest of the respondents, as opposed to the interest of the company's shareholders had become institutionalised.

68. I pause to note that in the case before me, the issue relating to the indemnity has caused the Petitioner to amend its Petition and to plead the misuse of company funds. I am

not of course dealing with the merits of that plea, but it is important, in my judgment, to keep in mind whether issues raised are really hostile litigation against the company by a shareholder or, as can be seen from above, merely allegations directed against the wrongdoers and result in further instances of unfairly prejudicial conduct. Saxon Woods has made it clear in its correspondence that it considers that there is a failure by the directors in considering the interests of the shareholders as a whole. This does not make the perceived threatened litigation for breach of the SHA hostile litigation against the company. In assessing the letters relied upon, it is important to bear in mind and take into account these fundamental principles relating to section 994 proceedings and also related derivative proceedings.

69. The fact the so-called independent directors have a view on the matters raised and relied upon in the section 994 petition is, Mr Justice Blackburne concluded, neither here or there. The advice sought and obtained was in connection with what, if any action the company should take in response to the petition in the interests of all its shareholders. The Judge continued (p 705), *'I seen no basis on which the company can assert entitlement to privilege in connection with these matters'*

70. In the case before me, there are numerous letters written by the solicitors acting on behalf of the Company commenting upon the allegations made and going as far as asserting that there is no merit in the petition itself. In my judgment, the advice provided by the Company in relation to all matters in connection with the threat and/or the petition itself are clearly disclosable to the petitioner as a shareholder. This is exactly what is established in *Arrows*. As stated clearly by Mr Justice Blackburne, the advice sought and obtained was in connection with what if any action the company

should take in response to the petition in the interests of all its shareholders. In *Arrows*, Mr Justice Blackburne stated that the company had no independent position in relation to the issue of remuneration which was only between the petitioners and the respondents to the petition as shareholders. In the case before me, it is irrelevant, in my judgment, that it appears from the letters which I have seen in the bundle that the Company's solicitors appeared to have descended into the arena of the section 994 petition and the allegations made therein rather then remaining neutral. That does not provide any entitlement to assert privilege. The company has no independent position in relation to the allegations which are made or threatened between the petitioner and the respondents as shareholders in the section 994 petition.

71. Earlier in his judgment, the Ms Justice Blackburne referred to *Re Hydrosan* and to *CAS Nominees Ltd v Nottingham Forest FC plc [2002] 1 BCLC 613* and stated, '*The essential distinction is between advice to the company in connection with the administration of its affairs on behalf of all its shareholders, and advice to the company in defence of an action, actual, threatened or in contemplation, by a shareholder against the company'*. In *CAS Nominees*, the petition pursuant to section. 994 attacked an agreement entered into by the company allowing Mr Dougherty (the third respondent) to acquire new ordinary shares in the club which represented 40.5 % of the share capital with an option to acquire further shares effectively allowing him to control the club. The agreement was subject to approval of the company's shareholders at an extraordinary general meeting. The petitioners asserted that the agreement was unfairly prejudicial and that the mechanism of allowing Mr Dougherty to invest in the club, rather than the company was adopted for no proper purpose of the company but specifically to ensure that shareholders of the company were denied the protections available to them under the 1985 Act or the City

Code on Take-overs and Mergers. The defendants asserted in their defence that the agreement was made for a proper purpose namely to ensure the urgent injection of funds into the club. The petition clearly attacked the actions of the company and this is clear from the 'no proper purpose' allegation. That attack or anticipated attack did not entitle the company to assert hostile litigation. It was clearly recognised that the proceedings were essentially one between the shareholders. Mr Justice Evans Lombe relied on and quoted a lengthy passage from Mr Justice Simmonds in *Dennis & Sons Ltd v West Norfolk Farmers' Manure & Chemcial Co-operative Co Ltd [1943] Ch 220*. In that case, the Judge held that an accountants' report which had been obtained by the company in anticipation of the dispute with the shareholder/plaintiff was not protected by privilege. The company had sought the report from the accountants as to the interpretation of one of the articles of association of the company involving the duty of the directors in administering the affairs of the company. The Judge held that in instructing the accountants to make the report, the company was doing something on behalf of all the shareholders. Mr Justice Simmonds also stated at the end of the passage quote and relied upon by Mr Justice Evans Lombe, *"In other words, the report was not a document obtained by the defendants for the purpose of defending themselves against hostile litigation, and it is only where a document is obtained by a company for that purpose that privilege can be claimed. It must never be forgotten that the rules as to privilege are strict, and, as has often been said, privilege is not to be extended'*.

72. At paragraph 19 of CAS Nominees, the Judge stated:-

> *'19. It follows, in my judgment, that the documents in the four classifications which I have set out, and which are the subject matter of this part of the a application, were not documents which were protected from disclosure by legal professional privilege. They were documents which were created or which were*

added to by lawyers or others for the purpose of procuring the company to take certain actions, albeit it was anticipated that those actions might give rise to litigation in which a challenge would be mounted to their propriety by the present petitioners. In the present case the company has procured the issue of a substantial number of the shares of its subsidiary to Mr Doughty and given him an option to acquire further shares which would render the company a minority shareholder in that subsidiary. It is alleged amongst other matters that the issue of those shares and the granting of the option were at a discount on the true value of the shares at the relevant time as demonstrated by their market price. It is also alleged that the shareholders of the company in general meeting were induced to vote in favour of this transaction as a result of a misleading circular. I say nothing as to whether any of those allegations are justified. I can see powerful contrary arguments. However, I can see no reason why the objecting shareholders should not be entitled to see the advice and guidance being given to the company's board at the time these transactions were embarked upon in proceedings in which the company itself only appears as a defendant in a nominal capacity so as to be bound by any order which the court makes'.

73. Ms Justice Evans Lombe also recognised that derivative proceedings were also not hostile proceedings against the company. The company is made a defendant to the representative shareholders action against the directors but it is a nominal and importantly, neutral defendant.

74. From these cases, it is clear that advice provided for the company is not necessarily covered by privilege even if the company asserts such privilege as in *CAS Nominees and Arrows or Dennis & Sons*. It is really an analysis of whether the proceedings (or threat of those proceedings) are against the company in the true sense. I add that the cases also demonstrate that the fact that the advice was obtained and acted upon by the company in anticipation of proceedings does not mean that the anticipated proceedings are hostile proceedings against the company. The facts in *CAS Nominees* make this clear. The proceedings were clearly a shareholders' dispute. Equally the report obtained by the company in *Dennis & Sons* was clearly held to have been obtained on behalf of all the shareholders. It makes no difference that the company and its legal advisors believe

otherwise. That is not the test as was abundantly clear from the facts in *Arrows*. I also bear in mind the warning given by Mr Justice Simmonds as to the rules of privilege being strict. This is, I add, a different point than what is actually covered by the privilege, if I had held that the same exists. The issue before me is whether the privilege asserted exists and not what is covered by it.

75. I now turn to the letters relied upon by Mr De Verneuil Smith in support of the Company's position that there was a threat of hostile litigation against the Company such as to fall under the exception to the general principle. Mr De Verneuil Smith accepted that the exercise to be carried out by me is an objective assessment of the letters relied upon and whether one or another can be determined as creating a threat of hostile ligation by the shareholder against the company. I agree. It forms no part of my assessment that Sidley considered such a threat existed as is apparent from their latest letter relied upon dated 17 July 2023. That was their subjective position as set out in that letter. As I have set out above, the assessment must also place the facts of the case into its proper legal context.

76. The letter dated 24 September 2019 is from Saxon Woods addressed to the shareholders of the company and cc'd to the board of directors of the company. In my judgment the letter is extremely clear. The first sentence states ,*'we are writing to you as shareholders in the Company*'. The letter then went on to provide details of the terms of the SHA and the agreed Exit process. The letter then sets out the concern of Saxon Woods that the Exit process is not being conducted in good faith and in line with the relevant terms of the Shareholders Agreement. The allegations relating to a failure to consider the offer of Metric (which is set out in the petition) is also set out in the letter.

The letter states, 'By way of reminder, the Shareholders' Agreement requires the Company's Board of Directors and its Investors (ie the shareholders) to "work together in good faith towards an Exit no later than 31 December 2019" and 'to give good faith consideration to any opportunities for an Exit during the course of the Investment Period'" There is also the following paragraph,

> *'Neither the wider Board of Directors nor the company's shareholders appear to have been consulted before the message from the "Spring team" that there was "no interest in a debt based capital raise" was passed either to Jefferies or onwards to Metric. This is clearly in breach of the Shareholders Agreement which requires "any opportunities for an Exit" to be given in good faith consideration by both the Company and by each and every Investor(shareholders)'*

77. This paragraph is relied upon by Mr Fox, of Sidley Austin, solicitors of the company, in his witness statements dated 23 June 2023, but in my judgment, the letter needs to be read as a whole. In any event I do not consider that the reference to 'the Company' on this paragraph without more, enables the Company to assert that this constituted hostile litigation by a shareholder against the company. The other paragraphs in the letter clearly do not support such a threat of hostile litigation assertion.

78. The subsequent paragraph expressly refers to the possibility of these failures resulting in the shareholders being unable to realise the fair value of their shares in the Company. This demonstrates, in my judgment, clearly, the purpose of the letter being sent to the shareholders. The letter seeks an urgent meeting of all stakeholders in the Exit process. The last paragraph of the letter is, in my judgment, also important because it makes it clear that the threatened action is clearly one against the other shareholders or a derivative claim. The last paragraph states, *'We should mention that we are in the process of*

seeking legal advice regarding actions available to the shareholders of the Company should it transpire that any steps being taken by any of the Company's directors in breach of their fiduciary and statutory duties to the Company and it shareholders which threaten to jeopardise the Exit process and which may be in breach of the Shareholders' Agreement'

79. In my judgment, this letter, read as a whole, raises no threat of hostile proceedings against the company by way of proceedings for breach of the terms of the SHA or some other basis. The letter is clear. It alleges wrongdoings against shareholders and also the directors of the company. Both these types of threatened actions are ones where the company is only a nominal defendant, being a section 994 or a derivative action. This is the case even if those allegations include breaches by the company of the shareholders agreement. Care must be taken to consider what exactly is being threatened and the type of proceedings/litigation is being threatened. Bearing in mind the wrongdoings alleged in the letter, these are clearly not against the company, 'in the true sense' but against the alleged wrongdoers identified as directors and shareholders. Accordingly, the Company is not entitled to assert privilege under the exception based upon this letter and disclosure needs to be provided from the date of this letter.

80. The next letter relied upon by the company is dated 11 December 2019 from Mischon de Reya, acting on behalf of Saxon Woods. This letter is stated to be for the attention of the board of directors and it was sent to each board member as well as to Sidley Austin. Paragraph 3 and 5 state as follows:-

' This letter is written to notify the Board of Directors that it considers the Board is currently failing to pursue the Exit in good faith or otherwise in accordance with the Shareholders Agreement. This failure is also contrary to various resolutions passed at Board meetings. In failing

to pursue the Exit and/or allowing certain directors appointed to the Exit Co to frustrate the Exit process, the Directors of the Company ('the Directors') are in breach of their duties as directors of the Company under the Companies Act 2006. In the event that the Board fails to achieve the Exit in the manner which has been agreed and in accordance with their duties, they will be acting in a way that is unfairly prejudicial to the interests of the members of the Company (or at least some of the members) in accordance with section 994 of the Companies' Act 2006. This letter has been sent to the Company's solicitors, Sidley Austin, as well.'

Paragraph 5 –'*If the Board of the Company fails to act properly and an Exit is not achieved as a result, our client will seek all remedies available to it, including an order requiring the purchase of its shares at the value of the Metric offer and action against each individual Director personally for their failure to comply with their fiduciary duties. This would be approximately $22,300,000 (or indeed the difference between this sum and the value of Saxon Woods' shares at the date of the final determination of this matter). It is hoped that the Board will give due consideration to ensuring the Exit process is properly executed in light of this letter. For the avoidance of doubt, any exit must be on arm's length terms as defined in the Shareholders Agreement'*

81. Mr de Verneuil Smith places great reliance upon the words in paragraph 5, namely, 'all remedies'. I will come back to this, but, in my judgment, what is necessary is consideration of the entire letter which followed on from the letter dated 24 September 2019. Properly assessed and construed, this letter also does not demonstrate any threat of hostile litigation by Saxon Woods against the company.

82. The letter goes on to repeat the concerns which were set out in the Saxon Woods letter to shareholders dated 24 September 2019 and sets out certain paragraphs of the SHA.

Whilst some of the clauses set out (Article VI) state that 'The Company and each of the investors agree to work together in good faith towards an Exit…' in my judgment, nothing really turns upon the obligations in the SHA being in relation to both the Company and the Shareholders. What is key in my judgment is to read the letter as a whole, (1) consider its contents as well as the previous letter to which it refers, and (2) to determine what are the threatened actions and whether there is a threatened hostile action against the Company by the shareholder rather than what has been already canvassed and threatened in the earlier letter dated 24 September 2019, being a section 994 petition and/or a derivative action. A reference to the Company being under obligations under the SHA in itself does not create a threat of hostile proceedings against the company. This is particularly the case when the directors and the shareholders are being identified as the alleged wrongdoers. In my judgment, this letter read as a whole is merely a continuation of the threats and allegations set out in the earlier letter dated 24 September 2019. The letter sets out Saxon Woods' complaints in relation to the exit process (or lack of it) and the lack of dealings with Metric. The letter makes an express reference at paragraph 16 to the fiduciary duty of the members of the board, to protect the best interests of the Company and to ensure that the Exit process is being adhered to. The letter carries on as follows, *'each and every Director of the Company is responsible for the conduct of the company. In the event that any directors are withholding any relevant information for the shareholders or allowing the exit process to be frustrated, they are potentially accountable for the loss suffered by the Company and/or shareholders'* . This statement was originally set out in the letter dated 18 October 2019 sent by Mischon de Reya to the shareholders. This therefore follows on from the letter dated 24 September 2019 and makes it clear that the litigation being threatened was clearly section 994 and/or

derivative action against the alleged wrongdoers, being the directors and/or the shareholders. This is a continuous threat from the letter dated 24 September 2019. The letter dated 11 December 2019 contains an express reliance on allegations relating to the conduct of both Mr Costa and Mr Uberoi. Paragraph 29 of the letter asserts that Mr Costa and potentially other members of the Board have taken steps to depress the potential share price of the Company in preparation for an Exit which is fundamentally in breach of the duty to promote the Company's interests. This is clearly all, in my judgment relating to either a section 994 or a derivative action. The letter also goes on to assert conflicts of interest by members of the Board.

83. In so far as there was any doubt (which I do not accept) as to what was covered by the letter in terms of threatened litigation, paragraphs 35 and 36 set out the section 994 threat and paragraph 37 and 38 set out the derivative action threat. Paragraph 41 then sets out the following:-

> *'Finally, this is a matter between the members and directors of the Company and therefore it is not appropriate to spend the Company's funds on legal representation for any of the Board members. We trust therefore, that each director that seeks representation will do so in his or her personal capacity and will not seek advice from Sidley Austin (or any other law firm) that is paid for by the Company'*

84. In considering the entirety of the letter as well as the matters referred to therein as being the complaints by Saxon Woods as against the directors and/or shareholders, it is, in my judgment, abundantly clear that this letter does not evidence any threat of hostile litigation against the Company. The reliance by Mr De Verneuil Smith on the expression in paragraph five of 'all remedies' is requiring those two words to do some

really heavy lifting in isolation to the rest of the letter and expressly go against what is really clear in the letter and the previous letter relied upon. The paragraphs I have quoted above and in particular the last paragraph warning expressly against the use of company funds should not be expended as the dispute did not concern the company is unambiguous. Accordingly, this letter dated 11 December 2019 alongside the earlier letter of 24 September 2019 do not allow the company to assert any privilege under the exception against Saxon Woods as shareholder because those letters contain no threat of hostile litigation against the company. Disclosure needs to be provided.

85. Whilst Mr De Verneuil Smith then seeks to rely upon a letter dated 3 April 2020, it is clear that between 11 December 2019 and the letter dated 3 April 2020, there were further letters from Mischon de Reya. Some of these are in the bundles provided to the court and accordingly I have taken them in account. In my judgment, in seeking to assert that a letter raises a threat of hostile litigation in circumstances where there is continuous correspondence, the court needs to be able to take into account the correspondence as a whole. This enables an assessment to be carried out in relation to whether there is any threat as to hostile litigation. Equally the facts relied upon in relation to whether there is a threat as to hostile ligation against the company may well not be in the one letter but are located in previous letters to which express reference has been made. To this extent, I do not accept that an assessment of the letters relied upon is an exercise to be carried out, on the facts of this case but considering each letter separately. This is particularly the case when the letters relied upon refer to earlier correspondence.

86. The letter dated 30 January 2020 is addressed to Sidley and seeks replies to specific issues which had bene asked in earlier correspondence, in particular whether Sidley had previously provided advice to any of the individual directors or shareholders. It sought copies of the correspondence with the Company including copies of any advice given to the Company. There is a reference to a letter dated 16 January 2020 sent by Sidley to Mischon de Reya which is quoted in the 30 January 202 letter which asserts as follows, '*The Company does not believe that there is any current or anticipated basis for a claim against the directors for breach of duty or at all*', and *'that clearly any petition would clearly be without merit and dismissed.'* The letter of 30 January 2020 from Mischon de Reya also stated that to date no director had replied to the letter dated 11 December 2019.

87. The letter then picks up on certain matters raised by Sidley in their letter dated 16 January 2020. I don't need to set them out, but it appears from this letter that for some reason, the Company as represented by Sidley, was replying to the letter dated 11 December 2019 and engaging positively with issues relating to a section 994 petition and/or a potential derivative action. I raise this because as I have already made clear above, the subjective view of Sidley is irrelevant to the assessment I have to carry out. The leter dated 11 December 2019 could not have been clearer in its direction and in relation to company funds not being expended on threatened actions against directors and/or shareholders. I raise this issue because part of the skeleton of Mr De Vernuil Smith asserted that, if I determined that there was no privilege, then the disclosure was irrelevant and unnecessary. In my judgment, these exchanges and the position taken by Sidley demonstrate clearly, if no privilege can be asserted, just why disclosure is relevant and needs to be given. Saxon Woods is entitled to know what advice the

Company gave the shareholders as a whole and why it was corresponding in relation to the merits of a potential section 994 petition and/or a derivative action.

88. The 30 January 2020 from Mischon de Reya expressly sets out toward the end of its letter that the actions being threatened are against the directors. There is an express reference to the letter dated 11 December 2019 and in particular to paragraphs 36 and 38 of the 11 December 2019 letter which relate to section 994 and derivative actions. I should add that the 30 January 2020 letter was addressed to an individual at Sidley. That is, in my judgment, not surprising because, as I have set out above, it seems that Sidley had decided to correspond and comment upon the merits of both a potential section 994 as well as derivative action.

89. The Mischon de Reya leter dated 16 March 2020 addressed to Sidley deals with a different, but related issue to the earlier ones. Up until this letter, it appears to me on the correspondence that I have seen, that Saxon Woods was clearly complaining about the actions of the directors and/or shareholders in relation to the Exit process. I have determined that the letters, which I have been directed to, fail to demonstrate any threat of hostile litigation against the company but relate to threatened actions against the directors and/or shareholders based on the perceived wrongdoings. I should add here, that when I refer to wrongdoings, I am not judging whether the allegations have merit or not. The letter dated 30 January 2020 does demonstrate that the issues raised by Miscon de Reya and Saxon Woods in their earlier correspondence were not being seriously engaged with by the directors and/or the shareholders in general. At least that is what Mishcon de Reya were asserting. Again I make no finding on that point.

90. The letter dated 16 March 2020 raised a complaint that Mr. Loy, a director, is entitled to see all the Company's documents. The letter asserts despite many requests the documents have not been provided. By paragraph 4, the letter states *'However at the outset, we should make it clear that, as we understand the position, responsibility for this continuing default on the part of the Company rests with Mr Costa. We therefore address this letter to Joseph Hage Aaronoson too, who are likely to be in a better position to respond'*. Importantly, the letter goes on to rely and refer to the matters raised and alleged in the earlier correspondence. Lest there be any doubt in the minds of the reader of this letter, it is again clear in this letter that the complaints being made relate to the actions of the wrongdoers identified in the earlier correspondence. Mr Costa was clearly identified as being the alleged wrongdoer in relation to the failure to provide documents requested by Mr Loy as director. There is also a reference in that letter to a letter dated 14 October 2019 sent to Saxon Woods from Mr Costa denying the matters which had been raised by Saxon Woods.

91. The letter of 16 March 2020 makes it clear in many places that the blame for the actions of the Company in relation to the refusal to produce documents as well as other allegations made against Mr Loy is placed firmly on Mr Costa (paragraph 22 is but one example) Paragraph 25 states,

> *'It is against this continued refusal to provide information and obstruction (in particular , by Mr Costa) that this firm wrote our leter or 11 December 2019, by which Saxon Woods put the directors of the Company on notice of their intention to present an unfair prejudice petition and/or commence a derivative action as a result of the directors' breaches of duty. By the same letter we repeated our clients' requests for information.*
>
> *26. Those requests remain unanswered'*

92. Paragraph 33 of the letter also makes the point which, in my judgment, was clear in any event from the earlier correspondence, namely, that Saxon Woods has not commenced or threatened to commence 'any litigation, arbitration or other dispute resolution process against the company..' The letter confirms that the threatened actions are unfair prejudice and/or a derivative claim. I pause to note that even without this clear statement, in my judgment the contents of this letter alongside the earlier letters make those points clear to the reader. At paragraph 33 there is in my judgement an accurate statement of the law in relation to both unfair prejudice petitions as well as derivative actions and the role of the company.

93. The letter suggests a moratorium on presenting the section 994 proceedings and/or the derivative action so as to allow the documents being sought to be produced for Saxon Woods and/or Mr Loy. Paragraph 38 states as follows, *'In the event that the above documents and confirmations are not provided within the requested timescale, we are instructed to apply for delivery up of the relevant documents and to seek Mr Loy's costs of doing so from those directors on the Board who are preventing the Company form complying with its obligations in this regard'* .

94. In my judgment, this letter again sets out clearly that the actions being threatened are section 994 and/or derivative actions. This is clear from its contents as well as the express words used. Significantly, in my judgment, the proposed moratorium of the threatened proceedings linked to the relevant documents and/or information being produced concerns the actions of the wrongdoers and not the company. If Saxon Woods had not proposed a moratorium as it did in this letter, then in my judgment, it would have either issued a section 994 and/or a derivative action. In those proceedings, it would have relied upon the actions of the wrongdoers set out in the correspondence.

It is clear that the failure to produce the documents would in all likelihood have been relied upon as part of the unfairly prejudicial conduct of the wrongdoers. The blame for the failure to produce the documents and information was clearly on Mr Costa and not the Company, or alleged to be. The threat to seek an order for delivery up must, in my judgment, be seen as part of the unfair prejudice and/or derivative action. Such a delivery up application on the facts of the case for Saxon Woods as set out in the correspondence to date is clearly, in my judgment, simply part of the threatened section 994 and/or derivative action. The failure to produce the documents and the other actions are clearly blamed on the directors and/or shareholders in the correspondence. Accordingly, the delivery up action would not, in my judgment, in the true sense be against the company. The costs of the same are sought against the wrongdoers. The threatened underlying proceedings are clearly section 994 and/or a derivative action. In both of those actions the company is merely a nominal defendant. The threatened delivery up application is, in my judgment, the type of interim relief sometimes sought in section 994 / derivative actions where the wrongdoers are directing the company not to produce the documents. That is exactly what Saxon Woods is alleging in this case.

95. The Company would obviously be a defendant to a delivery up application, but it is clear that the Company would be no more than a nominal defendant because the allegations relied upon by Saxon Woods are clearly against certain shareholders and directors. The *Arrows* case demonstrates just why the Company would be no more than a nominal defendant in any delivery up based on the matters set out in the correspondence. The Company and its advisors must act in the interest of all shareholders. In *Arrows*, the Company was injuncted from participating and opposing

the section 994 petition with the observations made by Sir Francis Ferris which I have referred to above. In my judgment, any delivery up application based on the threatened section 994 and/or derivative action would put the company in a similar position to the company in *Arrows*. I do not see it makes any difference that the threatened delivery up application was to occur before the issue of the proposed section 994 or the derivative action. The issue for my determination remains whether the letters and what is set out therein demonstrates a threat of hostile litigation against the company. For the reasons I have set out above, in my judgment, the 16 March 2020 letter does not threaten hostile litigation against the company necessary for reliance upon the exception.

96. The letter of 3 April. 2020, which is expressly relied upon by the Company as evidence of a threat of hostile litigation against the Company, refers expressly to the letter of 16 March 2020 which I have set out in some detail above. The 3 April 2020 letter refers to a failure to deal with the issues raised in that letter but sets out that Saxon Woods refrained from taking the action set out in that letter because of notice of a board meeting being sent by Mr Di Capua on 24 March 20020 (being the deadline set in the letter dated 16 March 2020). This letter does not in my judgment provide evidence of threat of hostile litigation against the Company. It must, in my judgment, be read alongside the letter dated 16 March 2020 and the matters I have set out above in relation to that leter are equally applicable. The 3 April 2020 letter refers again to the failure to produce documents and again this must be read alongside the letter dated 16 March 2020 which makes it clear, with its references back to the earlier letters, who the wrongdoers are and what action is being threatened by Saxon Woods. For the avoidance of doubt, I do not accept that the Company can rely upon the letter dated 3

April 2020 in support of its hostile litigation assertion without bringing to the court's attention and consideration the extensive earlier leter of 16 March 2020. For the reasons I have already set out in relation to the letter dated 16 March 2020, the letter dated 3 April 2020 does not entitle the Company to rely on the exception the general rule of hostile litigation against the company being threatened.

97. The next letter dated 22 April 2020 from Mischon de Reya sets out the limited documents which have been produced. That letter again makes it clear that the blame for the actions of the Company being complained of are placed at the door of Mr Costa. This includes a complaint that at a board meeting on 16 April 2020 Mr Costa as Chair, provided the board with only five minutes to discuss and vote on a proposal for which no adequate notice or explanation had been given.

98. The final letter relied upon by the Company as being evidence of threatened hostile litigation against the company is dated 15 September 2020. It relates to an entirely different issue than the earlier letters. This letter from Mischon de Reya concerns Mr Pasolo Lanzoni's appointment as Saxon Woods' designated director on the Company Board (Mr Loy having resigned). There is a reference to the terms of the SHA and also in particular to the assertion that neither the Board of Directors nor the investors (the other shareholders) can deprive Saxon Woods of its entitlement to representation on the board. The letter specifically asserts that those directors who voted against the acknowledgement of the appointment of Mr Lanzoni to the Board are in breach of their duties to the Company and are endangering its sale. This again is clearly section 994 territory and /or derivative action territory. Such allegations are typical of what would be pleaded in a section 994 petition relating to exclusion of a director and/or

shareholder from the company as well as being evidence of unfairly prejudicial conduct. This is clear from the cases which I have considered in some detail above. The last paragraph states, *'Please confirm that form AP01 has been filed at Companies House, provide us with the minutes of the meeting of the board of directors of 15 June 2020 for Mr Loy to review and comment upon, and provide Mr Lanzoni with all relevant papers that were distributed prior to and during the board meeting on 31 July 2020 without further delay. While it cannot be in any party's interests to become embroiled in litigation at this time, our client may have no option but to seek to enforce its rights under the Shareholders Agreement against the Company (and to seek its costs of doing so from those Board members who failed to act in the Company's best interests at the recent board meeting). We would note that the Investors may have a right of redress against your firm for the provision of inaccurate legal advice to the Company's Board, leading it to take steps which are not in the Company's best interests'*.

99. In my judgment, this letter does not contain a threat of hostile litigation against the Company in the true sense. The threat made clearly relates to the wrongdoing of the directors and/or shareholders. That is clear from this letter as well as the previous letters I have set out above. The alleged breaches of the SHA clearly relate in those letters to the actions taken by the directors and/or shareholders against whom Saxon Woods has clearly aimed its complaints being those it asserts to blame for the position Saxon Woods finds itself in. I do not accept that this letter properly assessed alongside the previous letters and complaints made can be taken as a threat of hostile litigation against the Company. All the letters demonstrate that the underlying actions is either a section 994 and/or a derivative action.

100. It is, in my judgment, part of the ongoing dispute between the respective shareholders and directors acting on their behalf. This is also clear from the sentence which states, *'It is critical that Saxon Woods' interests be represented in Board discussions to avoid further unfair prejudice being suffered, especially in circumstances where certain Board members represent the interests of shareholders with substantially lower shareholdings.*' An exclusion of a shareholder appointed director is, in my judgement 'classic' section 994 territory. Equally the reference in the letter to directors who voted against the appointment of Mr Lanzoni being in breach of their duties owed to the company are complaints and actions which fall squarely within either a section 994 or a derivative action The reference to the costs being sought from the directors in question is a clear indicator that the threatened action is in reality against the wrongdoers.

101. In any event, the letter dated 15 September 2020, in my judgment, raises a different issue relating to the board of director's actions in recent board meetings which again is blamed on wrongdoers' actions. I have not been provided with the earlier letters referred to between April 2020 and June 2020. These letters are not relied upon by the Company with reference to its hostile ligation assertion in relation to this separate point concerning the appointment of Mr Lanzoni. That is somewhat unfortunate because, as I have stated above, the letters need to be placed into the context of the earlier letters which set out the relevant background and facts, rather than being the subject of some selective exercise. I have placed this letter into the context of the earlier letters which demonstrate clearly that the actions complained of by Saxon Woods are those of the directors and/or shareholders. I have no indication that the position altered in relation to the matters raised in the letter dated 15 September 2020. From its contents , it is

clear that again the allegations are being made against directors and shareholders and any threatened action is in the true sense against them.

102. In the event that I am wrong about the threat of hostile litigation in relation to this letter dated 15 September 2020, this would not allow the Company to assert some wide ranging privilege in relation to the entire period claimed. The issue raised in the letter dated 15 September 2020 arises from events in June/July 2020 and only relates to the appointment of Mr Lanzoni. That is a discreet issue.

103. There is one further point to raise which relates to all the assertions of threat of hostile litigation against the Company by Saxon Woods as shareholder. A threat of a proceedings against the company by a shareholder pursuant to a shareholders agreement which contains express provisions relating to exit and sale is almost impossible to imagine. Threatened litigation will almost inevitably be between the protagonists, being differeing factions of the shareholders and/or directors appointed by the shareholders. A claim for damages for breach of a shareholders agreement by a shareholder against the company itself will actually reduce the value of the shareholding. This is precisely why the letter sent by both Saxon Woods and then by Mischon de Reay are clear that the underlying threatened actions are section 994 and derivative actions. I do not see anything on the facts of this case as set out in the letters relied upon by the Company (as well as those which I have considered as being part of the overall assessment I need to make) which leads me on an assessment to consider that this case is one where the shareholder, Saxon Woods actually threatened to bring hostile proceedings against the Company. The letters make clear that its goal and its

threatened litigation was against the protagonists. The Company may well have been a necessary party to threatened ligation but that is clearly not a decisive factor. Properly set into its context, the letters and each of them do not threaten hostile litigation against the Company in the true sense. To determine otherwise is asking the Court to ignore the previous correspondence and the matters set out therein. In my judgment, that last letter cannot be read in isolation as the reader of that letter would have received and considered all the earlier letters. Disclosure will need to be given by the Company without any assertion of privilege based on the letters.

104. I have asked Counsel to agree the order from the directions I provided to them at the end of last week on 28 July 2023.