Neutral Citation Number: [2024] EWHC 1437 (Comm)

Case No: CL-2024-000084 and CL-2024-000086

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**KING'S BENCH DIVISION**
**COMMERCIAL COURT**

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

Date: 13/06/2024

**Before** :

**Dame Clare Moulder DBE**
**Sitting as a Judge of the High Court**

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**CL-2024-000084**

**Between :**

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| **J.P. Morgan International Finance Limited** | **Claimant** |
| **- and -** | |
| **WEREALIZE.COM Limited** | **Defendant** |

**CL-2024-000086**

**And Between :**

| | |
|---|---|
| **WEREALIZE.COM Limited** | **Claimant** |
| **- and -** | |
| **J.P. Morgan International Finance Limited** | **Defendant** |

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**Richard Handyside KC, Rosalind Phelps KC, Rupert Allen, Christopher Langley and Gillian Hughes** (instructed by **Freshfields Bruckhaus Deringer LLP**) for **J.P. Morgan International Finance Limited**
**Richard Lissack KC, Robert Weekes KC, Timothy Lau and Charles Redmond** (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for **WEREALIZE.COM Limited**

Hearing dates: 13-16 and 21 May 2024

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# Approved Judgment

This judgment was handed down remotely at 14:00 on 13 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**Dame Clare Moulder DBE :**

## Introduction

1. This judgment relates to a dispute between J.P. Morgan International Finance Limited ("JPM") and WEREALIZE.COM Limited ("WRL") arising out of call options granted pursuant to a shareholders' agreement dated 24 January 2022 as amended and restated on 17 August 2022 (the "SHA") in relation to shares of a Greek fintech company, Viva Wallet Holdings Software Development SA ("Viva"). The Call Options are referred to as the "*JPM Call Option*" and the "*WRL Call Option*" respectively.

2. Both parties have brought proceedings against the other party: JPM had brought a Part 7 claim and WRL has brought a Part 8 claim.

3. Following a hearing on 22 March 2024, the Court ordered this expedited trial of the issues in the approved list of issues (the "Trial List of Issues"). Expedition was ordered in circumstances where the second Option Exercise Period (as referred to below) starts on 1 July 2024, with valuations to be carried out by party-appointed valuation experts (the "Valuation Experts") as at 16 June 2024. The expedited trial is, in effect, an amalgamation of the entirety of WRL's Claim and certain issues in JPM's Claim. That Trial List of Issues however has to be read subject to the pleadings and in particular the amendment to paragraph 64.3(b) of the JPM Particulars of Claim. This amendment was sought by an Application Notice dated 7 May 2024 (the "Application") for permission to amend the Particulars of Claim and the Application was heard on the first day of the expedited trial, 13 May 2024. Permission was granted for this amendment (only) in an ex tempore judgment handed down on the second day of the trial. An amended Defence responding to the amended Particulars of Claim has now been approved by the Court (with certain matters which the Court took the view were not responsive to the amended Particulars of Claim being held over to a future hearing).

4. An additional issue was raised by WRL on the first day of the trial seeking an amendment to advance a case that the JPM Call Option can only be exercised by JPM on one occasion and not in each of the call option periods (the "One Shot Issue").

5. JPM did not oppose WRL advancing this case at this trial (provided that WRL also amended its Part 7 Defence, sets out its argument in opening and that JPM was able to reserve its rights concerning rectification and estoppel).

6. I accepted that it was in furtherance of the overriding objective that this issue should be dealt with at this trial. In accordance with directions from the Court written supplemental skeletons were filed and oral submissions made on the afternoon of the 5th day of the trial.

7. Submissions and expert evidence (on the US law issues) on the issues (other than the One Shot Issue) were heard over four days (13 to 16 May 2024).

8. Both parties were represented by two leading counsel and juniors. Written submissions were filed in advance of the trial and the Court has had the benefit of the oral transcripts of the hearing. I note that JPM's submissions extended to certain issues which are not in

their pleaded case and for which permission to amend was refused. Those issues have not been dealt with in this judgment.

9. After conclusion of the evidence and the submissions on the issues (other than the One Shot Issue) JPM filed additional written submissions on the issue of valuation (Issues 2 and 3 below). WRL opposed such additional submissions being allowed.

10. The Court declined to accept these further submissions from JPM on the basis that no permission had been sought to file further submissions, the hearing on these issues had completed and in circumstances where the trial was expedited (and thus a judgment was also sought on an expedited basis) it would not be in furtherance of the overriding objective to reopen submissions on this issue. Accordingly the Court has not read the further submissions and they are not dealt with in this judgment.

## Background

11. It is not necessary to set out the history of this dispute in any detail. It is sufficient to note the following by way of background.

12. WRL is the majority shareholder (currently, as to 51.49%) in Viva and JPM owns the remaining 48.51% of the shares in Viva, having purchased them pursuant to a share purchase agreement between (i) JPM (ii) WRL and (iii) other entities dated 24 January 2022 for a consideration of approximately EUR 809 million (the "SPA"). The sale of shares pursuant to the SPA completed on 16 December 2022.

13. Viva carries on business directly and through its subsidiaries (together the "Group") providing a range of financial and payment system solutions to business.

14. The terms governing the relationship between WRL and JPM as shareholders in Viva are set out in the SHA. Viva became a party to the SHA on 16 December 2022.

15. The SHA is expressly governed by English law and contains an exclusive jurisdiction clause in favour of the English Court.

16. The Call option process in Schedule 1 of the SHA gives JPM the right to buy WRL's 51.49% shareholding in Viva at a price to be determined following an expert valuation process.

17. The JPM Call Option is potentially exercisable in four periods at six-monthly intervals, beginning a year from the closing of the sale under the SPA. For the first three of these periods WRL is not required to accept the call option if the option price is less than a floor valuation of €5 billion for Viva as a whole (as determined by the expert fair market valuation process) (the "Reference Valuation"). If the JPM Call Option is exercised at a price equal to or above the Reference Valuation, WRL is automatically deemed to accept it. However, in the fourth period, which ends on 30 July 2025, the floor price and WRL's ability to reject the option are removed and WRL is automatically deemed to accept the call option if exercised by JPM and must sell its shares to JPM for the relevant percentage of the option price (irrespective of whether the valuation of Viva as a whole is below €5 billion).

18. If JPM does not exercise its own option in each of the four exercise periods, WRL has the right to exercise its own call option at the same price.

19. The principal dispute between the parties to date has been the basis for the valuation of the fair market price pursuant to Schedule 1 of the SHA (the "Call Option Fair Market Value"). The dispute first arose in December 2023 in respect of the First Option Exercise Period: on 23 December 2023, WRL's English solicitors, Quinn Emanuel Urquhart & Sullivan UK LLP ("QE"), wrote to Freshfields Bruckhaus Deringer LLP ("Freshfields") requesting their confirmation that the valuation procedure in Schedule 1 required that Viva be "*valued on the basis that upon sale of the JPM Company Shares or WRL Company Shares (as the case may be), Viva's market activities could be lawfully conducted in the US and would not be subject to any restriction under Regulation K*". On 27 December 2023, Freshfields rejected QE's interpretation of Schedule 1.

20. The relevance of Regulation K to the valuation is an issue which is in dispute and is discussed below. However as a preliminary matter I note that as an "Edge Corporation", JPM is subject to the rules of the Board of Governors of the Federal Reserve System (the "Federal Reserve") on international banking operations in Part 211 of Title 12 of the Code of Federal Regulations ("Regulation K"). Under Section 211.6 of Regulation K, Edge Corporations may only engage, directly or indirectly, in activities in the United States that are permitted by Section 25A (6) of the Federal Reserve Act and are incidental to its international or foreign business (the "US Activity Restrictions"). Section 211.8 of Regulation K contains restrictions on the investments and activities of Edge Corporations outside the United States (the "Non-US Activity Restrictions").

21. Dispute notices were issued by both parties pursuant to the SHA in relation to a range of issues.

22. On 31 December 2023, JPM wrote to WRL requesting the appointment of a Third Valuation Expert in view of the fact that the Call Option Fair Market Values as determined by the Valuation Experts were more than 15% apart as per paragraph 3.10(b) of Schedule 1.

23. WRL's position was that no appointment should proceed in light of the valuation dispute and the Call Option Fair Market Values having been determined on an incorrect premise.

24. On 5 January 2024, JPM submitted a request to the ICC to appoint a Third Valuation Expert pursuant to paragraph 3.2 of Schedule 1.

## Declaratory relief

25. The primary relief sought in WRL's Claim and JPM's Claim is declaratory relief (although JPM also seeks injunctions in relation to the appointment of the Third Valuation Expert). It is set out at paragraph 64 of the Particulars of Claim in JPM's Claim and paragraph 13 of the Brief Details of Claim in WRL's Claim. JPM has also filed a draft order attached to its Skeleton by which JPM seeks further declarations which reflect the US law questions put to the experts.

26. Although the question of whether to grant declaratory relief has to be considered separately in relation to the issues raised, it is helpful to set out the general principles in relation to the grant of declaratory relief at the outset.

27. The general principles were common ground and are set out by the Court of Appeal (Aikens LJ) in *Rolls Royce Plc v Unite the Union* [2010] 1 WLR 318 at [120]:

> "*For the purposes of the present case, I think that the principles in the cases can be summarised as follows.*
> *(1) The power of the court to grant declaratory relief is discretionary.*
> *(2) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant.*
> *(3) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question.*
> *(4) The fact that the claimant is not a party to the relevant contract in respect of which a declaration is sought is not fatal to an application for a declaration, provided that it is directly affected by the issue; ...*
> *(5) The court will be prepared to give declaratory relief in respect of a "friendly action" or where there is an "academic question" if all parties so wish, even on "private law" issues. This may particularly be so if it is a "test case", or it may affect a significant number of other cases, and it is in the public interest to decide the issue concerned.*
> *(6) However, the court must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected are either before it or will have their arguments put before the court.*
> *(7) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised? In answering that question it must consider the other options of resolving this issue*."

## Valuation methodology

### Issues 2 and 3

28. As discussed below, the submissions in relation to Issue 2 and Issue 3 overlap to a degree and it is therefore convenient to take them together.

29. In the List of Issues for Expedited Trial (the "List of Issues") Issue 2 was as follows:

> "2. *On the proper construction of paragraph 3 of Schedule 1 of the SHA, what is the basis on which the Call Option Fair Market Value is to be determined?*
> *In particular:*
> *a. Is it to be determined on the basis of:*
> *i. Viva's <u>actual position</u> prior to and absent any sale of JPM's or WRL's shares, <u>without regard to the value of Viva to any particular prospective purchaser</u> (whether that be JPM, WRL or a hypothetical third party); and/or*
> *ii. Viva's actual financial performance and its projected financial performance based on the current Business Plan (as approved by JPM and WRL in accordance with clause 9.1 of the SHA)?*

> *b. Are the Valuation Experts required to disregard any obligations, restrictions, and/or limitations under Regulation K, Regulation Y or the BHC Act that are in fact applicable to WRL, JPM or Viva by reason of JPM having a shareholding in Viva?*" [emphasis added]

30. Issue 2 has now to be read in light of the amended Particulars of Claim paragraph 64.3(b):

> "*the Call Option Fair Market Value is to be determined on the basis of Viva's current approved Business Plan (including, for the purposes of paragraph 3.7(b)(vi) of Schedule 1 of the SHA, financial projections based on the current approved Business Plan insofar as they are not already contained in that Business Plan) and not by reference to any revised Business Plan or alternative financial projections that might be prepared and adopted by Viva unless any such revised Business Plan or alternative financial projections have been approved by both WRL and JPM in accordance with clause 9 of the SHA and/or pursuant to paragraph 3.7(b)(vi) of Schedule 1 of the SHA (as the case may be).*"

31. Issue 3 of the Trial List of Issues is as follows:

> "*3. Are any fresh financial projections permitted and/or required for the purposes of valuing Viva in accordance with paragraph 3 of Schedule 1 to the SHA?*
> *If so:*
> *a. Is JPM precluded from refusing to approve any financial projections prepared by Viva for the purposes of paragraph 3.7(b)(vi) of Schedule 1 on account of the fact that any of the activities addressed in those projections are or may currently be limited or excluded by reason of obligations under or provisions of Regulation K, Regulation Y or the BHC Act that apply or may apply to WRL, JPM or Viva by reason of JPM having a shareholding in Viva?*
> *b. Is JPM subject to an obligation to act reasonably in determining whether to give or withhold its consent to any financial projections prepared by Viva for the purposes of paragraph 3.7(b)(vi) of Schedule 1? If so, what is the meaning and effect of that obligation?*
> *c. Are the Valuation Experts permitted or required to take into account any financial projections prepared by Viva for the purposes of paragraph 3.7(b)(vi) if they have not been approved by JPM?*"

## Relevant contractual provisions

32. The relevant valuation provisions are set out in paragraphs 3.6-3.9 of Schedule 1:

> "*3.6 Each Valuation Expert shall exercise its independent professional judgment in arriving at a determination of the Call Option Fair Market Value (which shall be expressed in Euro) of the Shares by:*
> *(a) assessing the historical and projected financial performance of the Group;*
> *(b) applying generally accepted methodologies for valuing the Group, including discounted cash flow analysis, comparisons with any similar companies whose shares are traded on any stock exchange and comparisons with any publicly disclosed sales of similar companies or significant pools of similar assets; and/or*
> *(c) such other valuation methods as the Valuation Expert shall consider to be appropriate in the circumstances.*

*3.7 Each Valuation Expert shall determine the Call Option Fair Market Value of the Shares on the following basis:*
*(a) by valuing the Group on a going concern basis for an arm's length sale between a willing buyer and a willing seller and on the assumption that the WRL Company Shares or JPM Company Shares (as applicable) are being sold in an open market;*
*(b) by valuing the Shares by reference to:*
*(i) the value of the Group as a whole (and therefore without regard to the size of any relevant holding such that no premium shall apply to any majority or controlling stake and no discount shall apply to any minority stake);*
*(ii) the Group's current and reasonably expected operational capabilities under the ownership of WRL and JPM;*
*(iii) any investments which JPM is required to make in accordance with the terms of this Agreement, any other investments in the Company which JPM agrees to make and subsequently funds, and the financial impact of any such investment;*
*(iv) any partnerships between the Company and third parties which, at the relevant time, either already exist or are reasonably expected to occur;*
*(v) International Financial Reporting Standards, excluding any management adjustment items;*
*(vi) financial projections to be prepared by the Company, approved by the Board and Shareholders, and provided to the Valuation Expert, which shall include but not be limited to:*
*(A) the Group's actual financial performance in the then-current calendar year on a quarterly basis and projected financial performance in the subsequent three full calendar years;*
*(B) the year-to-date actual financial performance of the Group for the then-current period;*
*(C) the Group's financial performance in the prior three full calendar years;*
*(D) detailed income statements, balance sheets and cash flow statements for the time periods listed in sub-paragraphs (A), (B) and (C), specifically including all financial detail required for the Valuation Expert to prepare an unlevered discounted cash flow analysis;*
*(E) detailed revenue projections by country and by segment (Micro, Small, Medium, Large), including but not limited to*:
*(I) projections of revenue by revenue type and by country, including at least the following revenue type categories: Acquiring; Issuing; Merchant lending / Cash advance; Instant settlement; POS devices; and Other; and*
*(II) key assumptions supporting the projected revenue detail, including the assumed number of merchants, volume and headcount by country and by segment;*
*(F) details of expenses including but not limited to:*
*(I) headcount expenses and the key assumptions supporting headcount expenses, including headcount detail broken out by function and corporate title;*
*(II) marketing expenses and the key assumptions used to derive marketing expenses; and*
*(III) other expense items, including infrastructure and occupancy (including but not limited to detailed projections of depreciation, amortisation, interest expense, cash taxes, changes in net working capital, capital expenditures);*
*(G) other financial deliverables to be prepared by the Company and provided to the Valuation Expert, together with the financial projections, including but not limited to:*

> *(I) a qualitative summary of the Group's current capabilities, including but not limited to: (1) a detailed summary of the Group's footprint by country and operational capabilities in each country, including the status of the connection to local clearing and payment systems and the acceptance of local and alternate methods of payments; and (2) a detailed summary of the status of the Group's value added services and capabilities, including Cash Advance, Instant Settlement, Expense Management, Tap on Device; and*
> *(II) three years' audited financial statements for each Group Member;*
> *(c) making no allowances for and disregarding any financial impact that may be expected to be realised or derived as a result of WRL or JPM exercising any Call Option (or otherwise acquiring the WRL Company Shares or JPM Company Shares (as applicable)) in accordance with the terms of this Agreement;*
> *(d) making no allowances for and disregarding any financial impact or any financial synergy that may be expected to be realised or derived as a result of JPM acquiring a majority stake in the Company;*
> *3.8 The Call Option Fair Market Value of the Shares may also reflect any other factors suggested by a Shareholder or the Group which either Valuation Expert reasonably believes should be taken into account.*
> *3.9 The Parties shall procure that both Valuation Experts shall have access to all financial and accounting records or other relevant documents of the Group (together with such information as either Shareholder may wish to provide to them) which either Valuation Expert may reasonably request for the purposes of its determination (such information to be provided on a confidential basis) provided that if any party provides any information to one of the Valuation Experts pursuant to this paragraph 3, it shall, at the same time: (a) notify the other Valuation Expert and each Shareholder and the Company in writing that it has provided such information to the Valuation Expert; and (b) provide the other Valuation Expert and each Shareholder and the Company with copies of such information, as provided to the Valuation Expert.*"

33. The provisions relating to the Business Plan (referred to in Issue 2(a)(ii)) are set out in Clauses 10.5-10.8 of the SHA:

> "*10.5 Prior to the Effective Date, the Company has adopted the Existing Business Plan and the Existing Annual Budget. The Existing Business Plan and the Existing Annual Budget shall continue to be applied by the Company following the Effective Date.*
> *10.6 To the extent that either JPM or WRL believe that any changes may need to be made to the Existing Business Plan and/or the Existing Annual Budget with effect from the Effective Date, JPM and WRL shall discuss in good faith and agree such proposed changes before the Effective Date. Neither JPM nor WRL shall unreasonably condition or delay its consent to any changes. If JPM and WRL are unable to agree such proposed changes, then JPM and WRL shall continue discussing in good faith and, if the parties have been unable to agree by the date that is 10 Business Days before the Effective Date, each Shareholder and the Company shall procure that the Group shall continue to adopt and comply with the Existing Business Plan and/or the Existing Annual Budget after the Effective Date until such time as the proposed changes are agreed. JPM and WRL further acknowledge and agree that:*

*(a) the Strategy Framework shall be amended following the date of this Agreement and accordingly JPM and WRL undertake to discuss in good faith and agree such proposed changes as soon as reasonably practicable (with such changes taking effect from the date on which they are agreed provided that such date shall not be earlier than the Effective Date); and*
*(b) to the extent there is any conflict between the provisions of the Strategy Framework and the terms of this Agreement (disregarding the Strategy Framework), and/or the Strategy Framework is inconsistent with or incremental to the terms of this Agreement (disregarding the Strategy Framework), the relevant terms of this Agreement shall at all times prevail, supersede and override the Strategy Framework.*
*10.7 No later than:*
*(a) 90 Business Days before the expiry of the first Financial Year following the Effective Date, and, in the case of any subsequent Financial Years, 90 Business Days before the expiry of that subsequent Financial Year, a draft update to the Existing Business Plan (in substantially the same form as the Existing Business Plan) relating to the following Financial Year and the two subsequent Financial Years (a Subsequent Business Plan) and a draft annual budget for the Group (in substantially the same form as the Existing Annual Budget) relating to the following Financial Year (a Subsequent Annual Budget) shall be prepared by the Company and circulated to the Board and the Shareholders; and*
*(b) 15 Business Days after the circulation of such Subsequent Business Plan and Subsequent Annual Budget (or on such other date prior to the end of the then current Financial Year as all of the Directors may agree), the Board shall meet to consider and, if thought fit, approve the Subsequent Business Plan and Subsequent Annual Budget.*
*10.8 The Board shall review:*
*(a) the Business Plan at least once every three months; and*
*(b) the Annual Budget at least once every three months against the actual incurred costs and expenses for the previous quarter as shown in the management accounts of the Group.*
*10.9 The Business Plan and the Annual Budget may be amended at any time if Requisite Approvals have been obtained in respect of such amendment in accordance with Clause 9 (but, for the avoidance of doubt, may not otherwise be amended).*"

34. The relevant defined terms for the purposes of Clause 10 are as follows:

"*Annual Budget means the Existing Annual Budget or any Subsequent Annual Budget (as the case may be);*
*Business Plan means the Existing Business Plan or any Subsequent Business Plan (as the case may be);*
*Existing Annual Budget means the annual budget for the Group for financial year 2022 in the Agreed Form;*
*Existing Business Plan means the business plan for the Group being document 2261 of the Data Room and the Strategy Framework, provided that references to the Business Plan in rows 6, 8, 12, 16 and 20 of Schedule 5 shall not include the Strategy Framework until such time as any changes to the Strategy Framework are agreed between JPM and WRL in accordance with Clause 10.6(a);*
*Subsequent Annual Budget has the meaning given in Clause 10.7(a);*

*Subsequent Business Plan has the meaning given in Clause 10.7(a).*"

## Legal principles of contractual construction

35. In its written submissions WRL referred (amongst other authorities) to the recent decision of the Supreme Court in *Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd* [2023] UKSC 2, [2023] at [29] per Lord Hamblen JSC.

36. I note that Lord Hamblen JSC in the passage referred to, stated that:

> "*29. The relevant general principles are authoritatively explained by Lord Hodge in his judgment in Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] AC 1173 at paras 10 to 15.*"

37. In this judgment I have therefore adopted the approach set out by Lord Hodge in *Wood:*

> "*10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In Prenn v Simmonds [1971] 1 WLR 1381 (1383H-1385D) and in Reardon Smith Line Ltd v Yngvar Hansen-Tangen [1976] 1 WLR 989 (997) , Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 Lord Hoffmann (pp 912-913) reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham in an extra-judicial writing, A new thing under the sun? The interpretation of contracts and the ICS decision Edin LR Vol 12, 374-390, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.*
> *11. Lord Clarke elegantly summarised the approach to construction in Rainy Sky at para 21f. In Arnold all of the judgments confirmed the approach in Rainy Sky (Lord Neuberger paras 13-14; Lord Hodge para 76; and Lord Carnwath para 108). Interpretation is, as Lord Clarke stated in Rainy Sky (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause ( Rainy Sky para 26, citing Mance LJ in Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2) [2001] 2 All ER (Comm) 299 paras 13 and 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: Arnold (paras 20 and 77). Similarly, the court must not*

*lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.*
*12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: Arnold para 77 citing In re Sigma Finance Corpn [2010] 1 All ER 571, para 10 per Lord Mance. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.*
*13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance spoke in Sigma Finance Corpn (above), assists the lawyer or judge to ascertain the objective meaning of disputed provisions.*"

## JPM submissions

38. It was submitted for JPM (in summary) that:

   a. There is nothing in paragraph 3.6 of Schedule 1 to suggest the Valuation Experts should do anything other than value Viva on the basis of its actual historic and actual projected future financial performance in accordance with the contents of the current approved Business Plan (skeleton 39);

   b. More detailed directions are given by paragraph 3.7 of Schedule 1 as to the approach to valuing Viva and there is <u>no indication in the language</u> that the experts are required to assume that these activities are not or will not in future be subject to the regulatory obligations or restrictions that do in fact apply to it: paragraph 3.7 (b)(vi) refers to historical (or actual) and projected financial performance for the next three years; this reflects the fact that the Business Plan is also required to include financial predictions for the next three years; in context the references to projected financial performance can only sensibly be understood as references to

the financial projections contained in or based on the then current Business Plan approved by JPM and WRL in accordance with clause 9.1 (matters requiring joint shareholder consent in accordance with Schedule 5) (skeleton 41);

c. Where the Business Plan projections covered the relevant 3 year period those can simply be provided to the Valuation Experts; if not then further projections based on the existing Business Plan to cover the whole 3 years would be required to be produced and approved in accordance with paragraph 3.7 (b)(vi). It would make no sense for Schedule 1 to introduce *sub silentio* a parallel requirement to prepare projections for the call option process on a different basis outside this regime (skeleton 43);

d. Paragraph 3.7(b)(ii) requires the Valuation Experts to value Viva by reference to its "*current and reasonably expected operational capabilities under the ownership of WRL and JPM*"; Viva cannot be described as having or being reasonably expected to have operational capabilities in relation to activities that it does not and cannot lawfully carry out under its current shareholding structure;

e. It is contrary to commercial common sense that the financial projections should speculate as to business which Viva does not yet have but might be able to develop under a different ownership structure (skeleton 48); and

f. It would require the valuers to value on the basis of assumptions that they are not qualified to make (skeleton 49).

### WRL submissions

39. It was submitted for WRL (in summary) that the text makes clear that Viva is to be valued: (i) without making any assumption as to who the ultimate purchaser of the entirety of Viva's Shares might be; and (ii) without making any assumption as to what restrictions under Regulation K (or otherwise) may apply to the shareholders of Viva whether past, present or future.

40. WRL relied on:

a. Paragraph 3.7(a) of Sched. 1 of the SHA which refers to "*…an arm's length sale between a willing buyer and a willing seller and on the assumption that the WRL Company Shares or JPM Company Shares (as applicable) are being sold in an open market*";

b. Paragraph 3.7(c) of Sched. 1 of the SHA which states: "*…making no allowances for and <u>disregarding any financial impact</u> that may be expected to be realised <u>or derived</u> as a result of WRL or <u>JPM exercising any Call Option</u> (or otherwise acquiring the WRL Company Shares or JPM Company Shares…*"; and

c. Paragraph 3.7(d) of Sched. 1 of the SHA which provides "… *making no allowances for and <u>disregarding any financial impact</u> or any financial synergy <u>that may be expected to be realised</u> or derived <u>as a result of JPM acquiring a majority stake in the Company</u>*". [emphasis added]

41. WRL submitted that it was unnecessary and impermissible to consider the commercial purpose of these provisions BUT without prejudice to that rule it submitted that:

    a. The Call Option provisions in Schedule 1 provide an option to both JPM and WRL to exercise: if WRL were to acquire the entirety of Viva's Shares such that JPM was no longer a shareholder, then Regulation K would also not apply.

    b. JPM could procure that Regulation K ceases to apply now (or if and in the event of purchasing the WRL Shares, in the future) by dint of transferring the ownership of Viva to a different JPM entity that is not an Edge Corporation; it was accepted by JPM to be possible (though JPM say in its Voluntary Further Particulars of Claim that it would lose the "*synergies of the acquisition, which would ultimately defeat the purpose of doing so*").

    c. JPM could realise the open market value of Viva upon purchasing the WRL Shares simply by dint of: (i) selling Viva to any third party purchaser that was not an Edge Corporation; or (ii) making an IPO of Viva (or any part of JPM's shareholding in it).

    d. Paragraph 3.7(b)(ii) that refers to valuing the shares by reference to "*the Group's current and reasonably expected operational capabilities under the ownership of WRL and JPM*" does not refer to any regulatory restrictions applicable to WRL and/or JPM; nor does it concern the period once any call option has been exercised. Instead, "*operational capabilities*" is a reference to the shareholders' technology, resourcing, supplies, infrastructure and network that enables them to carry out and perform their respective operations and functions. This is clear from the terms of paragraph 3.7(b) itself, which refers at sub paragraph (vi)(G)(I) to "*operational capabilities in each country, including the status of the connection to local clearing and payment systems and the acceptance of local and alternate methods of payments*".

## Discussion

42. It seems to me that as it was developed in oral submissions, JPM's primary argument on the construction of the valuation provisions was that there are a number of indications on the language of 3.6 and 3.7 which make it clear that the business is to be valued on the basis of its actual business and not any "*hypothetical*" or "*speculative*" assessment of its future business. JPM submitted that it accepted that the shares should be valued without regard to a particular purchaser but that one should not assume that the purchaser would wish to pursue a business in the United States.

43. JPM's (narrower) case (which is reflected in Issue 2(a)(ii)) that the projected financial performance should be "*based on the current Business Plan*" appeared to assume lesser prominence in its oral submissions (particularly its Reply submissions).

44. Further as referred to below, JPM in its oral submissions sought to draw a distinction on the construction of the relevant provisions of Schedule 1 between the valuation by the Valuation Experts and what JPM sought to characterise as the "*data inputs*".

45. I propose to deal with both the narrower case (which reflects Issue 2) and the broader argument (which appears to be based on Issue 2 and the amended language in paragraph 64.3(b) of its Particulars of Claim) in that JPM in its amendment appears to accept that the financial projections may not be contained in the current Business Plan but maintains that the Call Option Fair Market Value must be based on Viva's "*actual position*" (by which I understand JPM to mean the current actual business) and that the alternative financial projections that might be prepared by Viva must be approved by the shareholders.

*Language of paragraph 3.6 and 3.7 of Schedule 1*

46. In my view the language of paragraph 3.6 makes clear that the Valuation Expert is exercising a judgment in arriving at a determination of the value of the Shares. It is not merely carrying out an arithmetical exercise based on data provided by Viva.

47. It is clear and not disputed by WRL that the word "*historical*" in paragraph 3.6 refers to the actual financial performance of the Group. However the language in 3.6(a) "*assessing the historical and projected financial performance of the Group*" does not give any indication as to how the "*projected financial performance*" will be assessed. Paragraph 3.6(a) is therefore silent as to how the projected financial performance would be assessed.

48. In paragraph 3.6(b) it provides that the Valuation Expert will apply "*generally accepted methodologies for valuing the Group including comparisons with any similar companies who shares are traded on any stock exchange…*".

49. It was submitted for JPM that this was indicative of the need to value the actual business and not any hypothetical business. I see no basis for that interpretation on the language as it is equally capable of being read as a comparison with any similar companies in that line of business, whether that is business which is actually carried on by Viva or which it is projected to carry on in the future.

50. One therefore needs to look at the language of paragraph 3.7 to see on what basis the assessment of the "*historical and projected financial performance*" of the Group is to be determined. The opening words of paragraph 3.7 are expressed in mandatory language namely that each Valuation Expert "*shall determine*" the market value "*on the following basis...*".

51. I note however that paragraph 3.7 does not at any point refer expressly to the Business Plan nor does it expressly cross refer to the provisions concerning the approval of the Business Plan elsewhere in the SHA.

52. It was submitted for JPM that no one sub-paragraph of 3.7 had any greater significance than any other. However one must read the various sub-paragraphs assuming that they were intended to form a coherent whole. There is a distinction however between sub paragraph (a) which refers to valuing the "*Group*" and sub paragraph (b) which refers to valuing the "*Shares*".

53. In my view the clearest indications on the language that in determining the market value, the Valuation Expert should ignore the restrictions which currently apply to JPM by virtue of Regulation K are in sub paragraphs (a), (c) and (d) of paragraph 3.7.

54. Paragraph 3.7(a) requires the valuer to value the Group "*on a going concern basis*" for "*an arm's length sale between a willing buyer and a willing seller*" and on the assumption that the shares are being sold "*in an open market*".

55. It was submitted for JPM that this sub paragraph does not affect what it termed the "*data inputs*" under sub paragraph 3.7(b) and that this paragraph meant that the value was not distorted by any discount or premium by virtue of the buyer being JPM or WRL. It was further submitted that the term "*going concern*" suggested that it was the "*actual business*" that was being valued.

56. Sub paragraphs (c) and (d) expressly address the point that any financial impact from JPM being the buyer is to be disregarded so that it is unlikely in this sophisticated and professionally drafted contract to be the objective meaning of sub paragraph (a) as taken in context it would be duplicative.

57. I accept that, as submitted by JPM (Day 4 p5), the term "*going concern*" means that the Group is to be valued as a "*going concern*" and not, therefore, on the basis of the liquidation value of the Group's assets. However I do not accept that it follows from that or is implicit within the term "*going concern*" that the valuation of that business is then limited to the "*existing business*". In my view the distinction here is likely to be the well-recognised accounting distinction between valuation of a business which is anticipated to be able to continue to trade going forward (a "going concern") as contrasted with a valuation of a company which is expected to have to liquidate or curtail its operations and thus not to be trading going forward. I do not think that this term gives any further indication as to how that business is to be valued and in particular does not limit the valuation of the Group to the "*existing business*" where the business is projected to expand.

58. JPM submitted orally that the term "*open market*" meant that the valuation should not assume that the shares are being sold in a restricted market, and it follows therefore, that the value must not be distorted by any discount or premium that might be driven by an off–market transaction: if a comparator transaction being considered under paragraph 3.6(b) was at a price that had been affected by the fact that it did not take place on the open market, or by the fact that it was a forced sale, the Valuation Expert should either ignore that transaction or make adjustments to that comparator in order to comply with 3.7(a). It was further submitted that paragraph 3.7(a) has nothing to do with changing the data inputs that define the business that is being valued which is the business as it exists.

59. In my view paragraph 3.7(a) sets out the fundamental basis of the valuation of the Group by its clear language that the business is to be valued for an "*arm's length sale*" i.e. a sale between unconnected parties and by reference to its "*open market*" value and not its value to any particular purchaser negotiated in a private sale. It is not an instruction to the Valuation Expert to adjust a comparison with a similar company under paragraph 3.6(b). It does not address the financial information to be provided (what JPM term the data inputs) to the Valuation Experts which is set out in 3.7(b). However paragraph 3.7(a) does set the basis for the valuation and by its language it does not limit the business being valued either expressly or by implication to the business "*as it exists*".

60. Paragraph 3.7(a) makes it clear that the value is the value to any purchaser thus disregarding matters which are only relevant to particular purchasers. Paragraph 3.7(a) is reinforced by the language of sub paragraphs (c) and (d) of paragraph 3.7 which in turn expressly require the Valuation Experts to determine the value by "*making no allowances for and disregarding any financial impact that may be expected*" as a result of JPM exercising the Call Option and "*making no allowances for and disregarding any financial impact…*" that may be expected as a result of JPM acquiring a majority stake in Viva. Thus in relation to JPM it is a requirement that the valuer should disregard the impact on the value of the business by JPM acquiring the shares and thus that particular restrictions which would otherwise constrain the business of Viva such as Regulation K are to be disregarded.

61. JPM submitted that the language in sub paragraphs (c) and (d) of paragraph 3.7 means that the valuer cannot have regard to WRL and any business it might carry on through Viva in the US.

62. I accept that on the language equally no financial benefit which would accrue as a result of WRL being the purchaser is to be taken into account. However that is not the same as saying that one should disregard a financial benefit which would exist in general terms for any purchaser (including the ability of Viva to expand its operations into the United States).

63. JPM relied on various sub paragraphs of paragraph 3.7(b) which it submitted makes it clear that the Valuation Expert is to value the shares on the basis of the "*actual*" business and not any "*hypothetical"* business. JPM submitted that reference in sub paragraph (b)(ii) to "*current and reasonably expected operational capabilities under the ownership of WRL and JPM*" is a reference to the current business and Viva cannot be described as having or being reasonably expected to have operational capabilities in relation to activities that it does not have and cannot lawfully carry out under its current shareholding structure.

64. The term "*operational capabilities*" also appears in sub paragraph (b)(vi) dealing with the financial projections to be provided to the valuer where at sub paragraph (b)(vi)(G) Viva is required to provide "*a qualitative summary of the Group's <u>current capabilities,</u> including but not limited to: ( 1 ) a detailed summary of the Group's footprint by country and <u>operational capabilities in each country</u>, including the status of the connection to local clearing and payment systems and the acceptance of local and alternate methods of payments...*". [emphasis added]

65. The natural meaning of the language in sub paragraph (b)(ii) requiring the valuer to have regard to "*current and reasonably expected operational capabilities*" does not suggest that the future performance must be assessed only by reference to the actual or current business of Viva and the current operational capabilities. Meaning must be given to the words in sub paragraph (b)(ii) "*reasonably expected*" operational capabilities which is clearly looking to the future. Thus the objective meaning of the language in sub paragraph (b)(ii) indicates that the valuer is required, in carrying out his assessment of the value of the Shares, to take into account both the present and the future operational capabilities of the Group, subject to the qualification that the anticipated future capabilities must be "*reasonably*" anticipated or expected "*under the ownership of WRL and JPM*".

66. The requirement therefore in sub paragraph (b)(ii) to value the Shares by reference to the Group's "*operational capabilities*" would therefore appear, read in the context of the whole of sub paragraph (b), to be a reference to the capabilities of the business of the nature indicated in sub paragraph (b)(vi)(G) and not to any legal or regulatory constraints. Such an interpretation of sub paragraph (b)(ii) is also reinforced when the SHA is considered as a whole: a separate definition is used elsewhere in the SHA (Schedule 15) where legal and regulatory constraints are addressed, of "*Applicable Safety-and-Soundness Expectations*" defined as "*any legal, regulatory, or supervisory expectations pertaining to risk management, prudent business operations, and compliance with any applicable Law*".

67. JPM submitted (in effect relying on commercial common sense as a principle of construction) that a valuation of future prospects would be a nonsensical exercise because it is purely hypothetical. In my view sub paragraph (b)(ii) has the effect that the valuation of projected financial performance has a basis in reality in that the valuer is required to have regard to the future operational capabilities of the Group but is limited as to the future capabilities by what is to be "*reasonably expected*". It is therefore consistent with commercial common sense to take into account future business even if it involves operational capabilities which the Group does not currently have, if it is assessed to be reasonably expected.

68. For these reasons, in my view there is no reason to give the language "*operational capabilities*" in sub paragraph (b)(ii) anything other than its natural meaning when the language is considered against the context. In this professionally drafted contract it seems likely that the natural meaning of the language "*operational capabilities*" is that it is referring only to operational matters and that it is not limited to current capabilities but extends to the future capabilities.

69. Turning then to sub paragraph (b)(vi) on which JPM place particular reliance, it was submitted for JPM (in its written submissions) that it would make no sense for Schedule 1 to introduce *sub silentio* a parallel requirement to prepare projections for the call option process on a different basis outside the regime for the preparation of the Business Plans and (orally) that it would be "*unreal*" to prepare separate financial projections for each Option Period.

70. The opening language of sub paragraph (vi) refers to "*financial projections to be prepared by [Viva]*" and provided to the Valuation Expert. Sub paragraph (vi) then lists in seven further sub paragraphs the matters to be included in those financial projections.

71. As noted above, in its oral submissions it appeared that JPM was seeking to move away from a case that the financial projections should be based on the "*Business Plan*" to a more general submission that the future projections should reflect the actual business. However even on its amended pleaded case, JPM still plead by its case (in part) by reference to the Business Plan:

> "*the Call Option Fair Market Value is to be determined on the basis of Viva's current approved Business Plan (including, for the purposes of paragraph 3.7(b)(vi) of Schedule 1 of the SHA, financial projections based on the current approved Business Plan insofar as they are not already contained in that Business Plan) ...*".

72. The difficulty with the submission for JPM that Schedule 1 is introducing a parallel requirement "*sub silentio*" is that the language of sub paragraph (b)(vi) does not use the defined term "*Business Plan*" nor does it cross refer to the relevant paragraphs of the SHA dealing with preparation and approval of the Business Plan (paragraphs 10.5-10.11). In the seven sub paragraphs of (b)(vi) the various detailed items which are to be included within the financial projections to be prepared by Viva and given to the Valuation Expert are not silently but expressly listed out such as "*detailed income statements, balance sheets and cash flow statements*" for the then current calendar year on a quarterly basis and for the subsequent 3 full calendar years and "*detailed revenue projections by country and by segment*".

73. In a professionally drafted contract which runs to some 145 pages the language used is given considerable weight in the interpretation of the contract and accordingly I infer that it is likely the language of sub paragraph (b)(vi) should be given its natural meaning when it states that the value of the Shares will be determined on the basis of "*financial projections to be prepared by [Viva]*" and that had the parties intended to refer to the Business Plan, the defined term would have been used in sub paragraph (vi) or at least cross referred to the relevant provisions.

74. I also note that JPM's case that the financial projections should be "*based on the current approved Business Plan*" does not appear to be supported by the content of the particular requirements of sub paragraph (vi)(A) which require Viva to provide figures for the "*actual financial performance in the then-current calendar year on a quarterly basis*". The Business Plan (defined as the Existing Business Plan or any Subsequent Business Plan) did not provide quarterly information.

*Factual context*

75. JPM also relied on the factual background that the parties were aware of the restrictions of Regulation K when the parties entered into the SHA. It was submitted for JPM that the relevant background that falls to be considered in interpreting a contract includes matters known to or reasonably available to the parties at the time of entering into the contract and which affect how the language would have been understood by a reasonable person including the state of the law (skeleton 38).

76. JPM accepted in its written submissions that the SHA does not refer expressly to Regulation K but relied on *inter alia*:

    a. JPM is described in the SHA and SPA as an "*Edge Act Corporation*" and Regulation K is (by definition) applicable to all Edge Act corporations.

    b. Clause 5.22 of the SPA required WRL to procure the implementation of "*Agreed Compliance Actions*" as soon as practicable after the SPA and, in any event, prior to Closing. The "*Agreed Compliance Actions*" included "*establishing, maintaining and enforcing such policies, procedures and systems of controls designed to ensure compliance with Regulation K*".

77. I accept that the parties were aware of the fact that Regulation K constrained the activities of Viva but this does not seem to me to affect the conclusion as to the objective meaning

of the language of paragraphs 3.6 and 3.7, in circumstances where as discussed above, the language of paragraphs 3.6 and 3.7 considered against the context of the other provisions of the SHA, makes it clear that the valuation is not to be so constrained but is to be done by a valuation for an arm's length sale in an open market disregarding any financial impact of JPM exercising its Call Option.

*Commercial common sense*

78. It seems to me that JPM's case rests (to a significant extent) on the context that the current business is constrained by Regulation K and an argument based on commercial common sense that the valuation should not be hypothetical but should be based on the actual projected business of the Group as reflected in the Business Plan.

79. Lord Hodge observed in *Wood* that:

> "*Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals.*"

80. Further whilst I note that Lord Hodge said that:

> "*where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense*."

I also take into account that "*in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest*."

81. This is an agreement that is clearly in the category of sophisticated and complex which has been negotiated and prepared with the assistance of skilled professionals. I therefore give less weight to elements of the wider context in reaching a view as to the objective meaning of the language.

82. This seems to me a case where the language is very clear. It is clear both from the language and as a matter of commercial common sense that the valuation exercise requires the Valuation Expert to exercise professional judgment in reaching a valuation. It is therefore in my view inherent in such an exercise that the Valuation Expert will consider all relevant information as to the value of the business.

83. It was submitted for JPM that it would make no sense to introduce *sub silentio* a requirement to prepare fresh financial projections not based on the Business Plan. However in my view it is not "*sub silentio*" but clear from the language of paragraph 3.7 as discussed above.

84. It was also submitted for JPM that it is contrary to commercial common sense for financial projections to speculate as to business which Viva does not yet have but might be able to develop under a different ownership structure.

85. However it seems to me to make commercial common sense that the value of the business to a purchaser will include an assessment of its future value and its future prospects and thus where the current business is operating under regulatory constraints (as opposed to operational constraints) which apply as a direct result of the particular shareholder, but will be free of those regulatory constraints in the future, the value of the business should be determined by the valuer disregarding those regulatory constraints although the value to be placed on the future business is still a matter to be determined by the valuers in their professional judgment and having regard to the information provided to it by Viva pursuant to sub-paragraph (vi) including its operational capabilities.

86. The other commercial consideration that JPM have advanced is that the valuation cannot be prepared in time for each call option. Whether or not the valuation can be done in the time available (as to which I have no evidence) or would be unduly onerous, any such commercial consideration does not in my view outweigh the clear language of paragraphs 3.6 and 3.7 considered against the context.

## Conclusion on Issue 2

87. Weighing the language against the context for the reasons set out above I find that on the proper construction of paragraph 3 of Schedule 1 of the SHA, the Call Option Fair Market Value is to be determined:

    a. Without regard to the value of Viva to any particular prospective purchaser (whether that be JPM, WRL or a hypothetical third party);

    b. On the basis of Viva's actual historical financial performance and its projected financial performance based on the figures provided by Viva pursuant to paragraph 3.7(b)(vi); and

    c. The projected financial performance is not based on the current approved Business Plan.

88. On Issue 2(b) it was submitted for JPM [Day 4 p155] that the experts are not required to disregard anything; the experts are required to exercise their judgment to produce a valuation based on the data inputs with which they are to be provided as set out in Schedule 1. The valuer is not required to sit there and ask themselves questions about Regulation K; it simply doesn't arise.

89. In my view this submission ignores the language of paragraphs 3.6 and 3.7 both of which are addressing the role of the Valuation Experts: firstly under paragraph 3.6 each Valuation Expert has to determine the Call Option Fair Market Value by carrying out an assessment of the historical and projected financial performance. The operative term is to arrive at a determination of the value by "*assessing*" the financial performance. Paragraph 3.7 then requires the Valuation Experts to determine the Call Option Fair Market Value "*by valuing the Group for an arm's length sale in the open market*" the operative term being to "*value*" and by the direction in sub paragraphs (c) and (d) to disregard the financial impact of JPM exercising its Call Option. These sub paragraphs are not directed at the "*data inputs*" prepared by Viva under sub paragraph (vi) of 3.7(b) but are duties imposed on the Valuation Experts. It may be the case that when the financial projections are prepared the future projections will disregard any restrictions by

reason of JPM having a shareholding in Viva but if and to the extent that the data inputs contained any such restrictions, paragraphs 3.6(a), (c) and (d) make it clear that the Valuation Experts would be required to assess the value of the Shares by disregarding any obligations, restrictions, and/or limitations under Regulation K, Regulation Y or the BHC Act that are in fact applicable to WRL, JPM or Viva by reason of JPM having a shareholding in Viva.

90. I therefore find that as a matter of construction of paragraph 3 of Schedule 1, in determining the Call Option Fair Market Value, the Valuation Experts are required to disregard any obligations, restrictions, and/or limitations under Regulation K, Regulation Y or the Bank Holding Company Act (the "BHC Act") that are in fact applicable to WRL, JPM or Viva by reason of JPM having a shareholding in Viva.

## Issue 3

91. The issue raised by the opening words of Issue 3 ("*Are any fresh financial projections permitted and/or required for the purposes of valuing Viva in accordance with paragraph 3 of Schedule 1 to the SHA*?") is to be answered in the affirmative for the reasons discussed above in relation to Issue 2.

92. It appears however from its oral closings that JPM now presses its case that even if fresh financial projections are required which are not based on the current Business Plan, it is able to refuse approval for any such new financial projections on the basis that the financial projections must reflect the "*current or existing business*".

### *JPM submissions*

93. In its oral submissions it was submitted for JPM that there are two stages to the valuation process: first, identifying the "*inputs*" and then secondly, valuing Viva through the experts' independent process. It was submitted that even if valuing the company on an open market basis means that one should disregard the constraints currently applying to the business arising from JPM being a shareholder, it does not follow that WRL should be granted the relief it seeks in relation to the financial projections.

94. It was submitted for JPM that what WRL wants the Court to do is to force JPM to agree with Viva and WRL a US business project not reflecting Regulation K restraints and requiring the experts to value the company using that data input. That approach would not disregard the characteristics of the buyer because it requires the experts to assume not just a buyer that wants to expand into the US but also a buyer that wants to have a go at the particular US project or projects that WRL and JPM have come up with, or that are in these projections. The hypothetical objective buyer may not want to expand in the US or may want to try a different US project from whatever JPM and Viva have come up with. The effect of their approach, is, therefore, to tie the hands of the experts by forcing them to assume a buyer that wants to expand in the US in a particular way. That is clearly wrong and directly conflicts with the objective test in paragraph 3.7(a).

95. JPM submitted (paragraph 49 of its skeleton) that:

> "*… there is nothing in the SHA that requires the preparation by Viva of financial projections on this hypothetical basis, just for this limited purpose and independent*

> *of the Business Plan, nor any requirement that JPM (or WRL) must approve any such projections prepared by Viva. Furthermore, any such requirement would create a recipe for disputes as to the grounds on which JPM could (reasonably) withhold its consent to hypothetical projections prepared by Viva that include revenues for (untried, untested and unexplored) activities that Viva cannot at present lawfully carry out.*" [emphasis added]

96. It was submitted for JPM that JPM accept that the experts, exercising their judgment on how to value the company using the actual current and projected data inputs may, for example when looking at comparators, consider the value a hypothetical buyer might place on the company, including what could be done with the company in the future, but that is a matter for the experts' judgment. It is not for the parties to prejudge that question by forcing the experts to assume a buyer with a particular US expansion project.

97. In closing submissions [Day 3 p108] Mr Handyside KC submitted that:

> "*…if fresh projections are required, are [JPM] precluded from approving them because they include activities which are covered by Reg K? We say [JPM are] not so precluded.*"

98. Mr Handyside KC submitted [Day 4 p155] that even if the valuers can have regard to the potential of the company, it does not follow that the projections should be prepared that do not reflect the company's existing business. That's the two–stage point: data reflecting the company's existing actual business and then the valuation exercise carried out using that data, among others.

*WRL submissions*

99. WRL submitted that a term would plainly be implied to require JPM not to refuse approval on the basis of insisting upon a false and contractually wrong valuation basis; that it is necessary to give business efficacy to this part of the contract, otherwise JPM would be able to prevent Viva being valued on the correct basis simply by dint of refusing to approve financial projections that reflect that correct basis, and instead, insisting on projections that do not: the contract would then lack commercial or practical coherence (*Yoo Design Services Ltd v Iliv Realty PTE Ltd* [2021] EWCA Civ 560), or would contradict what a reasonable person would understand the contract to mean (*Dear v Jackson* [2013] EWCA Civ 89 at [15], [18], [22]).

*Discussion*

100. Under paragraph 3.6 the Valuation Expert must exercise its independent professional judgment by reference to three matters which include "*(a) assessing the historical and projected financial performance of the Group*". Paragraph 3.6 must be read subject to paragraph 3.7 which requires the valuers to determine the value on the basis of the matters set out in 3.7 including the financial projections identified in sub paragraph (vi). To this extent I agree with JPM's submission that there are two stages to the valuation process: first, identifying the "*inputs*" and then secondly, valuing Viva through the experts' independent process. However as discussed above, paragraph 3.7 requires the Valuation Experts to determine the Call Option Fair Market Value "*by valuing the Group for an arm's length sale in the open market*" the operative term being to "*value*" and by the

direction in sub paragraphs (c) and (d) to disregard the financial impact of JPM exercising its Call Option. The "*data inputs*" prepared by Viva are provided under sub paragraph (vi) of 3.7(b) but are only part of the picture: the other sub paragraphs of 3.7 contain instructions to the Valuation Experts as to the basis on which the Valuation Experts will carry out the determination of the Call Option Fair Market Value.

101. I do not accept the submission for JPM that the parties are "*[prejudging] that question by forcing the experts to assume a buyer with a particular US expansion project*" nor in my view would it require the Valuation Experts to assume a buyer that wants to expand into the US and that wants to pursue the particular US project or projects that have been identified. If the financial projections are prepared on the basis that they include future activities in the US, this does not assume that the particular buyer will want to expand into the US and implement the projects in the financial projections but the valuation has to reflect the value of the Group which in turn includes its projected revenues. The particular buyer may not pursue the business as currently carried on or the future business as projected but the value of the Group at the time of valuation reflecting a price in the open market and on an arm's length basis has to reflect both its current operations and the projected value of its future operations.

102. As to the submission that the "*hypothetical projections*" prepared by Viva would include "*revenues for untried, untested and unexplored activities*" it is implicit in future projections that they may extend to new i.e. untried and untested activities but paragraph 3.7(b)(vi)(E) provides for "*detailed revenue projections by revenue type and country and the key assumptions supporting the projected revenue details*" and as referred to above, sub paragraph 3.7(b)(ii) requires the valuation to be "*on the basis of the current and reasonably expected operational capabilities*" *and with a* "*qualitative summary of the Group's current capabilities*" pursuant to 3.7(b)(vi)(G). The projections will therefore be based on the additional supporting information required to be provided by paragraph 3.7 which the Valuation Experts will then be able to assess as required by paragraph 3.6(a).

103. The law on implied terms did not appear to be in dispute. In my view a term should be implied that JPM should not be entitled to withhold consent to the financial projections on the basis that they are activities which are limited or excluded by reason of obligations under or provisions of Regulation K, Regulation Y or the BHC Act that apply or may apply to WRL, JPM or Viva by reason of JPM having a shareholding in Viva. Such a term should be implied in order to give business efficacy to the contract, in that otherwise the consequences of the express language in paragraph 3.7(b)(vi) would contradict what any reasonable person would understand the contract to mean, and in the alternative the business efficacy test is satisfied because without the term the contract will lack commercial and practical coherence.

### *Conclusion on Issue 3(a)*

104. Accordingly I find that JPM is precluded from refusing to approve any financial projections prepared by Viva for the purposes of paragraph 3.7(b)(vi) of Schedule 1 on account of the fact that any of the activities addressed in those projections are or may currently be limited or excluded by reason of obligations under or provisions of Regulation K, Regulation Y or the BHC Act that apply or may apply to WRL, JPM or Viva by reason of JPM having a shareholding in Viva.

105. As to Issue 3(b) JPM submitted orally that:

> "*To be clear, JPM does not suggest that it would be entitled to withhold consent to any amendments to the business plan for reasons that are irrational, arbitrary or capricious or in bad faith, provided, of course, that the same obligations apply to WRL, they would be under an equivalent restriction in their ability to refuse to approve business plans. JPM also says that when considering whether to approve amendments it would be entitled to have regard to its own commercial interests.*"

106. JPM further submitted that whilst WRL argues for an implied term that JPM cannot unreasonably refuse approval of changes to the Business Plan, no serious attempt has been made by WRL in their skeleton to explain what is meant by "*unreasonably*". In his Reply submissions Mr Handyside KC submitted that there would be no benefit in a declaration that JPM is subject to an obligation to act reasonably in circumstances where there is no issue about that, the court would not be putting any content on the legal meaning of "*reasonably*", and the circumstances would be at large because it's not an issue which has arisen.

*Conclusion on Issue 3(b)*

107. It seems to me that JPM has accepted in its submissions that it is under a duty to act reasonably in approving any financial projections pursuant to paragraph 3.7(b)(vi) but as to the content of that duty to act reasonably, absent a particular and present dispute, a declaration would serve no useful purpose and I decline to make any declaration as sought. This conclusion however in no way detracts from or affects the conclusion above in relation to Issue 3(a).

*Conclusion on Issue 3(c)*

108. As to Issue 3(c) it seems to me that the contract (paragraph 3.7(b)(vi)) expressly contemplates that the financial projections provided to the Valuation Expert should be approved by the Shareholders and in my view any reliance on 3.8 would contradict the express terms of the contract.

109. Accordingly I find that the Valuation Experts are not permitted or required to take into account any financial projections prepared for the purposes of paragraph 3.7(b)(vi) if they have not been approved by JPM.

## US law questions

### Introduction

110. In its Amended Particulars of Claim at paragraph 64.1 JPM seeks a declaration that:

> "*Viva's activities and investments are constrained by the requirements of Regulation K on the basis that Viva is (for the purposes of Regulation K) a subsidiary of an Edge Corporation (i.e. JPM), and such requirements include but are not limited to:*

*(a) The US Activity Restrictions under Section 211.6 of Regulation K (as set out in paragraph 26.1 above); and*
*(b) The Non-US Activity Restrictions under Section 211.8 of Regulation K (as set out in paragraph 26.2 above).*"

111. However the draft order filed by JPM with its skeleton seeks different and additional declarations in relation to Regulation K which reflect the US law questions which have been put to the US law experts.

112. Although WRL objected to the extension of the declarations sought beyond the pleaded case, I note the extract from *Zamir and Woolf: The Declaratory Judgment (4th ed)* at [7-05] to which JPM referred the Court:

> "*In practice it frequently happens that it is only after the court has determined the facts that it will be possible to decide in what terms a declaration should be granted. As long as the parties are given an opportunity to address the court on any proposed declaration it is highly desirable that it should retain as wide a discretion as possible as to the precise terms*".

113. Accordingly in my view the precise terms of any declaratory relief are a matter for the consequential hearing following hand down of this judgment.

114. It was common ground that the burden of proving foreign law falls on the person asserting it and that the standard is the balance of probabilities.

## Declaratory relief on US law questions

115. A preliminary question arises as to whether it is appropriate for this Court to grant any declaratory relief in relation to the US law questions.

### *Submissions*

116. It was submitted for WRL that:

    a. A declaration that Viva's activities are constrained by Regulation K if in fact they are not has "*dire and direct consequences*" allowing JPM "*a potential regulatory windfall to which they are not entitled*";

    b. Both experts accepted that this case raised novel questions of US banking law particularly where a foreign court is seeking to predict how the US regulator would interpret and apply its rules and regulations;

    c. It is notable that JPM has not sought any formal or informal guidance from the Federal Reserve; and

    d. The declarations sought regarding Regulation K should not be granted because JPM has not brought Viva before the Court and it would be inappropriate to grant declaratory relief of the nature that is sought without Viva present and represented in these proceedings.

117. WRL accepted the English law exclusive jurisdiction clause and that the court has jurisdiction to decide the issues in this case. However it was submitted for WRL that although there was no tension between the UK court making a decision or the US courts because this is not a matter for the US courts, the question is what this court should do given the regulator's position in the US.

118. WRL also submitted that the English court will not generally make or will be cautious about making declarations about the content and effect of foreign law especially in relation to matters within the province of the foreign court or other process. It does not matter much whether juridically this is conceived of as an illustration of the general principles that make a declaration being granted not generally serving a useful purpose undesirable or a proper acceptance of the English court's limitations in determining questions of foreign law or respect for comity: *Teva UK Ltd v Novartis AG* [2022] EWCA Civ 1617 at [51]:

> "*The conclusion I reach having considered these cases is that, as a matter of principle, it is wrong for an English court to make a declaration solely for the purpose of influencing a decision by a foreign court on an issue governed by the law of the foreign court. It is not the function of the courts of England and Wales to provide advisory opinions to foreign courts seised of issues which fall to be determined in accordance with their own laws. The English courts have no special competence to determine such issues. If anything, it is likely that they have less competence than the local courts. It makes no difference that the English court and the foreign court are applying the same basic law. Furthermore, comity requires restraint on the part of the English courts, not (to adopt Floyd LJ's graphic phrase) jurisdictional imperialism. Otherwise the English courts would be enabling forum shopping.*" [emphasis added]

119. It was submitted for WRL that there is no authority directly on point when dealing with a foreign regulator but there is domestic authority that weighs against the granting of declaratory relief which may interfere with a regulator's exclusive decision-making process: *Milebush Properties Limited v Tameside Borough Council [2011] EWCA Civ 270* at [47]-[52]. It was submitted that in that case the matters that were in play affecting the claimant were public law matters which, if they were to be decided by a court at all, ought to be decided in judicial review proceedings to which the local authority would be a party as the planning authority, and that the planning authority was the only person entitled to enforce the agreements in planning decisions. It was submitted that by analogy, when the English court is being invited to make a declaration, the Court asks what the utility will be in circumstances where the Federal Reserve Board of the United States of America have the exclusive decision−making power.

120. It was submitted for JPM that:

    a. All the shareholders are before the court and this is a shareholder dispute as to how a valuation exercise is to be carried out;

    b. Viva is well aware of this litigation and could have joined it;

c. There is a private law right because it is conceded by WRL that they owe JPM a contractual obligation to ensure that Viva complies in all material respects with regulatory law (Schedule 15 B paragraph 1);

d. The issues arise out of the operation of arrangements between the parties as shareholders pursuant to a shareholders agreement governed by English law and subject to an exclusive jurisdiction clause so this is the right forum;

e. This is not analogous with *Teva* as this is not to stymie foreign proceedings; JPM are not seeking an advisory opinion but a determination as to how the valuation mechanism under the SHA operates in order that the call options can operate smoothly in accordance with the agreed mechanism; and

f. In relation to *Milebush* the claimant had no private law right, and one sees that from the first instance decision [2010] EWHC 1022 (Ch) at [58]:

"*...Milebush claims no private law right enforceable against either Tameside or Hillingdon. It seeks declaratory relief against Tameside on the footing that it is directly affected by the interpretation placed upon the Principal Agreement. But why should the Court grant Milebush a declaration against Tameside in circumstances where, even if Milebush was right on the construction of clause 3.5 as it presently stands, Hillingdon would retain a discretion to decide not to enforce, or to vary, clause 3.5? It would be a pointless exercise…*".

121. In response to the closing submissions for WRL the Court was informed by leading counsel for JPM in its oral submissions in Reply that, even if JPM had a conversation with the Federal Reserve, JPM would in any event be "*unable to reveal the content of that conversation or even the fact of its existence to a third party*" on the basis that such communications would constitute "*Confidential Supervisory Information*".

122. This led to an application on the part of WRL after oral closing submissions (other than in relation to the separate issue of the One Shot Construction for which separate court time had been allocated on the fifth day of the trial) for further information pursuant to CPR 18.1. At the hearing on the fifth day of the trial the Court refused to deal with this application as part of the expedited trial for the reasons that at this late stage of the trial, it would not have been possible to resolve the issue of whether an approach had been made to the Federal Reserve and whether, and to what extent, it was confidential and still preserve the purpose for ordering the trial on an expedited basis which was to seek to resolve the issues before the second Option Exercise Period.

123. Thus, irrespective of whether an approach to the Federal Reserve could or would have resolved all or some of the US law issues, in the circumstances where there is no evidence from the Federal Reserve as to what position it would take on the specific issues before the Court, the Court has to decide whether in the light of the submissions summarised above, it is appropriate to determine the US law issues.

124. There are in my view 2 principal issues: the role of the Federal Reserve and the fact that Viva is not before the Court.

*The role of the Federal Reserve*

125. In my view the role of the Federal Reserve in relation to Regulation K and the nature of the US law issues does not preclude the Court from exercising its discretion to grant declaratory relief (assuming the other factors weigh in favour of the grant of relief):

a. WRL does not dispute that this Court has jurisdiction.

b. There is a private law right because it is conceded by WRL that WRL owes JPM a contractual obligation to ensure that Viva complies in all material respects with regulatory law (Schedule 15 B paragraph 1): in *Milebush* there was no private law right and the council retained a discretion whether to enforce the relevant obligation.

c. This case is not a case of the sort identified in *Teva* where the Court is asked to make a declaration "*solely for the purpose of influencing a decision by a foreign court on an issue governed by the law of the foreign court*".

d. Although there are aspects of the expert evidence which raise novel questions of law, it is not the case that this Court is unable to reach a conclusion on the issues of foreign law on the basis of the expert evidence and it would not in my view be unusual for the Commercial Court to form a view on issues of foreign law which have not been judicially considered in the home forum.

126. It was further submitted for WRL that the task of the Court is to determine the law not the meaning of the statute: that is, how the foreign courts would interpret and apply the provision: *Byers v Saudi National Bank* [2022] EWCA Civ 43 at [104].

127. In the course of its oral submissions counsel for WRL read out the following passage which is part of paragraph [104] in *Byers*:

> "*…Where the foreign law is in the form of a provision in a code, statute or other written source, the task of the court remains one of determining how the foreign courts would interpret and apply it, based on the evidence of the expert witnesses. Generally speaking the court's task is not to address how it would itself interpret and apply the provision; the wording of the provision is to be considered only as part of the evidence and as a help to decide between conflicting expert testimony.*"

128. I note that the court was not taken in submissions to the judgment in *Byers* and that paragraph 104 continued with a qualification to the general principle as follows:

> "*There is a qualification to this general principle, recognised in Macmillan Inc v Bishopsgate Investment Trust (No 4), and applicable to a first instance court as well as on appeal, where the nature of the foreign law issue means that the English Court's expertise approaches that of any foreign law expert, for example where the foreign law is written in the English language and involves concepts similar to English law and familiar to English judges.*"

129. It seems to me that the qualification could be said to be relevant to the present case which is concerned with provisions written in English and (in part) the definition of what constitutes a subsidiary and the concept of "*control*".

130. In my view the SHA raises issues as to how Regulation K affects Viva's activities which are relevant to the valuation exercise in Schedule 1 and it is a matter of dispute between the parties under the SHA. It is therefore appropriate for this court having heard the expert evidence and submissions to address the dispute under Regulation K as part of these proceedings. Accordingly, notwithstanding the possibility of an approach to the Federal Reserve having been made or being made in the future and the role of the Federal Reserve as the relevant regulator, I am of the view that this Court can and should deal with the US law issues that are before the Court pursuant to the order for the expedited trial and on the basis of the US law expert evidence.

### *The absence of Viva*

131. In relation to Viva, Viva has not been joined as a party. WRL accepted that Viva would not be bound by any declaration made in proceedings to which it was not a party but submitted that it would nevertheless be "*affected*" by a declaration that it is a subsidiary of JPM.

132. JPM submitted that Viva is aware of these proceedings as is clear from the statement made by it at its EGM in April 2024 and the subsequent correspondence concerning the financial projections in which it was asserted that WRL "*understands*" that Viva was "*currently undertaking preparatory work*" to enable it to produce such financial projections as may be required "*as soon as possible*" following the handing down of judgment after the expedited trial.

133. As referred to above (*Rolls Royce* at [120]), the Court:

> "*must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected are either before it or will have their arguments put before the court.*"

134. At an Extraordinary General Assembly of Viva on 11 April 2024, Viva made a statement that it is "*currently not in a position to provide appropriate forward-looking projections due to the ongoing litigation between its shareholders*".

135. However in my view it is not enough that Viva is aware of the proceedings and the issue of whether all sides of the argument have been put before the Court is a matter which has to be considered in relation to each of the specific US law issues on which declaratory relief is sought but taking into account the fact that expert evidence on the US regulatory issues has been sought and is before the Court.

### Expert Evidence

136. The court had the benefit of two US law experts, Mr Jeremy Newell appointed by JPM and Professor Dan Awrey appointed by WRL. Both experts produced two reports (each of them issuing a first report dated 12 April 2024 and a supplemental report dated 30 April 2024) and a joint statement dated 24 April 2024.

137. To determine the US law issues it is necessary for the Court to assess the weight to be given to the evidence of the respective experts.

138. Mr Newell had worked for the Federal Reserve for a couple of years commencing in 2010, first as an attorney in the legal division and then as a policy adviser in the division of bank supervision and regulation. Since then he had been involved in advising on regulatory issues for clients as a lawyer in private practice and more recently (the past 18 months) as a senior fellow at the Bank Policy Institute (the "BPI").

139. I understand the BPI to be the principal trade association and regulatory policy organisation for the largest banks operating in the US and thus can be described as a lobbying organisation on behalf of large US banks or foreign banks with large US operations, of which JPMorgan Chase & Co. ("JPMorgan Chase") is one. Mr Newell confirmed that the Chairman of BPI at the moment is presently the Chairman of the Board and Chief Executive Officer of JPMorgan Chase, Mr Jamie Dimon.

140. I do not regard Mr Newell's role with the BPI as a basis to discount his evidence. I did not form the view that he was unable or unwilling to give honest testimony to this court.

141. It was submitted for WRL that Mr Newell's experience was "*thin*". WRL referred to Mr Newell's evidence [Day 2 p10] that he was not making statements of fact as to what the Federal Reserve did in particular cases but was offering his opinion on the interpretative approach he believed the Federal Reserve takes based on his experience. In oral closings WRL described Mr Newell as someone who on his evidence "*had no experience of the direct issue*".

142. However it is clear from his evidence that Mr Newell has been involved in advising on bank regulation for nearly 20 years and the evidence of Mr Newell in this regard related to how to assess "*control*" under the definition of "*subsidiary*" for the purposes of Regulation K (as distinct from his evidence on the equity limb of the definition referred to below):

> "Q. … *Your opinion on these issues and in particular on the issue of control is founded upon your experience of your time in the law specialising in these areas as a matter of abstract or hypothetical as opposed to being based on anything solid, by which I mean a particular case or cases or series of cases.*
>
> *A. … I have advised a number of clients on questions of control and how to assess control, and I have at my time at the Federal Reserve been involved in specific assessments of control under the BHCA control framework, so again I do think that there is, you know, a solid grounding in terms of how I approach this issue.*"

143. Thus whilst this criticism may have carried some weight in relation to the issue of the relevance of the BHC Act to the assessment of control for the purposes of Regulation K and whether the Federal Reserve would look to and be guided by the principles and provisions of the BHC Act control rule, it is in my view of little, if any, relevance in the context of the "*equity*" definition discussed below which is not dependent on any "*read across*" from the BHC Act.

144. Professor Awrey is an academic at Cornell Law School. His teaching and research are in the field of financial regulation and, more specifically, the regulation of banks, investment funds, derivatives markets, payment systems, and financial market infrastructure.

145. However although apparently well qualified in this area, his approach to his evidence to the Court meant that the assistance to be derived from his evidence was somewhat reduced and the weight that the Court gives to his evidence was also adversely affected.

146. Although it may stem from his background as an academic, rather than provide an opinion to the Court Professor Awrey appeared to prefer to raise questions rather than seek to provide answers. One could infer that he genuinely held the position that he did not know how the US law issues would be resolved but there were certainly occasions when he appeared to take a contrary view on a point even in the face of what appeared to be the obvious and natural answer.

147. A significant and striking example was when he was asked in cross examination a question about the meaning of "*equity*" for the purposes of the definition of "*Subsidiary*" in Regulation K.

148. The relevant definition reads:

> "*(w) Subsidiary means an organization that has more than 50 percent of its voting shares held directly or indirectly, or that otherwise is controlled or capable of being controlled, by the investor or an affiliate of the investor under any authority. <u>Among other circumstances, an investor is considered to control an organization if:</u>*
> *(1) The investor or an affiliate is a general partner of the organization; or*
> *(2) The investor and its affiliates directly or indirectly own or control more than 50 percent of the equity of the organization.*" [emphasis added]

149. Professor Awrey insisted that the word "*consider*" did not mean that the entity would be a subsidiary for the purposes of Regulation K if the test set out in paragraph (2) was satisfied but rather that the regulator would merely "*consider*" the circumstances.

150. Whilst Professor Awrey is an expert on US regulatory law this seemed so far from the clear and obvious meaning of the language used in the definition that the court was left in some doubt as to why Professor Awrey would take such a view other than to avoid giving an answer which would support JPM's case.

151. The relevant exchange was as follows:

> "*A. …To my mind "considered" is a key word here because the Fed would consider the circumstances.*
> *Q. It doesn't mean "considered" in that sense, Professor Awrey. It means "is deemed", "is regarded". That's obviously what that means. Surely you'd accept that.*
> *A. I don't −− while I do, in the narrow sense, completely agree that "considered" means "it shall be considered by the Fed", but then the question arises as to all of these other facts and circumstances, including the WRL option.*

*Q. Professor Awrey, I have to put to you that that is an untenable reading of the word "considered" in that sentence. What "considered" means there is: an investor is regarded or is deemed.*

*A. I think the use of the word "considered" there was ––and I can't speak to this; I don't know what the Fed was thinking when it put this into play –– but that insofar as it's used the word "considered", "deemed" is a different word. "Deemed" to me is mandatory application, automatic by virtue of law. This is how the Fed will consider something.*"

152. Another example where Professor Awrey appeared to the Court to be seeking to avoid a clear inference from the documentary evidence was in relation to the interpretation of an enforcement decision involving JPMorgan Chase.

153. The third recital to the enforcement decision stated:

> "*WHEREAS, the Board of Governors of the Federal Reserve System (the "Board of Governors") is the appropriate federal banking agency supervisor of JPMC and JPMSAP*"

154. It was put to Professor Awrey:

> "*So it's clear from that third recital, isn't it, that the Fed regards itself as having supervisory jurisdiction over JPMSAP, the subsidiary of an Edge corporation?*"

Professor Awrey's evidence was:

*A. As I understand that language it's a reference to section 211.13 of Regulation K which means via its Edge Corp the subsidiary has to provide certain information or rather there's an obligation on the Edge Corp to obtain certain information from its investments that then goes into the consolidated supervision by the Fed.* [Day 3, p61]

155. This did not seem to me to be a natural reading of the recital but an apparent attempt to avoid the conclusion that supported JPM's interpretation on question 3 of the US law issues.

156. For these reasons, on points of dispute in the US law evidence, I prefer the evidence of Mr Newell to that of Professor Awrey. Against that assessment of the US law experts I turn to consider the questions of US law that were put to the experts and their evidence.

## The subsidiary issue (US Law Questions 1-3)

157. Questions 1 and 2 were as follows:

"*1. What is the test for a "subsidiary", a "joint venture", or a "portfolio investment" for the purposes of Regulation K?*

*2. Is Viva a "subsidiary" of JPMIFL for the purposes of Regulation K?*"

158. There appeared to be no longer any issue between the parties as to the applicable tests for the purposes of Regulation K (Question 1) and I note that JPM does not seek any

declaration in this regard. The experts are agreed that the test for a "*subsidiary*" is to be found in section 211.2(w). The experts also agree on the applicable tests for a "*joint venture*" and a "*portfolio investment*". A "*joint venture*" is defined by section 211.2(p) as an organisation that has 20% or more of its voting shares held directly or indirectly by the investor or by an affiliate of the investor under any authority, but which is not the investor's subsidiary or affiliate. A "*portfolio investment*" is defined by section 211.2(u) as an investment in an organisation other than a subsidiary or joint venture.

*Submissions on Question 2*

159. It was submitted for JPM that the primary question which arises in relation to Regulation K is whether Viva is a subsidiary of JPM for the purposes of Regulation K and that there are three routes through to the conclusion: the equity route; the holding of shares; and the "*otherwise controlled or capable of being controlled*" language. It was submitted that the shortest and simplest route is the equity limb because it turns on the construction of the two definitions in Regulation K, the definition of "*subsidiary*" and the definition of "*equity*".

160. It was submitted for JPM that:

> "*It is clear that on any view, the equity limb of the control test was satisfied. This follows from the express terms of the Regulation K definitions of "equity" and "subsidiary". This does not require you to import any concepts from the approach to questions of control under the Bank Holding Company Act, the BHCA. All that one needs to do simply is to apply the plain language of Regulation K itself.*"

*Discussion*

161. The definition of "*subsidiary*" in Regulation K is set out above. The definition of "*equity*" is as follows:

"*(h) Equity means an ownership interest in an organization, whether through:*
*(1) Voting or nonvoting shares;*
*(2) General or limited partnership interests;*
*(3) Any other form of interest conferring ownership rights, including warrants, debt, or any other interests that are convertible into shares or other ownership rights in the organization; or*
*(4) Loans that provide rights to participate in the profits of an organization, unless the investor receives a determination that such loans should not be considered equity in the circumstances of the particular investment*." [emphasis added]

162. Professor Awrey accepted that applying the test in Regulation K, it is possible to have a company that was a subsidiary of two companies, one ("Investor A") that held 60% of the shares and one that held the rest of the shares but with an option to acquire the 60% shareholding from Investor A [Day 2 p155].

163. However, as referred to above, Professor Awrey expressed the view that the language of "*controlled or being controlled*" invites an "*open ended qualitative enquiry*" into the nature of "*controlled or being controlled*" even if 50% of the equity is owned or

controlled by a company such that the mere fact of 50% equity will not be dispositive. [Day 3 p3]

164. Mr Newell took a contrary view. In his second report at paragraphs 6 and 7 Mr Newell stated that:

> "*6. … In paragraphs 32 and 35-46 of my Expert Report, I describe the standard under Regulation K for determining whether Viva is a "subsidiary" of JPMIFL and set out the basis of my view that Viva is a subsidiary of JPMIFL because (i) JPMIFL holds more than 50% of Viva's voting shares, appropriately taking into account JPMIFL' s contractual right to purchase all remaining voting shares of Viva pursuant to the terms of the shareholders' agreement between JPMIFL and WRL (the JPMIFL Call Option), (ii) JPMIFL owns or controls more than 50% of the equity of Viva, again appropriately taking into account the additional equity of Viva that JPMIFL may acquire under the JPMIFL Call Option, and (iii) Viva is otherwise "controlled or capable of being controlled" by JPMIFL as result of JPMIFL's current outright ownership of Viva's shares, the JPMIFL Call Option, and other indicia of control. For the avoidance of any doubt, I clarify here that it is my view that, under the text of Regulation K, these are separate and distinct lines of analysis, and that if JPMIFL's relationship with Viva meets any one of these prongs of Regulation K's definition of "subsidiary," it would be a "subsidiary" of JPMIFL regardless of the outcome under the other lines of analysis.*
>
> 7. *… In terms of the issues that are relevant to each line of analysis, for the avoidance of any doubt, I clarify here that, as explained in paragraphs 36-40 of my Expert Report, the first and second line of analysis on this point (that is, assessing whether (i) JPMIFL holds, directly or indirectly, more than 50% of Viva's voting shares and/or (ii) JPMIFL owns or controls more than 50% of the equity of Viva) depend only on the question of whether the additional shares of Viva that JPMIFL may acquire under the JPMIFL Call Option should be taken into account when calculating the relevant thresholds, and do not require consideration of other potential indicia of control of Viva by JPMIFL.*" [emphasis added]

165. Professor Awrey accepted in cross examination that there is nothing in the definition of "*subsidiary*" in Regulation K that suggests that the Federal Reserve needs to make an assessment of the probability of the relevant instrument actually converting into shares in order for that instrument to be treated as equity. [Day 3 p11]

166. As to whether the existence of the WRL Call Option makes any difference to the question of whether Viva is a subsidiary, Professor Awrey accepted in cross examination [Day 3 p13] that it would only impact on the conclusion in considering what he termed the "*open ended invitation*" in "*control or capable of being controlled*".

167. It seems to me that Mr Newell was not challenged on his interpretation of "*equity*" in cross examination.

168. It was put to Mr Newell that:

> "*…there are two routes to answer the question as to whether an entity is a subsidiary in that the use of the disjunctive "or" followed by the "otherwise" in*

*this definition creates two separate bases upon which an organisation may be deemed to be a subsidiary of another…*"

169. Mr Newell's evidence was:

> "*…So certainly the first two core prongs of the "subsidiary" definition are first , as you've referenced what I will probably refer to today consistently as the voting shares test , and the second is the otherwise is controlled or capable of being controlled aspect of the test .The Federal Reserve has also in the subsidiary definition provided two specific, although not exclusive circumstances, where it would view a party as being otherwise controlled or capable of being controlled. One is based on owning or controlling 50% or more of the equity of a company and the other is based on being the general partner of an organisation, and so at least for my own analytical perspective when I view this definition I distil it down to four paths that one might take to being a subsidiary. The first is holding more than 50% of the voting shares. The second is being the general partner of an organisation. The third is owning or controlling more than 50% of the equity of an organisation, and then the fourth, sort of as a residual matter, is otherwise being controlled or capable of being controlled, and so indeed, for that reason, that's the approach that I've taken in my own analysis, you have those four particular paths, the general partner path is not relevant because Viva is not a partnership, but the other three are.*" [emphasis added]

As discussed above, I prefer the evidence of Mr Newell on this point.

170. It was submitted for WRL in oral closings that JPM's case had shifted from a focus on the BHCA control rule to a simple read across into the equity arguments that are freestanding under Regulation K. It was further submitted that the reference to the definition of the word "*equity*" does not grapple with the test under Regulation K whether Viva is "*controlled or capable of being controlled*" by JPM in light of the relevant facts and circumstances.

171. However the evidence of Mr Newell, as referred to above, is clear that the equity limb is a specific circumstance where the Federal Reserve will view a party as being otherwise "*controlled or capable of being controlled*" without needing to consider any other facts and circumstances or carry out any "*open ended invitation*".

172. It was submitted for WRL that the point remains "*uncertain*" and WRL referred to the evidence of Mr Newell in cross examination when it was put to him that "*it leaves us in a very uncertain position*" to which Mr Newell replied:

> "*Uncertain if one is reading the plain text of Regulation K…*". [Day 2 p43]

173. However when this passage of evidence is read in context it is clear that Mr Newell is being asked about the concept of "*control*" and whether there should be a read across from other legislation. It is not addressing the definition of "*equity*" and how that fits into the definition of "*subsidiary*" in Regulation K:

"*Q. …if the Fed had wanted the test to be read across as it does under HOLA and Regulation LL, it could have said, either here or somewhere else, "and that test now applies under Reg K", couldn't it?*

*A. It could have, but it need not have.*

*Q. Yes, but the trouble is, if it need not have and it hasn't, it leaves us in a very uncertain position, doesn't it, Mr Newell?*

*A. Uncertain if one is reading the plain text of Regulation K, I would say as a practitioner in this space I don't feel that it is particularly uncertain as to how the Fed would look to and be guided by again the substantive concepts of control under the BHCA when assessing questions of control under Regulation K..*".

The evidence of Mr Newell addressing how the equity limb fits into the definition of subsidiary was dealt with later in his evidence (set out above) and not in this extract.

174. In my view, there is no need to consider the other routes by which Viva may be a subsidiary of JPM: on Mr Newell's evidence, which I have accepted, it is enough if any one of the routes or "paths" is satisfied.

175. For the reasons set out above, I find that Viva is a subsidiary of JPM for the purposes of Regulation K by reason of the fact that it satisfies the equity limb of the control test.

176. As to whether the Court should grant declaratory relief it seems to me that question 2 is a matter that is in dispute between the parties and although Viva is affected by the issue and is not before the Court, the matter has been fully considered by experts on US regulatory law such that all arguments are before the Court, it is a dispute between the shareholders under the SHA and a declaration would serve a useful purpose.

### *US Law Question 3*

177. Question 3 is:

> "*If Viva is a "subsidiary" for the purpose of Regulation K:*
> *a. Is Viva required by US law and regulation to comply with Regulation K?*
> *b. Do Sections 211.6, 211.8 and 211.10 apply directly or at all to Viva?*"

178. JPM submitted that in relation to the question of whether Edge Corporations or their subsidiaries can be the subject of enforcement it did not consider that this issue is of any practical significance.

179. JPM submitted in its skeleton that this point is an arid one since WRL accepts that:

a. The activities and investments of a subsidiary of an Edge Corporation "*may be affected*" by the requirements of Regulation K on the basis that it applies to the Edge Corporation's activities both directly and indirectly (Defence paragraph 40); and

b. WRL also accepts that Viva is – at the very least – subject to a contractual obligation under the SHA to comply with any constraints imposed on its activities and investments by Regulation K (as have been notified to Viva by JPM).

180. WRL submitted that the point is of significance because Viva is not represented in the proceedings and that the evidence of Professor Awrey was that Regulation K by section 211.1(c) expressly only applies to a list of corporates which includes Edge Corporations and not their subsidiaries.

181. I have referred above to the unsatisfactory evidence of Professor Awrey concerning the enforcement letter which was sent to JPMorgan Chase and this casts doubt on his interpretation of section 211.1(c) concerning enforcement.

182. In its Defence WRL pleaded at paragraph 48.3:

> "*If (which is not admitted), Viva is a "subsidiary" of JPM for the purposes of Regulation K, then it is admitted (insofar as it is alleged): (a) that the US Activity Restrictions as set out under section 211.6 of Regulation K and the Non-US Activity Restrictions as set out under section 211.8 of Regulation K would apply to JPM's activities, directly or indirectly; (b) for the purposes of Regulation K, JPM indirectly engages in Viva's activities; (c) by reason of paragraph 3 of Part B to Schedule 15 of the SHA, Viva would owe a contractual obligation to JPM not to engage in activities that JPM has notified Viva are not permissible for JPM pursuant to the US Activity Restrictions and Non-US Activity Restrictions but this obligation would be owed only insofar as those activities were, as a matter of US law, not so permissible. Any references in this Defence to Regulation K "applying" to Viva is a reference to that putative contractual obligation owed to JPM*." [emphasis added]

183. I note that in its draft order the declaration that JPM now seeks in relation to Question 3 is as follows:

> "*For as long as Viva is a subsidiary of JPM for the purposes of Regulation K, Viva is required to comply with Regulation K, including sections 211.6, 211.8, 211.10 of Regulation K, such that…*". [emphasis added]

184. This seems implicitly to include the possibility that Regulation K applies directly to Viva and could be enforced directly against Viva.

185. It seems to me that given WRL's acceptance in the Defence that by reason of paragraph 3 of Part B to Schedule 15 of the SHA Viva would owe a contractual obligation to JPM not to engage in activities that JPM has notified Viva are not permissible for JPM pursuant to the US Activity Restrictions and Non-US Activity Restrictions, it is not necessary for the Court to decide for the purposes of the present dispute whether Regulation K applies directly to Viva and could be enforced directly against Viva. Further in circumstances where the issue of whether Regulation K applies indirectly to Viva is not in dispute, such a declaration would serve no useful purpose.

## US Law Questions 4 and 5

186. Questions 4 and 5 are as follows:

> "*4. What if any restrictions and exceptions are applicable to the US activities of joint ventures in which Edge corporations or their subsidiaries invest?*

*5. What if any restrictions and exceptions are applicable to the US and/or non US activities of portfolio investments of Edge corporations or subsidiaries of Edge corporations?*"

187. WRL acknowledged in its written submissions that the experts were largely agreed on the position in relation to joint ventures: where an Edge Corporation invests in a "*joint venture*" and that joint venture engages in US activities that are neither permitted under section 211.6(a) of Regulation K, nor approved by the Federal Reserve under section 211.6(b) nor is retention of such investment otherwise authorised by the Federal Reserve under section 211.8(e), the general rule is that the Edge Corporation must divest from it under section 211.8(e).

188. The experts were agreed in relation to non-US activities that Regulation K does not restrict the non-US activities of portfolio investments but does impose quantitative limits on an Edge Corporation's individual and aggregate investments in portfolio investments.

189. The disagreement between the experts was as to whether the US activity restrictions under section 211.6(a): (i) only applies to an Edge Corporation's activities that the Edge Corporation engages in directly or indirectly (i.e. through a "subsidiary"); or (ii) also applies to "*joint ventures*".

190. However on the evidence of Professor Awrey this is a distinction which has no real consequences in this regard:

"*Q. …you accept, don't you, that under 211.8(e)(1)(ii)…unless the Fed authorises retention, an investor will be required to divest its investment in a joint venture if the joint venture engages directly or indirectly in business in the United States that is not permitted to an Edge corporation?*

*A. I agree, yes.*

*Q. So by that route the restrictions in section 211.6 are brought to bear upon the joint venture; correct?*

*A. Possibly, unless, if we go to the chapeau to subsection(e) there, unless the board authorises retention.*"

191. In relation to Question 5, in his oral evidence Professor Awrey agreed that in relation to the US activities of portfolio investments, the analysis is exactly the same as with joint ventures, save that the divestiture obligation in relation to portfolio investments is subject to the two carve−outs contained in section 211.8(e)(1)( ii )(A) and (B).

## US Law Question 6

192. Question 6 is:

"*Where an investment is made in a subsidiary under Section 211.8(c)(1) of Regulation K, there is a requirement that the existing activities of a going concern (that are not otherwise permissible) account for no more than 5% of either the consolidated assets or consolidated revenues of the acquired organisation. How is this requirement assessed? More particularly, is it assessed by reference to:*
*a. the top-tier subsidiary and also at the level of each individual direct and indirect subsidiary of that top-tier subsidiary; or*

*b. only the top-tier acquired subsidiary on a consolidated basis?*"

193. The experts disagreed as to whether this is to be assessed by reference to: (i) the acquired top-tier subsidiary (i.e., the acquired organisation) and also separately at the level of each individual direct and indirect subsidiary of that top-tier subsidiary; or (ii) only the top tier acquired subsidiary on a consolidated basis. Mr Newell was of the view that (i) was correct and Professor Awrey (ii).

194. It was put to Mr Newell in cross examination that the answer to Question 6 was (b) based on a "real world reading" of the language of the regulation. It was further put to Mr Newell that it was clear that the calculation should be made on the basis of the consolidated assets or revenues of the acquired organisation. Mr Newell accepted that the test was measured by reference to the consolidated assets and revenues but (consistent with his evidence at paragraph 27 of his supplementary report) his evidence was that the 5% test was to be calculated and applied with respect to each organization in which an Edge corporation or its subsidiary invests based on the fact that, under the structure and text of Regulation K, any acquisition of a corporate group of legal entities is treated not as a single investment in the top-tier entity alone, but rather as multiple, separate investments in each individual entity in the acquired group's ownership chain. Mr Newell's evidence in cross examination was as follows:

> "*…<u>when one steps back and look at the structure of 211.8(c), and it comes from the basic premise that in the context of acquiring a group entity</u>, so let's say a subsidiary that has beneath it various indirect subsidiaries that could be joint ventures, that could be portfolio investments, these eligible investment standards apply to both direct and indirect investments, and so in context of the acquisition of a group, <u>there are in fact a series of separate investments</u> in the top tier entity , in the indirect subsidiary, in any joint venture portfolio investment that might sit beneath it, and basic sort of –– <u>straightforward facial application of 211.8(c) requires that you apply the relevant eligible investment standards for the relevant type of entity to each entity that one is investing in in the context of a group investment</u>, and so I certainly don't disagree at all that with respect to a top tier subsidiary it needs to meet the test enumerated in (c)(1) which refers to, you know, a reference to 5% of its consolidated assets and revenues. The point I've tried to make in my initial report and supplemental report is <u>if there is as well an indirect subsidiary, you need to apply again the eligible investment standard of 211.8(c)(1) to that indirect subsidiary as well and see if it satisfies the test. That test again is then measured on the basis of the consolidated assets and consolidated revenues of the indirect subsidiary, and to the extent that there is as well in the corporate group structure indirect joint venture investments or indirect portfolio investments, one also needs to confirm that each of those meet the relevant eligible investment standard that's set out in 211.8(c) for that particular type of entity</u>.*" [emphasis added]

195. I accept the submission for JPM that Mr Newell's evidence on this point was not challenged. [Day 2 p119]. I therefore accept the evidence of Mr Newell and find accordingly.

## US Law Question 7

196. Question 7 was:

> "*As regards section 211.8(e) ("Divestiture"):*
>
> a. *Does section 211.8(e)(1)(ii) provide "exceptions" for engaging in activities in the United States beyond what is permitted under section 211.6(a)? If so, are these the only exceptions and to which entities are they relevant?*
>
> b. *In what circumstances may authorisation be sought and given by the FRB for the retention of an investment in a company under Section 211.8(e) where a divestiture would otherwise be required under that Section?*"

197. Mr Newell's evidence was that:

> "*Section 211.8(e) requires that an Edge corporation dispose of an investment promptly if, inter alia, the organization in which the Edge corporation has invested "[e]ngages directly or indirectly in other business in the United States that is not permitted to an Edge corporation in the United States. There are only two exceptions to the divestiture requirement as concerns such investments, the effect of which is to permit the retention of investments that engage in activities beyond what is permitted under section 211.6(a) in certain limited, specific circumstances. First, section 211.8(e)(1)(ii)(A) permits an Edge corporation to "[r]etain portfolio investments in companies that derive no more than 10 percent of their total revenue from activities in the United States…"*
> *Second, section 211.8(e)(1)(ii)(B) permits an Edge corporation to "[h]old up to 5 percent of the shares of a foreign company that engages directly or indirectly in business in the United States that is not permitted to an Edge corporation."…*"

198. I understand it to be common ground that the first limb only relates to portfolio investments.

199. In relation to the second limb Mr Newell's position was that this is in practice only relevant to portfolio investments:

> "*…Because this exception only applies to investments in an organization of which an Edge corporation holds, either directly or through its direct or indirect subsidiaries, fewer than 5% of the shares, it is principally relevant only to portfolio companies, as subsidiaries and joint ventures are generally defined by reference to shareholding levels that are significantly higher than this 5% threshold (i.e., 50% and 20%, respectively). It is theoretically possible that an Edge corporation could hold fewer than 5% of the shares of an organization but otherwise control or be capable of controlling the organization by other means, such that it meets the definition of "subsidiary." However, I strongly consider that the Federal Reserve would not view the exception in section 211.8(e)(ii)(B) as applicable in cases where an Edge corporation holds fewer than 5% of an organization's shares but nonetheless controls it through other means, such that it is a Regulation K subsidiary…*".

200. Professor Awrey appeared to take a different view: in his first report his evidence was:

> "*Section 211.8(e)(1)(ii) does not provide any "exceptions" for engaging in activities in the United States beyond what is permitted under section 211.6(a).*

*Section 211.8(e)(1)(ii) identifies one of the circumstances in which an Investor may be required to divest its investment in an organization. In contrast, section 211.6 identifies the range of activities in which an Edge or agreement corporation may, directly or indirectly, engage in the United States. While the circumstance requiring potential divestment is framed with reference to whether an organization engages directly or indirectly in other business in the United States that is not permitted to an Edge corporation, sections 211.8(e)(1)(ii) and 211.6(a) are otherwise completely separate and wholly independent provisions: one dealing with an Investor's potential divestment, the other with the permissible activities of Edge or agreement corporations.*"

201. Mr Newell's explanation in his oral evidence was as follows:

> "*I think as a matter of structure it's very important to read 211.8(e) and 211.6 in context. 211.8(e) requires divestiture of any investment that is engaged in impermissible activities under 211.6, and so very clear and obvious result, when one has an investment that's engaged in activities that are not permitted under 211.6, unless certain exceptions apply, is that it has to be divested. As I've tried to describe particularly in my supplemental report, that represents a difference in regulatory means, which is to say it's a different way to constrain the activities of joint ventures in portfolio investments rather than directly have section 211.6 apply to them, instead it requires the same result by requiring divestiture of any joint venture or portfolio investment that's engaged in activities that aren't permissible under 211.6. So from my perspective, 211.6 and 211.8(e) are very closely, sort of inextricably linked and one needs to read those two provisions together to identify, you know, to what extent a joint venture or portfolio investment can engage in US activities.*" [Day 2 p120-121]

202. In cross examination it was put to Professor Awrey that it might be regarded as a "*semantic difference*" as to whether one characterised the carve−outs from the divestiture requirements set out in the rest of section 211.8(e)(1) as exceptions to the restrictions on activities contained in section 211.6(a).

203. Professor Awrey responded that he "*struggle[d] with the word "semantic" when we're talking about what the law says and who it applies to*".

204. Whether or not the word "*semantic*" is the correct term, it is clear that as a matter of substance the two provisions must be read together to determine to what extent a joint venture or portfolio investment can engage in US activities.

205. On Question 7(b) ("*In what circumstances may authorisation be sought and given by the FRB for the retention of an investment in a company under Section 211.8(e) where a divestiture would otherwise be required under that Section?*") it was common ground between the experts that the Federal Reserve retains a discretion to authorise retention of an investment that an Edge Corporation is otherwise required to divest promptly but that there is no guidance as to the process or the factors that the Federal Reserve would take into account.

206. I note that no declaratory relief appears to be sought by JPM in its draft order in this regard. Although Question 7(b) is included in the list for determination by the US law

experts, given the evidence of the experts, I can see no useful purpose that would be served by any declaration in relation to this question which is clearly a matter for the discretion of the Federal Reserve on a case by case basis.

## Contractual estoppel

### Issue 4

207. In light of my findings above on Issue 2 and 3 this issue does not arise for determination. I will therefore address it briefly for completeness only.

208. Issue 4 is as follows:

> "*Is JPM contractually estopped from:*
>
> *a. contending that Schedule 1 of the SHA requires that Viva be valued on the basis of financial projections that do not take account of activities that Viva might carry out inside of the US and activities that Viva might undertake (or investments it might make) outside of the US if Viva was not a subsidiary of JPM for the purposes of Regulation K;*
>
> *b. contending that fresh financial projections are not required for the purposes of valuing Viva under paragraph 3 of Schedule 1 so as to take account of such potential activities or potential investments, or alternatively such investments or activities as Viva may lawfully undertake in the US or Europe under its current shareholding structure; or*
>
> *c. seeking declarations it requests as to the basis on which the Call Option Market Value is to be determined?*"

### Relevant legal principles

209. So far as relevant to the discussion below the legal principles were not in dispute: *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396:

> "*47. <u>It is now firmly established at this level in the judicial hierarchy that parties can bind themselves by contract to accept a particular state of affairs even if they know that state of affairs to be untrue. This is a particular form of estoppel which has been given the label "contractual estoppel"</u>. Unlike most forms of estoppel it requires no proof of reliance other than entry into the contract itself. Thus as a matter of contract parties can bind themselves at common law to a fictional state of affairs in which no representations have been made or, if made, have not been relied on. Aikens LJ put the point thus in Springwell Navigation Corp v JP Morgan Chase Bank [2010] EWCA Civ 1221; [2010] 2 CLC 705 at [143]:*
>
> > *"If A and B enter into a contract then, unless there is some principle of law or statute to the contrary, they are entitled to agree what they like. Unless Lowe v Lombank is authority to the contrary, there is no legal principle that states that parties cannot agree to assume that a certain state of affairs is the case at the time the contract is concluded or has been so in the past, even if that is not the case, so that the contract is made upon the basis that the present or past facts are as stated and agreed by the parties."*
>
> *94. Like Moore-Bick LJ in Peekay at [57], I can see no reason in principle why it should not be possible for parties to an agreement to give up any right to assert*

*that they were induced to enter into it by misrepresentation, provided that they make their intention clear. But I question whether a clause, such as clause 5.8 of the lease in this case, which says simply that A "acknowledges" that it has not entered into the contract in reliance on any representation made by B, clearly expresses such an intention. It seems to me that such wording is more naturally understood as stating a fact which may or may not be true. That, indeed, is how a similarly worded clause was understood by the Court of Appeal in Watford Electronics Ltd v Sanderson CFL Ltd [2001] EWCA Civ 317, [2001] 1 All ER (Comm) 696. If what the parties wish to agree is that A will not assert in any future dispute that it relied on a representation made by B even if A did in fact rely on such a representation, then it seems to me that this is what the clause ought to say. However, a different view was taken by the Court of Appeal in Springwell at [170]. No doubt for that reason the tenant did not dispute in the present case that clause 5.8 of the lease has that meaning, and I shall therefore assume that it does.*

*95. It is important, nonetheless, not to be misled by the use of the word 'basis'. To say that a clause giving rise to a contractual estoppel establishes the 'basis' of the contract could be taken to suggest that the clause is of fundamental or foundational importance to the parties' bargain. That in turn might encourage the thought that a 'basis' clause is entitled to particular respect in order not to interfere with freedom of contract and is different in nature from a common or garden exclusion clause. Such a line of thought, however, is fallacious, as it turns on an ambiguity in the word 'basis'. There is nothing in the terms of the lease in this case, for example, to suggest that clause 5.8 is intended to have a special foundational or fundamental importance as a term of the parties' contract. The same is true of other clauses which have been considered in the case law to give rise to a contractual estoppel. Those clauses have no more been agreed to form the basis of the contract in this sense than any other term of the contract. The statements in Peekay and subsequent cases that the parties have agreed that a particular state of affairs is to form the 'basis' on which they are contracting use the word in a different sense to mean an assumption that is agreed for the purpose of the transaction. Such statements are just another way of saying that the parties have agreed to assume that the relevant state of affairs is true, whether or not it is in fact true. It would be conducive to clarity if the use of the expression 'basis clause' were to be avoided.*" [emphasis added]

## Discussion

210. WRL relied on clauses 11.1.(b) 20.5 and/or 39.1 of the SHA. These provide as follows:

"*11. WRL agrees that during the period from the Effective Date to the earlier of (i) the completion of the transfer of the WRL Company Shares to JPM following exercise of a JPM Call Option in accordance with Schedule 1 (the WRL Exit Date) and (ii) the date on which the Option Exercise Period starting on the Fourth Option Exercise Date expires (such period being the WRL Restricted Period), without the prior written consent of JPM, it shall not (whether alone or jointly with another and whether directly or indirectly) be interested economically in any Competing Business in:*

*(a) Europe (including, for the avoidance of doubt, the United Kingdom);*

*(b) the United States of America (<u>the Parties acknowledging that: (A) the Group intends to offer and provide certain products and services in the United States</u>*

*of America following the Effective Date; and (B) the Group has prior to the Effective Date already made plans to prepare to do so);*

*…*

*"20.5 Without prejudice to Clause 20.4, each of the parties acknowledges and agrees that:*

*(a) the Shareholders have a common commercial objective and interest, being the successful promotion and development of the Group and the Business, and that this is dependent on:*

*(i) mutual trust, confidence and co-operation between the Shareholders and between the Directors that they appoint; and*

*(ii) the Group and the Business being operated and managed in accordance with this Agreement, the Business Plan and Annual Budget;*

*(b) a Material Default is likely to substantially affect and damage the commercial objectives and interests of the Shareholders;*

*(c) Clauses 20.3(a) and 20.3(b) are common provisions in agreements of this nature and are reasonable and proportionate in order to secure performance of this Agreement by the Shareholders, deter any breach of this Agreement by the Shareholders; and*

*(d) each of the Shareholders is a sophisticated commercial company which has engaged professional advisers to advise it in relation to this Agreement.*

*39.1 So far as it is legally able, each Shareholder, acknowledging its commitment to the success of the Business as a whole, shall procure that:*

*(a) its rights as a holder of Shareholder Instruments; and*

*(b) the rights of the Directors nominated by it (subject to Law and the Directors' duties and obligations thereunder), are exercised in a manner, and that it and they shall act, so as to ensure that: (i) the provisions of this Agreement are completely and punctually fulfilled, observed and performed by it; and (ii) the Directors nominated by it do not act inconsistently with this Agreement.*" [emphasis added]

211. It was submitted for WRL that by those clauses, the parties agreed that the SHA would be approached on the basis that Viva would (and would be entitled to) offer and provide services in the US (regardless of whether the application of Regulation K to JPM would actually have prevented Viva from doing so). This basis (or state of affairs) formed part of the basis upon which the parties contracted when entering into the SHA including the terms on which the Call Option Fair Market Value would be calculated.

212. Clause 11 is an obligation not to compete in certain business but acknowledging that "*the Group intends to offer and provide certain products and services in the United States of America following the Effective Date.*" It is not a blanket right to carry on business in the US without regard to the restrictions referred to elsewhere in the SHA. Clause 11.1(b) does not suggest that Viva would or could ignore regulatory restrictions applicable to it.

213. By Clause 20.5, the parties further acknowledged and agreed that: "*the Shareholders have a common commercial objective and interest, being the successful promotion and development of the Group and the Business*". WRL submitted that such promotion and development included Viva's intention and acknowledged plans to enter the US. However WRL's submission ignores the rest of the provision which expressly refers to the Agreement and the Business Plan:

> "*... the Group and the Business being operated and managed in accordance with this Agreement, the Business Plan*".

Read as a whole, this provision provides no basis for WRL's contention that the valuation exercise should be carried out on the basis of any activities in the United States that are not in the current Business Plan and which disregard the obligations imposed on its US activities as a result of JPM being a shareholder.

214. By Clause 39.1, the parties acknowledged their "*commitment to the success of the Business as a whole*" and agreed to procure that their respective rights as shareholders would be exercised in a manner consistent with that goal.

215. In my view these clauses do not individually or taken together establish that the parties agreed that the SHA would be approached on the basis that Viva would (and would be entitled) to offer and provide services in the US regardless of whether the application of Regulation K to JPM would actually have prevented Viva from doing so.

216. Had it been necessary to decide the issue, I would have concluded that these clauses do not establish that JPM is contractually estopped from contending that the SHA requires Viva to be valued on the basis of financial projections that do not take into account the activities and investments that Viva had planned and intends to carry out in the US.

## Appointment of the Third Valuation Expert

### Issue 5

217. Issue 5 of the Trial List of Issues is as follows:

> "*What, if any, conditions precedent apply to the appointment of a Third Valuation Expert under paragraph 3.10 of Schedule 1 of the SHA?' In particular, is it a condition precedent to the appointment of a Third Valuation Expert by the ICC that:*
>
> *a. The Valuation Experts have produced determinations of the Call Option Fair Market Value that are more than 15% apart?*
>
> *b. The determinations of both of the Valuation Experts are not subject to any manifest error and/or any unresolved allegation of manifest error?*"

### Relevant contractual provisions

218. The relevant provision of the SHA which falls to be construed is paragraph 3.10 which reads as follows:

> "*3 10 If the Call Option Fair Market Value of the Shares as determined by one Valuation Expert is:*
>
> *(a) within 15% of the value determined by the other Valuation Expert (with the lower of the two valuations provided by the Valuation Experts being the base for these purposes), then the Call Option Fair Market Value of the Shares shall be the average of the value determined by both Valuation Experts; and*

*(b) more than 15% apart from the value determined by the other Valuation Expert (with the lower of the two valuations provided by the Valuation Experts being the base for these purposes), then the parties shall appoint:*

*(i) any one of the firms of accountants listed in paragraph 3.2 as the Shareholders may agree (provided that the Shareholders shall not appoint any firm already appointed by any Shareholder for the purposes of and in accordance with this Schedule 1); or*

*(ii) if agreement is not reached pursuant to subparagraph (i) within 10 Business Days of the Effective Date, such internationally recognised firm of accountants, independent of the Shareholders, as the International Centre for Expertise of the International Chamber of Commerce shall appoint at the request of either Shareholder,*

*(in either case, the Third Valuation Expert) and the Third Valuation Expert shall be requested to determine the Call Option Fair Market Value of the Shares within 15 days of its appointment and follow the process as set out in this paragraph 3.*

*3 11 If paragraph 3.10(b) applies, then the Call Option Fair Market Value of the Shares shall be the average of the value determined by the Third Valuation Expert and the value of such Valuation Expert as is nearest the value of the Third Valuation Expert.*"

## Issue 5(a)

219. Looking first at the language of the paragraph it seems to me correct, as WRL submitted, that the language provides that if the condition set out in 3.10(b) is satisfied, namely that the Call Option Fair Market Value determined by one valuer is more than 15% apart from the value determined by the other valuer, the condition in paragraph 3.10(b) is satisfied and the sub paragraph provides "*then*" the parties shall appoint the persons identified in sub paragraphs (b)(i) or (b)(ii).

220. Thus it reads:

> "*<u>If</u> the Call Option Fair Market Value of the Shares as determined by one Valuation Expert is:*
> *…*
> *(b) more than 15% apart from the value determined by the other Valuation Expert …, <u>then the parties shall appoint</u>:*
> *(i) any one of the firms of accountants listed in paragraph 3.2 as the Shareholders may agree…; or*
> *(ii) if agreement is not reached pursuant to subparagraph (i) within 10 Business Days of the Effective Date, such internationally recognised firm of accountants… as the International Centre for Expertise of the International Chamber of Commerce shall appoint …,*
> *(in either case, the Third Valuation Expert) and the Third Valuation Expert shall be requested to determine the Call Option Fair Market Value of the Shares <u>within 15 days of its appointment</u>…*" [emphasis added]

221. The natural meaning of the words "*then the parties shall appoint*" suggests that the person to carry out the third valuation is only appointed <u>after</u> the condition has been satisfied. This is consistent with the language at the end of sub paragraph (b) where having identified and appointed the third valuer, the language provides for the Third

Valuation Expert to determine the Call Option Fair Market Value "*within 15 days of its appointment...*".

222. JPM submitted however that the correct construction of the relevant provision in paragraph 3.10 is that the Third Valuation Expert should be appointed at the outset of the SHA and once appointed would remain as the Third Valuation Expert for the remainder of the agreement. JPM's interpretation relied on the language of (b)(ii) which refers to the Third Valuation Expert not having been agreed by the parties pursuant to sub paragraph (i) of paragraph 3.10 "*within 10 business days of the Effective Date"* (which is defined in clause 1.2 of the SHA as the closing date). Accordingly JPM submitted that the correct interpretation of paragraph 3.10 is that it requires the Third Valuation Expert to be appointed within 10 business days of the closing and not once the valuations have been obtained and are more than 15% apart. JPM submitted that the requirement at the end of sub paragraph (b) that the Third Valuation Expert shall determine the Call Option Fair Market Value "*within 15 days of its appointment*" is a reference not to its original appointment which it submitted occurs at the outset of the agreement but to its appointment for the purposes of the particular valuation then in issue.

223. JPM accepted in oral submissions that this interpretation meant that the word *"appoint/appointment*" was given two different meanings within the same sub paragraph but submitted that there was no basis for giving any other meaning to the defined term "*Effective Date*".

224. WRL submitted that the term "*Effective Date*" has to be interpreted in context as "*relevant date*".

225. In *Wood* Lord Hodge said that:

> "*...some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement*."

226. It is clearly the case that this provision although contained in a sophisticated contract drafted by lawyers has not resulted in a logical and coherent text. This is not a provision that can be successfully interpreted solely by textual analysis given that on either party's case words have to be given other than their natural meaning.

227. This is therefore a case where, as stated by Lord Hodge in *Wood*, the court can have regard to commercial common sense:

> "*where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense.*"

228. JPM submitted that it made commercial sense for the Third Valuation Expert to be appointed at the outset to avoid delay if and when it became necessary to appoint a Third Valuation Expert given the short window for the call option process. It was submitted that if one adopted WRL's construction there would not be enough time for the Third Valuation Expert to be appointed particularly if one needs to have recourse to the ICC for the appointment to be made in order for the option to be exercised in time and that cannot be what the parties intended. [Day 4 p160]

229. WRL submitted that it did not make commercial sense to appoint at the outset the Third Valuation Expert in circumstances where such a valuer may never be needed and further submitted that it made sense to appoint the Third Valuation Expert at the time he was needed in order to be sure that the person appointed had the practical capacity to deal with the valuation within the limited time available.

230. Both parties rely on commercial common sense but in my view there is force in both sets of submissions and neither provides any real assistance in support of the competing interpretations of the language.

231. The Court must also consider the clause in context and it is in my view significant that paragraph 3.2 provides for the appointment by each shareholder of an expert to act as the Valuation Expert such appointment being expressly stated to take effect from Closing. Further paragraph 3.2 expressly provides that each shareholder "*shall maintain the appointment*" of the Valuation Expert appointed by it until either the Valuation Expert is unable to continue or any Call Option is exercised and option completion occurs. Clause 3.2 provides that in the circumstances where the Valuation Expert is unable to continue, the shareholder "*shall appoint another Valuation Expert*" in accordance with paragraph 3.2.

232. Paragraph 3.2 provides (so far as material):

> "*Each Shareholder shall appoint one expert <u>with effect from Closing</u> who shall be one of:*
> *(a) Duff and Phelps;*
> *(b) Houlihan Lokey;*
> *(c) Deloitte;*
> *(d) KPMG;*
> *(e) Ernst & Young; or*
> *(f) Grant Thornton,*
> *or, if any Shareholder is unable to appoint any of the firms listed above for any reason, such internationally recognised firm of accountants, independent of the Shareholders, as the International Centre for Expertise of the International Chamber of Commerce shall appoint at the request of the relevant Shareholder (in each case, the Valuation Expert and together the Valuation Experts), provided that in any case no Shareholder shall appoint the same Valuation Expert. <u>Each Shareholder shall maintain the appointment</u> of any Valuation Expert appointed by it until as the earlier of: (i) that Valuation Expert informing that Shareholder that it is unable to continue to act for or on behalf of that Shareholder; and (ii) any Call Option being exercised and any Option Completion subsequently occurring in accordance with the terms of this Agreement. <u>If any Valuation Expert informs a</u>*

*Shareholder after being so appointed that it is unable to continue to act for or on behalf of that Shareholder, that Shareholder shall appoint another Valuation Expert in accordance with the terms of this paragraph 3.2.*" [emphasis added]

233. Paragraph 3.4 requires each valuation expert to determine the Call Option Fair Market Value within 15 days "*of each relevant Measurement Date*".

234. Thus it is clear in paragraph 3.2 that the original Valuation Experts whose valuation will be averaged (in accordance with paragraph 3.10) for the purpose of determining the Call Option Fair Market Value provided that those valuations are within 15% of each other, are appointed at the outset of the agreement and the parties are required to ensure that there are at all times Valuation Experts acting for each of them until any Call Option has been exercised and thus they are no longer needed.

235. Reading paragraph 3.10 therefore in context, would suggest that if the intention had been that the Third Valuation Expert should also be appointed from the outset and maintained throughout the life of the agreement that would have been made clear either in paragraph 3.2 or in similar language. However no such provision appears.

### Conclusion on Issue 5(a)

236. "*The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.*" *(Wood)*

237. In my view the language of paragraph 3.10 does not allow for a literal interpretation of the wording of the paragraph but weighing the language against the wider context and the competing arguments as to business common sense, for the reasons discussed above, I find that the objective meaning of the language is that is it a condition precedent to the appointment of a Third Valuation Expert by the ICC that the Valuation Experts have produced determinations of the Call Option Fair Market Value that are more than 15% apart.

### Issue 5(b)

238. Issue 5(b) is in the following terms:

"*Is it a condition precedent to the appointment of a Third Valuation Expert by the ICC that the determinations of both of the Valuation Experts are not subject to any manifest error and/or any unresolved allegation of manifest error?*"

239. Paragraph 3.5 provides:

"*Each Valuation Expert shall act as an expert and not as an arbitrator. Neither Valuation Expert's decision shall be subject to appeal to any court or tribunal on any basis whatsoever, and, save in the case of fraud or manifest error, its decision*

*shall be final and binding on the Shareholders and the Parties who must proceed with the Valuation Experts' decisions.*"

240. It was submitted for JPM that there is no such condition precedent:

a. No such express requirement appears in the SHA.

b. It is not enough for one party merely to assert manifest error to prevent the parties proceeding with the appointment of the Third Valuation Expert given the tight timeframe for the exercise of the option, since any dispute as to whether there was manifest error may not be capable of resolution swiftly enough to enable the Third Valuation Expert thereafter to be appointed and to make their own determination before the end of the Option Exercise Period.

c. It would be absurd that an incorrect assertion of manifest error freezes the process while the Option Exercise Period expires, thereby collapsing irreversibly the detailed valuation methodology in Schedule 1. Even where a manifest error is alleged, it is plainly necessary that the Third Valuation Expert should be appointed (if not already) and proceed to determine the value of Viva within the timeframe contemplated in paragraph 3 of Schedule 1 so that all potentially necessary valuations are produced in time to be taken into account by the parties.

d. Paragraph 3.5 provides that the "*decision*" of each Valuation Expert shall be "*final and binding on the Shareholders and the Parties who must proceed with the Valuation Experts' decisions*", save in the case of "*fraud or manifest error*". As a matter of ordinary language, a decision which is not "*final and binding*" does not mean that the decision has been "*vitiated*" such that it is wiped from existence.

241. Paragraph 3.10 provides two routes for the determination of the Call Option Fair Market Value: the first is where the two valuations are within 15% of each other in which case the Call Option Fair Market Value is the average of the value determined by those experts; the second is where the two values are more than 15% apart in which event the parties are to appoint a Third Valuation Expert to determine the Call Option Fair Market Value. Paragraph 3.10 makes no reference to manifest error but does refer to the "*Call Option Fair Market Value*" as determined by one valuation expert and "*the value*" determined by the other valuation expert. "*Call Option Fair Market Value*" is defined in Schedule 1 as "*the fair market value of the Shares as determined in accordance with paragraph 3 of this Schedule 1*". The language of paragraph 3.10 and within that the term "*Call Option Fair Market Value*" must therefore be construed subject to paragraph 3.5 and cannot be read in isolation. The relevant phrase in paragraph 3.5 reads:

> "*save in the case of fraud or manifest error, its decision shall be final and binding on the Shareholders and the Parties who must proceed with the Valuation Experts' decisions.*"

242. It seems to me that on a natural reading of the language of paragraph 3.5, the words "*save in the case of fraud or manifest error*" qualify both the statement that the decision is final and binding and the phrase "*[the parties] must proceed with the Valuation Experts' decisions*". Accordingly it seems to me that as a matter of language if there is fraud or

manifest error the parties are no longer obliged to proceed with the Valuation Experts' decisions.

243. Paragraph 3.10 requires the parties to appoint the third valuer if the Call Option Fair Market Value as determined by one valuer is more than 15% apart from the value determined by the other valuation expert but the term "*Call Option Market Fair Market Value*" as defined must be determined in accordance with the entirety of paragraph 3. Thus the determination of Call Option Market Value is in my view qualified by paragraph 3.5 with the result that the objective meaning of paragraph 3.10 read in context is that if the determination of the value contains a manifest error the determination is not binding and the parties do not proceed with that determination.

244. I do not accept any distinction can validly be drawn between a decision which is not "*final and binding*" and yet not "*vitiated*". There is no provision in the language of paragraph 3.10 for the valuation to take place by reference to the determination of the Valuation Expert even if such determination is not "*binding*". It seems to me that the value "*determined*" by the Valuation Expert must be a determination which is binding and on which the parties are obliged to proceed. If the decision is not binding it cannot be relied on as a "*determination*" of the value.

245. However there is no provision in paragraph 3 for the mere assertion of manifest error to delay the appointment of the Third Valuation Expert. In this sophisticated and professionally drafted contract the parties have not chosen to include any provisions dealing with a disputed allegation of manifest error even though they have expressly provided for the possibility of manifest error and provided that the obligation on the parties to proceed with the decisions of the Valuation Experts is subject to the case of manifest error. This may reflect the inherent nature of a "*manifest*" error which is an error that is obvious on its face and thus should be capable of being identified without a protracted dispute process to resolve the allegation.

### Conclusion on Issue 5(b)

246. For the reasons discussed above, I find that the objective meaning of the language in paragraph 3.10 is that it is a condition precedent to the appointment of a Third Valuation Expert by the ICC that the determinations of both of the Valuation Experts are not subject to any manifest error but that it is not a condition precedent to such an appointment that there should be no unresolved allegation of manifest error.

### Issues 6-11

247. The remaining issues concerning the Third Valuation Expert are Issues 6-11.

248. WRL submitted that if it succeeded on Issue 2, any issue in relation to the appointment of the Third Valuation Expert or extension of the option period, that is to say Issues 5 through to 11, all fall away because the whole of the first Option Exercise Period was tainted by manifest error: it would have been a valuation on plainly an incorrect basis because both experts proceeded on the incorrect basis and incorrect financial projections.

249. JPM submitted in oral closings that the manifest error carve−out in the Schedule is dealing with a manifest error made by the experts. If the experts are instructed by both

parties, there would be no manifest error if the experts have simply complied with their instructions and based their valuations on the underlying data that was given to them. The underlying data that was given to them were the financial projections that had been approved by both shareholders so there is no manifest error. [Day 4 p159]

250. Paragraph 3.5 provides that the "*decision*" is not binding if there has been a "*manifest error*" and it seems to me that this includes (to the extent that it is manifest) a failure by the Valuation Expert to determine the Call Option Fair Market Value on the basis set out in paragraph 3.7. Paragraph 3.7 contains mandatory language as to the basis for the determination by the Valuation Experts and this includes but is not limited to the financial projections referred to in sub paragraph (vi). In my view there is no express qualification to the carve out for manifest error which limits it to an error "*made by the experts*" in the sense of a fault on their part. If the financial projections have not been prepared in accordance with sub paragraph (vi) then the mere fact that a set of projections have been approved by the shareholders and/or provided to the Valuation Experts does not prevent a manifest error from occurring in the determination of the Call Option Fair Market Value.

## Issues 6 and 7

251. Issues 6 and 7 can be taken together:

Issue 6: "*Does the ICC have authority under paragraph 3.10 of Schedule 1 of the SHA now to appoint a Third Valuation Expert?*"
Issue 7: "*If the ICC were now to appoint a Third Valuation Expert, would such appointment be valid and effective for all future Option Exercise Periods?*"

252. WRL submitted that Issue 6 was moot as the ICC are taking steps to appoint a Third Valuation Expert anyway.

253. JPM submitted that the determination of the dispute between the parties as to the appointment of a Third Valuation Expert is not moot because:

a. The SHA provides for the appointment of a Third Valuation Expert for all Option Exercise Periods; [Day 3 p143]

b. WRL maintained its position that the ICC has no authority to appoint the Third Valuation Expert and that any appointment by the ICC would be invalid. [Day 4 p161]

254. As found above under Issue 5(b), it is a condition precedent under paragraph 3.10 of Schedule 1 of the SHA to the appointment of a Third Valuation Expert by the ICC that the determinations of both of the Valuation Experts are not subject to any manifest error. Accordingly only if I were wrong on the issue of manifest error, would the ICC now have authority to appoint a Third Valuation Expert (Issue 6).

255. However, in my view if the ICC were now to appoint a Third Valuation Expert, such appointment would not be valid and effective for all future Option Exercise Periods (Issue 7). This flows from the determination of Issue 5(a) for the reasons set out above.

## Issue 8

256. Issue 8 is:

> "*Are the parties under an obligation under Schedule 1 to the SHA (on its proper construction and / or pursuant to an implied term):*
> *a. to refrain, without justification, from taking any steps to obstruct, disrupt, hinder or delay the appointment of the Third Valuation Expert or its determination of Call Option Fair Market Value; and*
> *b. to procure that the Third Valuation Expert has access to all financial and accounting records or other relevant documents of Viva (and of the Viva group) which the Third Valuation Expert may reasonably request so as to enable it to determine its valuation of Viva within the 15 day period set out in paragraph 3.10(b)?*"

257. JPM submitted [Day 3 p150] that WRL is in breach of a contractual obligation, whether as a matter of construction or pursuant to an implied term, to refrain without justification from taking any steps to obstruct, disrupt, hinder or delay the appointment of the Third Valuation Expert, and to procure that the Third Valuation Expert has access to all financial and accounting information and other documents that they may reasonably request so as to enable them to determine the valuation of Viva.

258. However, JPM submitted orally that although JPM continued to rely on the implied term argument, if necessary, Clause 39.1 of the SHA contains an express obligation on the part of WRL firstly to exercise its rights as shareholder and, secondly, to act on its own behalf in order to ensure that the provisions of the agreement, which includes Schedule 1, are completely and punctually fulfilled, observed and performed by it.

259. It was submitted further for JPM that the words "*without justification*" are otiose because there is no basis on which pursuant to Clause 39.1 either party can lawfully act in the manner described in sub paragraph (a) of Issue 8.

260. Clause 39.1 provides that:

> "*So far as it is legally able, each Shareholder, acknowledging its commitment to the success of the Business as a whole, shall procure that:*
> *"(a) its rights as a holder of Shareholder Instruments...*
> *are exercised in a manner, and that it ... shall act so as to ensure that (i) the provisions of this Agreement are completely and punctual fulfilled, observed and performed by it ...*"

261. It was submitted for WRL that it is a vague implied term and it is simply not necessary because if it is alleged that that the Third Valuation Expert needs to be appointed, then an application can be made straight to the ICC as it was pursuant to 3.10(b)(ii), and then it is a matter for the ICC, not the Court.

262. In relation to Issue 8(b) it was submitted for WRL there is currently no dispute in relation to the access to records: the Third Valuation Expert has not been appointed, there is no dispute in relation to the Third Valuation Expert having access to financial and accounting records because such a person does not even have a role. It was submitted

that this is premature and was an example of seeking declaratory relief when there is in fact no dispute.

263. The law in relation to implied terms was not in dispute and I was not taken to the authorities in oral submissions.

264. It was submitted for JPM (skeleton paragraph 108) that a term can be implied into a contract where: (i) it is required to give business efficacy to the contract in the sense that, without the term, "*the contract would lack commercial or practical coherence*"; or (ii) it is so obvious that it goes without saying: *Marks and Spencer plc v BNP Paribas Securities Services* [2015] UKSC 71 at [21] per Lord Neuberger.

265. This submission focuses on only 2 aspects of the test as to which I note the following passages from the judgment of Lord Neuberger at [18] and [21]:

"*18 In the Privy Council case BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266, 283, Lord Simon of Glaisdale (speaking for the majority, which included Viscount Dilhorne and Lord Keith of Kinkel) said that:*

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

"*21 In my judgment, the judicial observations so far considered represent a clear, consistent and principled approach. It could be dangerous to reformulate the principles, but I would add six comments on the summary given by Lord Simon in the BP Refinery case 180 CLR 266, 283 as extended by Bingham MR in the Philips case [1995] EMLR 472 and exemplified in The APJ Priti [1987] 2 Lloyd's Rep 37. First, in Equitable Life Assurance Society v Hyman [2002] 1 AC 408, 459, Lord Steyn rightly observed that the implication of a term was "not critically dependent on proof of an actual intention of the parties" when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting. Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Fourthly, as Lord Hofmann I think suggested in Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988, para 27, although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied. Fifthly, if one approaches the issue by reference to the officious bystander, it is "vital to*

> *formulate the question to be posed by [him] with the utmost care", to quote from Lewison, The Interpretation of Contracts 5th ed (2011), p 300, para 6.09. Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption JSC in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence.*" [emphasis added]

266. In relation to Issue 8(a) it seems to me that the implied term cannot be said to be necessary "*to give business efficacy to the contract*": there are clear provisions in paragraph 3.10 for the appointment of the Third Valuation Expert and in light of the express provision in Clause 39.1 there is no need for any term to be implied in the terms sought by JPM.

267. As to the express term relied on in Clause 39.1, it seems to me that the requirement to procure that the provisions of the Agreement "*are completely and punctually fulfilled*" must mean the provisions of the Agreement read in context, such that if for example a condition precedent to the appointment of the Third Valuation Expert or the determination of the Call Option Fair Market Value has not been met, any obligation on WRL would be subject to the satisfaction of the condition precedent and in those circumstances WRL would not be in breach of Clause 39.1. I do not therefore accept the submission for JPM that the term "*without justification*" in the formulation of Issue 8(a) is otiose. Although the words "*to obstruct, disrupt, hinder or delay the appointment*" arguably import a notion that the actions are not justified or wrongly taken and are pejorative, it seems to me that WRL would be lawfully entitled to "*obstruct, disrupt or hinder*" in the sense of block the appointment or the determination of the Call Option Fair Market Value if the conditions precedent were not met.

268. In relation to Issue 8(b) I accept WRL's submission that there is currently no dispute in relation to the access to records. Although therefore this has been included in the Trial List of Issues, in my view a declaration would be inappropriate and serve no useful purpose.

### Issue 9

269. Issue 9 is:

> "*Is WRL in breach of the SHA by failing to appoint or agree to the appointment of the Third Valuation Expert and/or by objecting to the appointment of the Third Valuation Expert by the ICC?*"

270. In relation to Issue 9 I have found that the conditions precedent for the appointment of a Third Valuation Expert have not been met, and that is a complete answer to the allegation of breach.

### Issue 10

271. Issue 10 is as follows:

> "*In the event that the Third Valuation Expert does not determine the Call Option Fair Market Value within 15 days as required under paragraph 3.10(b), is the JPM Option Exercise Period extended by the number of days in excess of that 15 days that the Third Valuation Expert takes to determine the Call Option Fair Market Value in accordance with paragraph 3.10(b) of Schedule 1 to the SHA?*"

272. JPM's case is that there should be two terms implied: firstly that where the Third Valuation Expert has actually been appointed and asked to give a valuation but has not done so within 15 days as required by paragraph 3.10(b) there should be a corresponding extension to the JPM Option Exercise Period, and that this term arises as a matter of necessity and business efficacy; secondly, that if the appointment of the Third Valuation Expert is delayed by a breach by WRL of its obligations to refrain from obstructing that appointment, a term should be implied that the JPM Option Exercise Period should be extended for a reasonable period after the Third Valuation Expert has determined the Call Option Fair Market Value.

273. It was submitted for WRL that:

    a. There is a clear regime which has short time limits which is set out in Schedule 1, drafted by sophisticated parties. If those parties had wished to provide for some open–ended extension of time, then they would have done so and the court should not intervene in order to re-write their contract; and

    b. The issue that is framed by Issue 10 has not yet arisen because the Third Valuation Expert has not been appointed and cannot be appointed in this case because the conditions precedent for appointment have not been met, so Issue 10 is premature and the court therefore should not grant a declaration in respect of it in circumstances where there are no facts to frame that declaration as sought.

274. As stated by Lord Neuberger in *Marks and Spencer plc v BNP Paribas Securities Services* at [21]:

> "*a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them.*"

275. Further:

> "*…necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is… a term can only be implied if, without the term, the contract would lack commercial or practical coherence*."

276. This is a sophisticated contract drawn up by lawyers. I infer that the detailed provisions concerning the exercise of the Call Options were carefully crafted to reflect the parties' intentions. The time periods for the determination by the Valuation Experts under paragraph 3.4 are short: within 15 days of the relevant Measurement Date. If the circumstances arise such that pursuant to paragraph 3.10(b) the Third Valuation Expert

has to be appointed, he is also placed under a similar short timeframe: he is to be requested to determine the Call Option Fair Market Value within 15 days of his appointment. The contract does not specify what happens if the Third Valuation Expert does not do so within 15 days as required by paragraph 3.10(b) but it is not obvious that a term should be implied which would allow for an extension of the JPM Option Exercise Period limited only by the number of days in excess of that 15 days that the Third Valuation Expert takes to determine the Call Option Fair Market Value.

277. I note the following passage in Lord Neuberger's judgment in *Marks and Spencer plc* at [19]:

> "*In Philips Electronique Grand Public SA v British Sky Broadcasting Ltd [1995] EMLR 472, 481, Bingham MR set out Lord Simon's formulation, and described it as a summary which "distil[led] the essence of much learning on implied terms" but whose "simplicity could be almost misleading." Bingham MR then explained, at pp 481—482, that it was "difficult to infer with confidence what the parties must have intended when they have entered into a lengthy and carefully-drafted contract but have omitted to make provision for the matter in issue", because "it may well be doubtful whether the omission was the result of the parties' oversight or of their deliberate decision", or indeed the parties might suspect that "they are unlikely to agree on what is to happen in a certain... eventuality" and "may well choose to leave the matter uncovered in their contract in the hope that the eventuality will not occur." Bingham MR went on to say, at p 482: "The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong. [He then quoted the observations of Scrutton LJ in the Reigate case, and continued] it is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred...*". [emphasis added]

278. In my view these remarks of Lord Bingham encapsulate the position in this case. I do not know whether the decision to omit a further fallback if the valuation was not completed in 15 days was deliberate nor can I be certain that there is only one contractual solution (that is to extend the JPM Option Exercise Period) or what that preferred solution would have been. For these reasons I reject JPM's case that such a term should be implied.

279. JPM accept (skeleton paragraph 114) that this is not a situation which has yet arisen but submitted that "*it would obviously be helpful for the Court to rule on it now, given the potential for a value determination to be delayed in future*".

280. In my view even if I were wrong on this issue of an implied term in relation to Issue 10, a declaration would serve no useful purpose. The situation has yet to arise and there is no reason to believe that the Third Valuation Expert once appointed will be unable to carry out the valuation within the specified period.

## Issue 11

281. Issue 11:

> "*In the event that the appointment of the Third Valuation Expert is delayed* *by a breach of WRL of its obligations:*
> *a. Is the JPM Option Exercise Period extended for a reasonable period after the Third Valuation Expert has determined the Call Option Fair Market Value?*
> *b. Alternatively, is JPM entitled to exercise the JPM Call Option on the basis of the valuation determined by JPM's Valuation Expert without regard to the valuation determined by WRL' s Valuation Expert?*" [emphasis added]

282. Dealing first with Issue 11(a): "*In the event that the appointment of the Third Valuation Expert is delayed by a breach of WRL of its obligations: a. Is the JPM Option Exercise Period extended for a reasonable period after the Third Valuation Expert has determined the Call Option Fair Market Value?*".

283. It was submitted for JPM (skeleton paragraph 115) that a contracting party "*will not in normal circumstances be entitled to take advantage of his own breach as against the other party*": *Alghussein Establishment v Eton College* [1988] 1 WLR 587 at 591D-E per Lord Jauncey. Accordingly, contracts are to be construed so as to preclude a party from obtaining any benefit under the contract on account of its breach of its own obligations under the contract.

284. It was further submitted for JPM that in *King Crude Carriers SA v Ridgebury November LLC* [2023] EWHC 3220 (Comm) at [95], Dias J recently explained that this principle can be given effect as the circumstances permit by one or more of the following mechanisms: (a) by construction of the contract (e.g. to prevent a party in breach from relying on a particular provision or to limit the application of a particular condition); (b) by the implication of terms (where this is justified on orthodox principles); and/or (c) by waiver (e.g. the party in breach may be taken to have waived compliance with a condition that the contract would otherwise require to be fulfilled). Thus, one consequence of a breach of an implied obligation to co-operate in performance (or not to prevent the satisfaction of a condition for performance) may be that where the other party is consequently unable to act within a time period specified in the contract, the party in breach will not be able to rely on the expiry of that time period; and the specified time period will be replaced, pursuant to an implied term, by an appropriate alternative period (e.g., a "*reasonable time*").

285. It was submitted for WRL that:

    a. Issue 11 is parasitic upon the question of breach; WRL is not in breach, therefore Issue 11 does not arise; and

    b. In any event, 11(a) as an implied term is unnecessary: there is a clear regime which has short time limits, drafted by sophisticated parties and it is unclear to provide for an extension for "*a reasonable period*".

286. The passage from the judgment in *King Crude Carriers* at [95] make it clear that the implied term has to be justified in accordance with normal principles and that the maxim

that a person cannot derive a benefit from his own wrong does not amount to a freestanding rule of law:

> "*A contract may, however, be construed as containing an implied term of co-operation wherever this is justified on grounds of obviousness, necessity and business efficacy in accordance with normal principles.*
> …
> *(iii) There also exists a further maxim to the effect that a person cannot derive a benefit from his own wrong.*
> …
> *The maxim does not, however, amount to a freestanding rule of law. In so far as the decision in New Zealand suggests that it does, it is inconsistent with the subsequent approach of the House of Lords in Cheall. Nonetheless, it is a maxim which can be given effect as the circumstances permit by any one or more of the following mechanisms…*
> *a) Construction of the contractual terms, for example to prevent a party in breach from relying on a particular provision (as in Alghussein) or to limit the application of a particular condition precedent (as in Little) …*
> *b) Implication, where justified on orthodox principles, of an implied term which may, depending on the circumstances, be a term requiring co-operation, or a term preventing one party from relying on a particular provision when itself in breach…*". [emphasis added]

287. The implied term for which JPM contends goes beyond merely an implied term to cooperate and an implied term to cooperate would in any event arguably cut across the express term in Clause 39.1 and cannot therefore be said to be necessary for business efficacy. Further the argument that the court should imply a term that in these circumstances the JPM Option Exercise Period shall be extended for "*a reasonable period*" has to be considered against the background that as discussed in relation to Issue 10, the parties have established a detailed framework and timetable for the exercise of the Call Options and the court cannot be certain that this would have been the preferred contractual solution such that the implied term can be said to be "*obvious*". For these reasons I find that no such term as set out in Issue 11(a) can be implied.

288. Even if I were wrong on this, there has been no finding that WRL is in breach of its obligations and absent a finding as to breach a declaration would serve no useful purpose.

289. Issue 11(b) is "*In the event that the appointment of the Third Valuation Expert is delayed by a breach of WRL of its obligations …is JPM entitled to exercise the JPM Call Option on the basis of the valuation determined by JPM's Valuation Expert without regard to the valuation determined by WRL' s Valuation Expert?*".

290. WRL submitted that Issue 11(b) involves draconian consequences: it is a complete rewriting of the contractual bargain for which there is no basis. It is an essential part of the contractual bargain that the valuation is conducted on the basis of an average of two valuations and not simply the valuation which is provided by one party's expert.

291. JPM submitted that although it would arguably have "*some draconian consequences*" and that is not what is expressly provided for in the contract, "*logically*", if there's no implied term or there is no way of extending the Option Exercise Period in circumstances

where WRL is in breach of contract then either the option craters, even though they are the party in breach, which JPM submitted was not a commercial outcome or JPM can proceed on the basis of what it has i.e. the JPM valuation expert, without regard to WRL's valuation. It was submitted that the only other sensible alternative would be for JPM to be entitled to exercise the Call Option on the basis of its reasonable and good faith estimate of the exit proceeds due to WRL, but that it should be able to do that subject to a condition that the option is only exercised provided that the exit proceeds do not ultimately exceed a specified amount. So where the valuation process has not yet come to an end because there has been a delay in the Third Valuation Expert producing their report, then JPM should be allowed to exercise the option up to a specified amount, and what would then happen is that the Third Valuation Expert would eventually produce their report and if a final valuation came out within the cap that JPM had put in its option notice then the option would be exercised, and if it came out above that, then it would not be.

292. JPM submitted (skeleton paragraph 118) that although WRL denies the existence of the implied term WRL does not explain on what alternative basis JPM could exercise the Call Option nor how the option price would then be calculated in this situation.

293. However as Lord Bingham said (referred to above):

> "*…the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong… it is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred…*".

In my view in circumstances where the valuation process was expressly to be on the basis of the average of two valuations (either those of the valuers appointed by the parties pursuant to paragraph 3.10(a) or the average of the value determined by the Third Valuation Expert and the Valuation Expert nearest to that pursuant to paragraph 3.11) it cannot be said to be obvious that a term should be implied that JPM is entitled to exercise the JPM Call Option on the basis of the valuation determined by JPM's Valuation Expert without regard to the valuation determined by WRL's Valuation Expert.

## Term sheet (Issue 12)

294. Issue 12 is as follows:

> "*In circumstances where it is common ground that the Term Sheet is non-binding and of no contractual effect, are the Valuation Experts entitled to take into account the Term Sheet in valuing Viva pursuant to paragraph 3 of Schedule 1 of the SHA?*"

295. The declaration that JPM seeks at paragraph 64.2 of its Particulars of Claim is as follows:

> "*The entire agreement of the parties in relation to the exercise of the Call Options and the valuation of Viva for that purpose is set out in the SHA (in particular,*

*clause 12 and Schedule 1 and Schedule 7 thereof) and nowhere else (including in particular, but without limitation, the Term Sheet)*".

296. WRL's pleaded case is that this issue is not one that is in dispute between the parties: paragraph 117 of its Defence.

297. In its written submissions JPM invite the Court to grant the declaration sought "*to foreclose the possibility of WRL seeking to resurrect that argument or some variant of it in the future*".

298. It was submitted for JPM that (skeleton paragraph 88) that WRL has taken various positions over time as to the alleged relevance of the term sheet. It was submitted for JPM that more recently in correspondence (skeleton paragraph 90(1)), WRL has maintained the position that the Valuation Experts are still entitled to take account of the term sheet, and it may be necessary for them to do so pursuant to paragraphs 3.6(b), 3.6(c) and 3.8 of Schedule 1. However, it was submitted for JPM that the term sheet could never properly be regarded as reflecting "*generally accepted methodologies for valuing the Group*" (paragraph 3.6 (b)) or "*such other valuation methods as the Valuation Expert shall consider to be appropriate in the circumstances*" (paragraph 3.6(c)) nor as being another "*factor ...which either Valuation Expert [could ever] reasonably [believe] should be taken into account*" (paragraph 3.8), and in this respect, it is common ground that the term sheet reflects a different potential deal to the one which was ultimately agreed and that in those circumstances, there is no sensible basis on which the experts could ever take the Term Sheet into account; and it will reduce the scope for disputes if the Court confirms that now.

299. It was submitted for WRL that:

   a. Paragraph 3.8 is unbounded; the condition is that it is put forward by a Shareholder or the Group and it is something which the Valuation Expert in their independent professional judgment reasonably believes should be taken into account. It is a broad discretion.

   b. It is not a matter which the court, in the absence of any factual evidence, can decide is irrelevant; that would be a matter for the valuation experts to consider.

   c. It is not necessary nor appropriate to make that declaration.

300. I note that in its oral submissions WRL relied solely on paragraph 3.8 of Schedule 1 which provides:

> "*The Call Option Fair Market Value of the Shares may also reflect any other factors suggested by a Shareholder or the Group which either Valuation Expert reasonably believes should be taken into account.*"

301. In its written submissions WRL submitted that:

> "*the Term Sheet provides important context so as to understand the parties' intention and understanding to carry out activities in the US. It is a matter which*

> *WRL is entitled to refer to the Valuation Experts and they are entitled to take into account.*"

302. It is difficult to see how the term sheet which reflects a different deal can provide context as to the parties' intention and understanding to carry out activities in the US which would be relevant to the valuation exercise under the SHA. However absent detailed argument and evidence as to what particular matters are sought to be taken into account and their relevance to the valuation exercise, in my view it would be undesirable for the Court to make a declaration in the abstract given the broad discretion accorded to the Valuation Experts.

303. In circumstances where there is no dispute on the pleadings in my view it would be inappropriate to make a declaration in the terms sought and any other declaration referring to paragraph 3.8 would not serve any useful purpose as there is no current dispute and absent the detailed arguments and evidence, it would not reduce the scope for disputes in the future.

### "One Shot" issue

304. WRL advance a construction issue (referred to as the "One Shot Construction") that JPM only has one Call Option under the SHA and that JPM can send a JPM Exercise Notice in only one of the four Option Exercise Periods such that it will have no JPM Call Option remaining in later periods if it sends a notice in any of the first three where the Call Option Price is less than €5 billion and WRL rejects the exercise of the JPM Call Option. JPM's case is that JPM can send a JPM Exercise Notice in any and all of the four Option Exercise Periods (the "Multi Shot Construction").

### WRL submissions

305. WRL's pleaded case (Part 8 Amended brief details of Claim) on the One Shot Construction is founded on the following paragraphs of Schedule 1: paragraph 2.12, paragraph 2.3 and in particular sub paragraphs (b) to (e) which stipulate that JPM may only exercise the JPM Call Option "*provided neither the JPM Call Option nor the WRL Call Option has been previously exercised in accordance with this Schedule 1*", paragraph 2.6(a) and paragraph 4.6 which provides that the diagram set out in Part B of Schedule 1 is an "*illustrative example of the manner in which the Call Options are intended to work*".

306. WRL submitted that the word "*exercise*" in Schedule 1 refers to the giving of the Call Option Notice. WRL submitted that the provisos to the sub paragraphs in paragraph 2.3 make it clear that once a notice has been given, the Call Option has been "*exercised*" and cannot be exercised in the future.

307. Paragraph 2.3 reads as follows:

> "*JPM may elect to exercise the JPM Call Option at the following times by sending the JPM Exercise Notice in accordance with paragraph 2.12 below:*
>
> *(a) during the Option Exercise Period commencing on the JPM First Option Exercise Date; <u>or</u>*

*(b) during the Option Exercise Period commencing on the JPM Second Option Exercise Date, provided neither the JPM Call Option nor the WRL Call Option has been previously exercised in accordance with this Schedule 1; or*
*(c) during the Option Exercise Period commencing on the JPM Third Option Exercise Date, provided neither the JPM Call Option nor the WRL Call Option has been previously exercised in accordance with this Schedule 1;*
*(d) during the Option Exercise Period commencing on the JPM Fourth Option Exercise Date, provided neither the JPM Call Option nor the WRL Call Option has been previously exercised in accordance with this Schedule 1; or*
*(e) during the Option Exercise Period commencing on the JPM Discretionary Option Exercise Date, provided neither the JPM Call Option nor the WRL Call Option has been previously exercised in accordance with this Schedule 1.*" [emphasis added]

308. WRL also relied on the "*or*" at the end of each sub paragraph of 2.3 as supporting its case.

309. WRL further relied on paragraphs 2.5 and 2.12 of Schedule 1 in support of its argument that "*exercise*" of the Call Option is the giving of the notice and submitted that, contrary to the position advanced for JPM, it does not extend to acceptance and the creation of a binding agreement:

"*2.5 The date of exercise of the JPM Call Option is the date on which the JPM Exercise Notice is sent in accordance with paragraphs 2.3 and 2.12.*
*…*
*2.12 The JPM Call Option shall be exercised by JPM sending WRL an irrevocable written exercise notice in accordance with Clause 29, which shall include:*
*(a) the date on which the notice is given;*
*(b) a statement to the effect that JPM is exercising the JPM Call Option;*
*(c) JPM's reasonable and good faith estimate of the Exit Proceeds due to WRL (including any amounts to be set-off against the Exit Proceeds in accordance with Clause 22); and*
*(d) a signature by or on behalf of JPM,*
*(the JPM Exercise Notice).*"

310. WRL submitted that the distinction between exercise and acceptance can also be seen in paragraphs 2.6 and 4.2:

"*2.6 Save with respect to any JPM Exercise Notice served after the JPM Fourth Option Exercise Date in accordance with paragraph 2.3(d) for which paragraph 2.7 applies, if the JPM Call Option Price during the applicable Option Exercise Period during which a JPM Exercise Notice is sent is:*
*(a) less than the Reference Valuation, then WRL shall not be required to (but may at its discretion) accept the JPM Call Option and sell the WRL Company Shares to JPM (provided that, unless WRL rejects the JPM Call Option by written notice to JPM within 10 Business Days of receipt of the JPM Exercise Notice, WRL shall be deemed to have accepted the JPM Call Option and shall be required to sell the WRL Company Shares to JPM for the Exit Proceeds on the terms set out in this Schedule 1, and, for the avoidance of*

*doubt, if WRL issues such notice to JPM, the Parties shall proceed to the next Option Exercise Date); or*

*(b) equal to or greater than the Reference Valuation, then WRL shall be automatically deemed to accept the JPM Call Option and shall be required to sell the WRL Company Shares to JPM for the Exit Proceeds on the terms set out in this Schedule 1.*"

"*4.2 Subject to paragraph 4.3, if either the JPM Call Option or WRL Call Option is exercised (and, if applicable, accepted) in accordance with this Schedule 1, each Party shall use all reasonable endeavours to: (i) enter into the Transfer Agreement as soon as reasonably practicable and in any event no later than 10 Business Days following the date on which the JPM Exercise Notice or WRL Exercise Notice (as applicable) is delivered by JPM or WRL (as applicable); and (ii) complete the Transfer as soon as reasonably practicable. Following the satisfaction of any Mandatory Consents required for the Transfer (the Unconditional Date), the following shall apply:(a) WRL, where the JPM Call Option has been exercised, and JPM, where the WRL Call Option has been exercised, may (but is not obliged to) elect (within a period of five Business Days of the Unconditional Date) to require the Valuation Experts to prepare updated valuation reports in order to determine an updated Call Option Fair Market Value (Updated Valuation Process) in which case:*

*(i) the Updated Valuation Process shall be carried out in accordance with the provisions of paragraph 3 of this Schedule 1; and*

*(ii) the price payable by JPM for the WRL Company Shares or by WRL for the JPM Company Shares (as applicable) shall be the lower of:*

*(A) the updated Call Option Fair Market Value as determined following the Updated Valuation Process; and*

*(B) the Call Option Fair Market Value multiplied by 1.2;*

*(the Alternative Exit Proceeds); and*

*(iii) ...*

*(b)....*" [emphasis added]

311. WRL submitted that the same approach of defining the exercise of the Call Option as the sending of the relevant notice can be seen in the WRL Call Option provisions:

"*2.9 WRL may elect to exercise the WRL Call Option during the Option Exercise Period commencing on the relevant WRL Option Exercise Date by sending the WRL Exercise Notice in accordance with paragraph 2.13 below. WRL may only exercise the WRL Call Option if JPM has not already exercised the JPM Call Option in the relevant Option Exercise Period.*

*2.10 If the WRL Call Option is not exercised during the Option Exercise Period following the last applicable WRL Option Exercise Date, it shall lapse.*

*2.11 The date of exercise of the WRL Call Option is the date on which the WRL Exercise Notice is sent in accordance with paragraphs 2.9 and 2.13.*"

312. Finally WRL relies on the diagram which is set out at Part B of Schedule 1. Paragraph 4.6 provides that:

"*As an illustrative example of the manner in which the Call Options are intended to work, the Parties have prepared the diagram set out in Part B below.*"

313. The diagram is entitled "*Decision Tree*" and the first two steps are (my numbering):

Step 1: "*Call Option Fair Market Value established by Valuation Experts at each Measurement Date*"
Step 2: "*Prior To Fourth Measurement Date and JPM has a call option remaining?*"

In support of its interpretation WRL relies on the language in the second step which states "*JPM has a call option remaining?*". It was submitted for WRL that if JPM had multiple call options then this question could not arise.

## Discussion

314. As stated by Lord Hodge in *Wood*:

> "*10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning...*
>
> …
>
> *12. ...once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.*"

## The language of Schedule 1

315. Looking first at the language of Schedule 1, paragraph 1 of Schedule 1 sets out the definitions. The starting point in Schedule 1 is therefore the grant of the Call Options to JPM and WRL respectively in paragraph 2.1 and paragraph 2.2 and the definition of "*JPM Call Option*".

316. Paragraph 2.1 reads:

> "*In consideration of the grant by JPM of the option in paragraph 2.2 below, WRL grants to JPM an option to purchase the WRL Company Shares for the Exit Proceeds on the terms set out in this Schedule 1.*"

317. Paragraph 2.2 reads:

> "*In consideration of the grant by WRL of the option in paragraph 2.1 above, JPM grants to WRL an option to purchase the JPM Company Shares for the Exit Proceeds on the terms set out in this Schedule 1.*"

318. "*JPM Call Option*" is defined as:

> "*the call option in respect of the WRL Company Shares granted by WRL to JPM pursuant to paragraph 2.1 of this Schedule 1*".

319. On the language of these provisions, the substantive right which is granted by paragraph 2.1 to JPM and defined as the "*JPM Call Option"* is therefore the option or contractual right to purchase the shares not the right to give a notice to buy.

320. In support of its argument that the Call Option can only be exercised once**,** WRL submitted that paragraph 2.1 refers to "*an*" option i.e. a single option to purchase the shares. However in my view JPM are correct in their submissions (Supplemental skeleton para 8) that it is a single option in the sense that the Shares can only be bought once; however the notion of a single option is not inconsistent with JPM being entitled to elect to exercise the option in multiple option periods but with WRL being given a right to reject the option such that if it is rejected, the option is not "*exercised*".

321. Paragraphs 2.3-2.8 then deal with the JPM Option Exercise Period. I note that in its supplemental skeleton WRL submitted that the issue was whether the JPM Call Option may only be exercised "*once in the JPM Option Exercise Period*" and by footnote 1 stated that the JPM Option Exercise Period "*is the period identified in paragraph 2.3 of Schedule 1*." However paragraph 2.3 does not refer to a single period but sets out in paragraphs (a) to (e) a series of Option Exercise Periods which run from the relevant Option Exercise Date i.e. the First Option Exercise Date, the Second Option Exercise Date etc.

322. In a similar vein WRL submitted orally that the relevant term in paragraph 2.3 is "*elect*", and that election is consistent with a choice between alternative courses of action or "*having an opportunity to do something once and for all rather than on multiple or repeated occasions*".

323. I do not accept this submission. It seems to me clear on the language of paragraph 2.3 that JPM is entitled to "*elect*" i.e. choose to send a notice "*at the following times*". The language of paragraph 2.3 clearly indicates that the Exercise Notice may be sent in any of the periods identified in sub paragraphs (a) to (e) and does not suggest a single election.

324. In my view the language of paragraph 2.3 clearly provides the mechanism for the exercise of the substantive right namely by the giving of a notice in the specified periods. That is not the same as saying that the giving of the notice amounts to the exercise of the substantive right. The language of paragraph 2.3 sets out how JPM may "*elect to exercise*" the Call Option and does not say that the giving of the notice amounts to the exercise of the contractual right:

> "*JPM may elect to exercise the JPM Call Option at the following times by sending the JPM Exercise Notice in accordance with paragraph 2.12 below…*".

325. Turning to the language of the provisos in paragraph 2.3 on which WRL place particular reliance, I note that the provisos are not limited to the JPM Call Option but also refer to the WRL Call Option:

> "*provided neither the JPM Call Option nor the WRL Call Option has been previously exercised in accordance with this Schedule 1*".

326. In the case of the "*exercise*" of the WRL Call Option no acceptance or deemed acceptance is required and thus the term "*exercise*" in the context of the WRL Call Option in the provisos clearly refers to the exercise of the contractual right to purchase the JPM shares and the creation of a binding contract requiring JPM to sell the Shares and not just to the giving of a notice: thus the provisos in paragraph 2.3 provide that if WRL has exercised its Call Option in the sense of exercising its contractual right to require JPM to sell its Shares then JPM will no longer be able to exercise its Call Option to require WRL to sell the Shares in the next Option Period.

327. In relation to the WRL Call Option there is no reason on the language not to give the word its usual meaning and to interpret the term "*exercised*" in the provisos to mean the exercise of the contractual right to acquire the Shares and not just the giving of the notice to exercise the WRL Call Option. In my view, it would be surprising if a different meaning was intended in relation to the JPM Call Option within the same proviso.

328. I do not accept that the use of the conjunction "*or*" lends any real weight to WRL's case. Sub paragraph 2.3 states that JPM can elect to send the notice "*at the following times*" i.e. it has a discretion to send the notice in any of the Option Exercise Periods; however JPM is not required to send a notice in each of the Option Exercise Periods. In my view the words "*at the following times*" suggest the election can be made on more than one occasion and had it been the intention to limit the exercise to one occasion this would have been expressly stated. In my view the word "*or*" merely reflects the discretion for JPM to elect to exercise the Call Option in any of the relevant Option Exercise Periods.

329. The objective meaning for which WRL contends cannot be said to be clear from the language of the sub paragraphs to paragraph 2.3.

330. Sub paragraph 2.4 provides:

> "*If the JPM Call Option is not exercised during an Option Exercise Period set out in paragraph 2.3, it shall lapse until the next Option Exercise Period, unless WRL exercises the WRL Call Option in accordance with paragraph 2.9 in which case it shall terminate. The JPM Call Option shall also terminate after the expiry of the Option Exercise Period set out in paragraph 2.3(d).*"

331. JPM submitted (supplemental skeleton paragraph 13) that paragraph 2.4 describes two situations where JPM's Call Option will terminate: where WRL exercises the WRL Call Option or after the expiry of the fourth Option Exercise Period. It was submitted for JPM that if JPM could lose its Call Option by trying but failing to purchase WRL's Shares in one of the first three Option Exercise Periods the SHA would have expressly dealt with this in paragraph 2.4.

332. It was submitted for WRL that although relied on by JPM, this sub paragraph did not support JPM's construction because it was dealing with the position where the JPM Call Option had <u>not</u> been exercised i.e. no Exercise Notice had been sent by JPM.

333. It seems to me that WRL's construction has the effect of placing a different meaning on the term "*exercise*" in the same sentence: in the second half of the sentence referring to the WRL exercise of its Call Option, the term "*exercise*" is being used in relation to WRL

in the sense both of sending a notice and creating a binding agreement i.e. the exercise of the contractual or substantive right to acquire the JPM Shares whereas on WRL's construction the reference to "*exercised*" by JPM in the first half of the sentence is to be read as only referring to the sending of the notice. It would be surprising in a professionally drafted contract if the parties had intended to attribute different meanings to the word "*exercise*" within the same sentence.

334. Paragraph 2.5 provides:

> "*The date of exercise of the JPM Call Option is the date on which the JPM Exercise Notice is sent in accordance with paragraphs 2.3 and 2.12.*"

335. The provisions of paragraph 2.5 logically follow from the general provision in sub paragraph 2.3 that the Call Option notice can be sent "*during the [relevant] Option Exercise Period*". Paragraph 2.5 specifies when the date of exercise occurs and thus thereby provides certainty in order to determine whether the notice has been sent within the relevant Option Exercise Period. Read in context it is clear that paragraph 2.5 is part of the mechanism for exercise of the Call Option and is not defining what constitutes the "*exercise*" of the Call Option.

336. Sub paragraph 2.6 then imposes limits on the effect of the election by JPM to exercise the Call Option by the sending of the notice: (except in relation to the Fourth Option Exercise Date) if the Reference Valuation is less than €5 billion then WRL has a discretion whether to accept the JPM Call Option but if it is greater than €5 billion WRL is deemed to accept the JPM Call Option.

> "*2.6 Save with respect to any JPM Exercise Notice served after the JPM Fourth Option Exercise Date in accordance with paragraph 2.3(d) for which paragraph 2.7 applies, if the JPM Call Option Price* <u>*during the applicable Option Exercise Period during which a JPM Exercise Notice is sent*</u> *is… [less than or equal to or greater than 5 billion]*". [emphasis added]

337. It seems to me that paragraphs 2.6 and 2.7 are not concerned with what constitutes the exercise of the Call Option but with the parameters of the contractual right to require WRL to sell the shares. Thus paragraph 2.6 gives WRL a discretion to refuse the JPM Call Option if it is less than the Reference Valuation but paragraph 2.7 provides that the JPM Call Option is deemed to be accepted in the fourth Option Exercise Period regardless of the Call Option Fair Market Value.

338. Although paragraph 2.6 refers to the sending of the JPM Exercise Notice rather than the exercise of the Call Option if the "*exercise*" of the Call Option was the sending of the notice, paragraph 2.6 could simply refer to the price being less than or greater than €5 billion during the applicable Option Exercise Period "*in which the JPM Call Option is exercised*" rather than referring to the notice being sent.

339. Further I note that the sentence refers to "*a*" JPM Exercise Notice being sent and not "*the*" JPM Exercise Notice which suggests that more than one notice may be sent.

340. At the end of sub paragraph (a) of paragraph 2.6 it provides that if WRL gives notice rejecting the Call Option the parties proceed to the next Option Exercise Date:

> "*(a) less than the Reference Valuation, then WRL shall not be required to (but may at its discretion) accept the JPM Call Option … (provided that, unless WRL rejects the JPM Call Option by written notice to JPM within 10 Business Days of receipt of the JPM Exercise Notice, WRL shall be deemed to have accepted the JPM Call Option … and, for the avoidance of doubt, if WRL issues such notice to JPM, the Parties shall proceed to the next Option Exercise Date)…*" [emphasis added]

341. An "*Option Exercise Date*" is defined to include both the several JPM Option Exercise Dates and the WRL Option Exercise Dates but if WRL's interpretation were correct then the relevant sentence need only have referred to the next "*WRL Option Exercise Date*" and could have stated that the parties would proceed to the next "*WRL Option Exercise Date*".

342. Although both sub paragraphs 2.6 and 2.7 refer to the acceptance and/or deemed acceptance of the JPM Call Option given the purpose of these paragraphs which is to set out when and how WRL can block the exercise of the Call Option and the drafting points discussed above, it does not follow in my view that the reference to "*exercise*" in sub paragraph 2.3 is to be interpreted as limited to the giving of the notice and thus that the One Shot Construction is correct.

343. In relation to the WRL Call Option the provisions in paragraphs 2.9-2.11 largely mirror the mechanics for exercise of the JPM Call Option requiring the giving of a notice during the relevant Option Exercise Period and provision for the determination of the date for the purposes of determining whether the Call Option is exercised during the relevant Option Exercise Period.

> "*2.9 WRL may elect to exercise the WRL Call Option during the Option Exercise Period commencing on the relevant WRL Option Exercise Date by sending the WRL Exercise Notice in accordance with paragraph 2.13 below. WRL may only exercise the WRL Call Option if JPM has not already exercised the JPM Call Option in the relevant Option Exercise Period.*
>
> *2.10 If the WRL Call Option is not exercised during the Option Exercise Period following the last applicable WRL Option Exercise Date, it shall lapse.*
>
> *2.11 The date of exercise of the WRL Call Option is the date on which the WRL Exercise Notice is sent in accordance with paragraphs 2.9 and 2.13.*"

Thus the same considerations apply as discussed above in relation to the interpretation of paragraphs 2.3-2.5.

344. However an additional point arises in relation to the final sentence of paragraph 2.9. Although WRL placed particular reliance on paragraph 2.9 in its oral submissions I note that it was not relied on expressly in its pleaded case or mentioned in its written submissions on the One Shot Construction.

345. The final sentence of paragraph 2.9 provides:

> "*WRL may only exercise the WRL Call Option if JPM has not already exercised the JPM Call Option in the relevant Option Exercise Period*".

346. JPM submitted (supplemental skeleton para 18) that in this context the word "*exercised*" should be interpreted "*in a wider sense*" as "*elected to exercise*" such that WRL cannot exercise its option if JPM has elected to exercise its option in the relevant Option Exercise Period and that this ties in with the definition of WRL Option Exercise Date which arises "*if JPM does not elect to exercise the JPM Call Option*".

347. WRL submitted orally that JPM was in effect conceding that where the term "*exercise*" is used in paragraph 2.9 of schedule 1, it bears a different definition to the one which JPM alleges that it bears elsewhere, including in paragraph 2.3, the very analogue to paragraph 2.9. WRL submitted that JPM was seeking to avoid the situation in which WRL would be able to say, on the basis of the second sentence, it can exercise its Call Option because there is no binding agreement to sell the relevant shares and that JPM wishes to be able to block WRL from exercising its Call Option until one gets to the fourth Option Exercise Period and then buy the shares automatically without the floor of the €5 billion.

348. It was submitted for WRL that in paragraph 2.9 the term "*exercise*" appears three times, twice, it would appear on JPM's case, to mean a binding agreement to sell the relevant shares, but once, where it suits JPM, it means sending of the Call Option Exercise Notice and WRL submitted that this is simply an argument to suit JPM's commercial objective, it is an incoherent construction to read the same verb differently in the same paragraph and offends a fundamental canon of construction.

349. It was submitted for JPM that its interpretation was not inconsistent but was a "*slightly broader"* definition.

350. Within paragraph 2.9 it seems clear that the meaning of the term "*exercise*" in the final sentence in relation to JPM is the sending of an Exercise Notice; otherwise it could just state that WRL is unable to exercise its Call Option if JPM has already exercised the JPM Call Option without any reference to the relevant Option Period.

351. JPM submitted that as a matter of commercial common sense WRL's construction would result in a situation under paragraph 2.9 which makes no sense in that it would require WRL to wait 6 months until the next Option Exercise Period. In other words if WRL were correct, if JPM gave a notice which was rejected, WRL would have to wait until the next Option Exercise Period to exercise its Call Option at which point JPM could not give a further notice to exercise its Call Option.

352. WRL, in its submissions, accepted that on its interpretation JPM giving a notice would have the effect of barring WRL from exercising its Call Option in the 31 days after the JPM Option Exercise Date and therefore WRL would have to wait until the next Option Exercise Period with a different valuation. WRL submitted that this interpretation made commercial sense as it would allow WRL time to secure funding and WRL would know at the time of securing funding that the exercise of its Call Option could not be blocked.

353. I am not persuaded by WRL's submission on this point. Paragraph 2.9 provides for WRL to have the right to exercise its Call Option during the period which commences on the relevant WRL Option Exercise Date which in turn is defined as the date which is 31 days after the JPM Option Exercise Date. Thus the period during which WRL can exercise its

Call Option starts immediately after the end of the 30 day window within which JPM can exercise its Call Option.

354. It seems to me that the structure of the Option Exercise Periods for WRL following immediately after the Option Exercise Period for JPM suggests that the WRL Call Option is to be capable of exercise in the period immediately after the JPM Call Option has ended for that period (if JPM has not given a notice) and that commercial common sense would suggest that the market value of the Shares having been determined for that period, WRL would want to be entitled to exercise its right to purchase at the value then determined and not be forced to wait for a new valuation which would be triggered at the next Measurement Date six months later. The structure of the timing of the Exercise Periods would suggest that the parties intended that WRL should be able to exercise its Call Option immediately and I do not accept that WRL could not seek to acquire funding contingent upon any exercise of its Call Option or that any need to secure funding by WRL would override the commercial rationale to be able to acquire the shares at that price rather than risk paying a higher price six months later. Even if there were substance to the funding argument there seems no commercial rationale to delay the WRL Call Option for as long as six months. If the One Shot Construction were correct commercial common sense would suggest that any delay to secure funding would have been for a relatively short period.

355. It seems to me that the interpretation of "*exercise*" in the final sentence of paragraph 2.9 does not sit easily with JPM's arguments in relation to the interpretation of the term "*exercise*" elsewhere in Schedule 1. However it seems to me that the inconsistency in the way "*exercise*" is used in the final sentence of paragraph 2.9 in relation to JPM, is not fatal to the interpretation of the provisos to paragraph 2.3 which is the crux of the One Shot Construction in relation to JPM's Call Option and which fall to be interpreted not only by reference to the language of paragraph 2.3 and the context of the rest of the Schedule but also the context of the rest of the SHA (as discussed below) and commercial common sense.

356. Paragraphs 2.12 and 2.13 provided the detailed requirements for the exercise notices in relation to JPM and WRL, respectively.

357. WRL rely on paragraph 2.12 specifically in their pleading referring to JPM exercising the JPM Call Option "*pursuant to paragraph 2.12 of Schedule 1*".

358. In my view however paragraph 2.12 has to be read in conjunction with paragraph 2.3. Thus paragraph 2.3 provides that:

> "*JPM may elect to exercise the JPM Call Option … by sending the JPM Exercise Notice in accordance with paragraph 2.12 below…*".

359. Paragraph 2.3 therefore makes it clear that JPM can elect to exercise the option by sending the notice and 2.12 sets out the detailed requirements for such a notice:

> "*The JPM Call Option shall be exercised by JPM sending WRL an irrevocable written exercise notice in accordance with Clause 29, which shall include:*
> *(a) the date on which the notice is given;*
> *(b) a statement to the effect that JPM is exercising the JPM Call Option;*

*(c) JPM's reasonable and good faith estimate of the Exit Proceeds due to WRL (including any amounts to be set-off against the Exit Proceeds in accordance with Clause 22); and*

*(d) a signature by or on behalf of JPM,*

*(the JPM Exercise Notice).*"

360. In my view therefore paragraph 2.12 should not be read in isolation and the language of paragraph 2.12 in stating that the Call Option is "*exercised*" by sending the notice should not be interpreted to mean that the Call Option is exercised by the mere sending of the notice. The reference to "*exercise*" in paragraph 2.12 read in context is in effect a shorthand reference to the election to exercise the Call Option provided for in paragraph 2.3.

361. As to paragraph 4.2 which is also relied upon by WRL in support of its interpretation it seems to me that the word "*exercise*" is arguably used inconsistently in that in the opening words it refers to the exercise of the Call Option and acceptance, whereas in sub paragraph (a) of paragraph 4.2 it provides that where the call option has been "*exercise*d" it triggers the right to require updated valuations.

"4.2 *Subject to paragraph 4.3, if either <u>the JPM Call Option</u> or WRL Call Option is <u>exercised (and, if applicable, accepted)</u> in accordance with this Schedule 1, each Party shall use all reasonable endeavours to: (i) enter into the Transfer Agreement as soon as reasonably practicable and in any event no later than 10 Business Days following the date on which the JPM Exercise Notice or WRL Exercise Notice (as applicable) is delivered by JPM or WRL (as applicable); and (ii) complete the Transfer as soon as reasonably practicable. Following the satisfaction of any Mandatory Consents required for the Transfer (the Unconditional Date), the following shall apply:*

*(a) WRL, <u>where the JPM Call Option has been exercised</u>, and JPM, where the WRL Call Option has been exercised, may…*" [emphasis added]

Thus in the first sentence it appears to draw a distinction between exercise and acceptance whereas in sub paragraph (a) which applies after the consents for the transfer of the shares have been satisfied, the reference to "*exercise*" can only refer to the position where the substantive right has been exercised.

362. Paragraph 4.2 is therefore unclear on the use of the term and given the inconsistent way in which the terms are used does not in my view provide support by way of context for either party's interpretation as to the meaning of "*exercise*" in the construction of the provisos in paragraph 2.3.

363. Turning then to the diagram which is said at paragraph 4.6 to be an "*illustrative example of the manner in which the Call Options are intended to work*".

364. WRL submitted that the diagram is just as much a part of Schedule 1 and the SHA as the body of Schedule 1, the diagram does not operate only as a cross-check or a secondary source, but rather the diagram and body of Schedule 1 must be read consistently with each other and in this case there is no issue since both are consistent with each other, at least in the material respects. WRL relied on *Starbev GP Ltd v Interbrew Central*

*European Holdings BV* [2014] EWHC 1311 (Comm) and *Altera Voyageur Production Ltd v Premier Oil E&P UK Ltd* [2020] EWHC 1891 (Comm).

365. JPM noted that Blair J said in the *Starbev* case that the appropriate approach depends on the terms of the illustration read in context with the rest of the agreement.

366. Blair J said that:

> "*284. …There is in my view no reason why illustrations or examples should be construed differently than any other term in a contract. It could be said in the context of lengthy contracts in financial transactions with much boiler plate that illustrations or examples deserve particular attention as something to which the parties particularly turned their minds.*
> *285. Ultimately, it depends on the terms of the illustration read in context…*"

There is no evidence or submissions before the Court to the effect that the diagram in this case deserves particular attention as "*something to which the parties particularly turned their minds*".

367. WRL pleaded in its Part 8 claim that:

> "*The diagram provides that it is necessary to ask (amongst other questions) whether "… JPM has a call option remaining?". This question only arises because JPM would not have a call option remaining if it were to exercise its JPM Call Option and if WRL were then to reject it pursuant to paragraph 2.6(a) of Schedule 1.*"

368. The diagram sets out a number of steps/questions with alternatives leading to different outcomes (my numbering):

Step 1 is "*Call Option Fair Market Value established by Valuation Experts at each Measurement Date*"
Step 2, and the step upon which WRL rely in support of its One Shot argument is:
"*Prior to Fourth Measurement Date and JPM has a call option remaining?*"
If the answer is Yes, the third step is:
*Currently measuring at Fourth Measurement Date?*
If the answer is No, the third step is:
*WRL exercises WRL Call Option?*

369. The competing constructions of Step 2 can be tested by considering the outcome under the diagram of various factual scenarios which could arise.

<u>Scenario 1 (referred to by JPM in its written submissions (supplemental skeleton para 29) as the middle of the 3 routes through the Decision Tree)</u>

370. If one assumes the scenario of the giving of an exercise notice by JPM in the second Option Exercise Period when it has not previously elected to exercise the Call Option, at below the Reference Value which notice is rejected by WRL.

371. Applying the diagram would appear to lead to the following result:

Step 1 the Call Option Fair Market Value is established
Step 2 it is prior to the Fourth Measurement Date and JPM has not previously given notice to exercise its Call Option
Step 3 not currently measuring at the Fourth Measurement Date
Step 4 JPM Call Option Price not greater than the Reference Value
Step 5 JPM exercises Call Option
Step 6 WRL does not agree to sell at the Call Option Fair Market Value
Step 7 "*Defer to next Option Exercise Date*"

372. If the One Shot Construction was correct then one would expect Step 7 to state that the process was then deferred to the next "*WRL Option Exercise Date*" (consistently for example with paragraphs 2.9 and 2.10 which provide for the exercise of the WRL Call Option by reference to the defined term "*WRL Option Exercise Date*") and not the next "*Option Exercise Date*" which is defined to include the JPM Option Exercise Dates and the WRL Option Exercise Date.

Scenario 2

373. If one assumes the giving of an exercise notice by JPM in the Fourth Option Exercise Period when it has not previously elected to exercise the Call Option, applying the diagram would appear to lead to the following result:

Step 1 the Call Option Fair Market Value is established
Step 2 it is not prior to the Fourth Measurement Date but JPM has not previously given notice to exercise its Call Option

In this situation the answer to the first limb of Step 2 is "No" but the answer to the second limb is "Yes". This does not seem to be a possible outcome on the diagram.

374. WRL's solution is to add the words "*on or*" to the first limb so it applies "*on or prior to the Fourth Measurement Date".* This would mean that the steps would then work as follows:

Step 3 Currently measuring at Fourth Measurement Date
Step 4 JPM exercises JPM Call Option or, if JPM does not exercise its Call Option, the next step is Point A WRL exercises WRL Call Option.

375. Although this solution appears to work in this scenario, WRL's solution casts doubt on the language of the very step that WRL relies on, albeit that WRL contend that it is the first limb of the sentence and not the second that is incorrect.

376. WRL submitted that the language of Step 2 is fundamentally inconsistent with the question as to JPM having a call option remaining, and it is inconsistent with the route down with Point A which contemplates a situation where JPM does not have a call option remaining and WRL nevertheless exercises its Call Option.

377. However an alternative construction advanced by JPM is that Step 2 is a "*shorthand*" for asking whether the parties have got to the end of the JPM option process in the fourth measurement period such that the only routes out are for WRL to exercise its Call Option

or, if WRL does not exercise its Call Option, then the parties proceed to the Strategic Review Period (in accordance with Clause 15).

378. In my view JPM's submission (supplemental skeleton para 31(2)) is correct that Step 2 must be read as a single composite question. Read in this way, in the circumstances where JPM has not exercised its Call Option in the Fourth Option Exercise Period, the answer to Step 2 would be "*No*" because it was not prior to the Fourth Measurement Date and JPM does not have a Call Option remaining because it has terminated (consistent with paragraph 2.4). This would lead to Step 3 (Point A) being "*WRL exercises WRL Call Option*" and if no, would lead to Step 4 being the attempt to find alternatives: the Strategic Review Period under Clause 15.1 which applies "*If no Call Option has been exercised...*".

379. This construction of Step 2 does not require additional language to be read into Step 2 and is consistent with the Multi Shot Construction.

380. A further problem with WRL's interpretation of Step 2 is that under Clause 15.1 the Strategic Review Period only comes into effect "*if no Call Option has been exercised*". On the One Shot Construction in circumstances where it is prior to the Fourth Measurement Date but JPM has given notice to exercise the Call Option and been rejected, the answer to Step 2 would be that JPM has no Call Option remaining. This would lead to Step 3 (Point A) being WRL can exercise its Call Option but if it does not do so, Step 4 leads to Clause 15.1 and on WRL's interpretation of "*exercise*" being the giving of notice by JPM, JPM would have exercised its Call Option and that result would be inconsistent with the language of Clause 15.1 which applies only where no Call Option has been exercised.

381. WRL submitted that one does not read out entire contractual provisions on the basis of an inconsistency between one provision and another but rather that the Court seeks to interpret the clauses consistently with each other and construe the contract as a whole consistently. WRL submitted that it would be wrong to look at Clause 15.1, about which no dispute is taken, and to say as a result the Court should place no weight on the diagram.

382. However Clause 15 does provide context for the interpretation of the language in Schedule 1 including the diagram and the Court should and does weigh the language against the wider context in determining the objective meaning.

383. In my view JPM's interpretation of Step 2 as a single composite question does provide a consistent basis for the construction of the diagram with the rest of Schedule 1 and does not require additional language to be read into Step 2.

384. It was submitted for JPM that there was an inconsistency between Step 2 and Step 3 in that Step 2 asked whether it was "*prior to Fourth Measurement Date*" and Step 3 asked whether you were "*currently measuring at Fourth Measurement Date*". However I am not persuaded that this is necessarily so.

385. Assuming that each step is taken sequentially, Step 2 asks the composite question whether you are "*Prior to Fourth Measurement Date and JPM has a Call Option remaining*". Step 3 then poses a separate question which is whether you are measuring at the Fourth Measurement Date. It seems to me that this is not inconsistent with the previous Step 2 but logically can follow: one asks the question at the start of the process

as to whether you are prior to the Fourth Measurement which may be immediately before the start of the Fourth Option Exercise Period or may be before the start of an earlier Option Exercise Period and (assuming a JPM Call Option remaining) move to Step 3 at the relevant Measurement Date which can be the Fourth Measurement Date or an earlier Measurement Date.

386. The "shorthand" on JPM's case would seem to be that the answer to Step 2 would only be "No" if it was not only after the Fourth Measurement Date but also after the end of the JPM fourth Option Exercise Period when JPM would not have a Call Option remaining (assuming it had not been exercised and had therefore terminated as provided in paragraph 2.4). Step 2 does not refer to the possibility where you are after the Fourth Measurement Date but the JPM Call Option remains in existence as the fourth Option Exercise Period has not expired. However treating Step 2 as a composite question, the diagram works in this scenario as at the start of the $4^{th}$ period by reference to the Fourth Measurement Date you would answer "Yes" to Step 2 and move to the top of the diagram leading to either JPM exercising the JPM Call Option or moving to Point A with WRL exercising its Call Option.

387. WRL's case on the diagram hinges on the language of the second limb of Step 2 but as referred to above there are other provisions in the diagram which support JPM's Multi Shot Construction. Further there is no express provision in the various alternatives in the diagram of any circumstances in which JPM would lose its Call Option for future Exercise Periods which is in my view a notable omission had this been the objective intention.

388. WRL's case is that in Step 2 the question "*only arises*" because JPM would not have a Call Option remaining if it were to exercise its JPM Call Option and if WRL were then to reject it. However as discussed above it would also arise if it was after the Fourth Measurement Date and JPM no longer had a Call Option remaining because it had not exercised the JPM Call Option in the fourth Option Exercise Period.

389. Even if I were wrong on my interpretation of the language of Step 2 and the way that Step 2 was intended to work, the language of Step 2 can be said to be unclear or ambiguous and construction is "*not a literalist exercise focused solely on a parsing of the wording of the particular clause*". In my view the language of Step 2 does not outweigh the conclusion to be drawn from considering the rest of the language of the Schedule including the other provisions of the diagram which in my view for the reasons discussed in the rest of this section considering the One Shot issue support the Multi-Shot Construction.

*The wider context*

390. JPM also relied on the context provided by other provisions of the SHA, notably Clause 14 and 15 where the term "*exercise*" is used in relation to the Call Option.

391. Clause 14.2 provides:

> "*Between the date of this Agreement and the Effective Date, the parties shall discuss in good faith and agree the exact terms of the New Share Option Plan in line with the following principles:*

> …
> (c) *participants in the New Share Option Plan shall only be able to exercise their options in the event of an Exit or exercise of the JPM Call Option, or on a longstop date specified in the New Share Option Plan rules;*
> (d) *the New Share Option Plan shall include a power that on an Exit all options shall vest, lapse, or roll over into replacement options (as agreed between WRL and JPM); and*
> (e) *the New Share Option Plan shall include a power that on exercise of the JPM Call Option, all options shall vest, lapse, or roll over into replacement options (as determined by JPM acting fairly and reasonably).*" [emphasis added]

392. In my view it is clear in these provisions that the term "*exercise*" is intended to mean the exercise of the substantive right and not merely the sending of the exercise notice (which is then rejected).

393. Clause 15.1 provides that:

> "*If no Call Option has been exercised during the Lock-In Period in accordance with the terms of this Agreement (and no other circumstances exist which have resulted in one Shareholder holding all of the Shares in accordance with the terms of this Agreement), JPM and WRL shall enter into the Strategic Review Period…*". [emphasis added]

394. As discussed above, although WRL submitted that Clause 15.1 is not in dispute in these proceedings, Clause 15.1 is relevant context for the interpretation of Schedule 1 and it does not support the One Shot argument.

*Business common sense*

395. I turn then to the issue of commercial common sense which is relied on by both parties in this context. Lord Hodge said that:

> "*where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause … and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest*".

396. For JPM it was submitted that the One Shot argument gives rise to a "*nonsensical and absurd*" outcome (supplemental skeleton para 3). It was submitted that the intention of the parties was to provide a period of 30 months during which Viva could develop its business. The price would reflect that and WRL was not bound to accept an exercise of the Call Option below the Reference Valuation until the fourth and final Measurement Date. However JPM should be able to submit further Call Option notices to reflect the revised and increased fair market value of Viva over time and WRL was free to reject these notices if they were less than €5 billion.

397. It was submitted orally for JPM that the underlying purpose of Schedule 1 to the SHA is for JPM to acquire WRL's shares in Viva should the parties find the right price, and this is what the parties set out to do. WRL can block JPM's purchase of its shares if JPM elects to exercise the Call Option in the first three periods and Viva's fair market value at that time is less than €5 billion. The process allows WRL time to maximise the fair market value of Viva before it is ultimately required to sell. At the end of the four lots of six−month intervals, the parties also agreed that at that point WRL had no right to block the exercise of the option by JPM in that last period. They also agreed that if JPM decided that at that point it did not ultimately wish to purchase WRL's shares, WRL should have the right to purchase JPM's shares at the valuation produced by that valuation process.

398. It was submitted for JPM that the idea that there is only one opportunity for JPM to elect to exercise its option makes no commercial sense because the consequence of the One Shot Construction is that JPM has no effective option at all except if the valuation exceeds €5 billion in the first period, and that is because JPM's one shot can be blocked in any of the first three option periods where the valuation is below that reference amount.

399. For WRL it was accepted that the call option mechanism was to provide a 30 month "*runway*" to grow and develop Viva's business. It was submitted (supplemental skeleton para 12) that on the One Shot Construction WRL is incentivised to assist in the growth and development and its commercial position is protected because should JPM wish to buy out WRL earlier than 30 months the market value would have to achieve the Reference Valuation. It was further submitted that on the Multi Shot Construction JPM could have an incentive to depress the value of Viva since this would mean Viva did not achieve the Reference Valuation and JPM could acquire the shares at a depressed value in the Fourth Option Exercise Period.

400. I do not see any realistic explanation advanced by WRL as to the commercial rationale for the One Shot Construction. I do not accept that JPM in reality would have an incentive to depress the value of Viva given its significant current investment in Viva: JPM holds a 48.51% stake for which it paid €800 million.

401. Further in my view WRL's submissions on business common sense do not accord with the clear structure of Schedule 1 which provides for 4 separate occasions on which JPM can exercise its call option and gives the option for WRL to reject the exercise if the price at that time is less than €5 billion. There would arguably be no need for these provisions on WRL's construction as JPM is only given one opportunity to exercise its Call Option and in reality it would have to pay the Reference Value or risk rejection. Insofar as JPM held off from exercising its Call Option it would also put JPM at risk of WRL exercising its Call Option without any protection as to the level achieved.

### Conclusion on "One Shot"

402. In my view the natural interpretation of the language in the provisos to paragraph 2.3 is that "*exercised*" means the exercise of the substantive right and not merely the giving of a notice to exercise the right. Although on occasions within Schedule 1 the term "*exercise*" is not used consistently, when the Schedule is considered as a whole and in the context of the SHA as a whole, and having regard to commercial common sense, it is clear in my view that the objective meaning of the language is that JPM can send a JPM

Exercise Notice in any and all of the four Option Exercise Periods and for the reasons set out above, I find that the Multi Shot Construction is correct.

## Relief

403. The Court has made findings above to the extent necessary to resolve the issues in dispute and indicated where it does not intend to exercise its discretion to grant declaratory relief. The order consequent upon this judgment should therefore be capable of agreement between the parties: where the Court has indicated that declaratory relief is appropriate, the precise terms of the declarations should be apparent from the judgment. If any further determination of the terms of the declarations is required this will be a matter for the consequential hearing following hand down of this judgment.