Neutral Citation Number: [2022] EWCA Civ 1040

Case No: CA-2021-000677 (formerly A3/2021/1212)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUST AND PROBATE LIST (ChD)
Upper Tribunal Judge Jonathan Richards (sitting as a Judge of the High Court)
[2021] EWHC 1526 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 22 July 2022

Before :

LORD JUSTICE LEWISON
LORD JUSTICE MALES
and
LORD JUSTICE SNOWDEN

- -

Between :

ZAVARCO PLC	**Claimant/ Respondent**
- and –	
RANJEET SINGH SIDHU	**Defendant /Appellant**

- -

Robert-Jan Temmink QC and Tom Nixon (instructed by **Teacher Stern LLP**) for the **Defendant/Appellant**
Patrick Lawrence QC and Andrew Blake (instructed by **Needle Partners Limited**) for the **Claimant/Respondent**

Hearing date : 17 March 2022
Further written submissions received on 28-29 June and 1 July 2022

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Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10.30am on 22 July 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Snowden :

1. This is an appeal by Mr. Ranjeet Singh Sidhu ("Mr. Sidhu") against a decision of Upper Tribunal Judge Jonathan Richards, sitting as a High Court Judge ("the Judge") ordering Mr. Sidhu to pay €84 million and interest of about €17.5 million to Zavarco plc ("Z plc" or "the Company").

2. The case concerns the provisions of the Companies Act 2006 (the "2006 Act") which relate to the payment for shares of a public company. In particular, it raises issues in relation to section 584 (which requires shares taken by a subscriber pursuant to an undertaking in a public company's memorandum of association to be paid up in cash); sections 593 and 594 (which prohibit a public company from allotting shares other than for cash unless certain exemptions apply); and section 606 (which gives the court a discretion to exempt a person who is liable to pay for shares from such liability).

The statutory framework

3. The relevant statutory framework is to be found in Chapters 5 and 6 of Part 17 of the 2006 Act. The general rule is that shares allotted by a company, and any premium on them, can be paid up in money or money's worth (section 582(1)). That general rule is, however, subject to particular additional rules for public companies (section 582(3)). Those additional rules include sections 584, 593-594 and 606 of the 2006 Act.

4. Section 584 appears in Chapter 5 and provides,

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

5. Section 593 appears in Chapter 6 and provides,

> "(1) A public company must not allot shares as fully or partly paid up (as to their nominal value or any premium on them) otherwise than in cash unless—
>
> (a) the consideration for the allotment has been independently valued in accordance with the provisions of this Chapter,
>
> (b) the valuer's report has been made to the company during the six months immediately preceding the allotment of the shares, and
>
> (c) a copy of the report has been sent to the proposed allottee.
>
> …
>
> (3) If a company allots shares in contravention of subsection (1) and either—

> (a) the allottee has not received the valuer's report required to be sent to him, or
>
> (b) there has been some other contravention of the requirements of this section or section 596 that the allottee knew or ought to have known amounted to a contravention,
>
> the allottee is liable to pay the company an amount equal to the aggregate of the nominal value of the shares and the whole of any premium (or, if the case so requires, so much of that aggregate as is treated as paid up by the consideration), with interest at the appropriate rate.
>
> (4) This section has effect subject to—
>
> section 594 (exception to valuation requirement: arrangement with another company) …

6. Section 594 provides,

> "(1) Section 593 (valuation of non-cash consideration) does not apply to the allotment of shares by a company ("company A") in connection with an arrangement to which this section applies.
>
> (2) This section applies to an arrangement for the allotment of shares in company A on terms that the whole or part of the consideration for the shares allotted is to be provided by—
>
> (a) the transfer to that company …
>
> of all or some of the shares, or of all or some of the shares of a particular class, in another company ("company B").
>
> (3) It is immaterial whether the arrangement provides for the issue to company A of shares, or shares of any particular class, in company B.
>
> (4) This section applies to an arrangement only if under the arrangement it is open to all the holders of the shares in company B (or, where the arrangement applies only to shares of a particular class, to all the holders of shares of that class) to take part in the arrangement.
>
> …
>
> (6) In this section—
>
> (a) "arrangement" means any agreement, scheme or arrangement (including an arrangement sanctioned in accordance with—

(i) Part 26 …, or

(ii) section 110 of the Insolvency Act 1986 …), and

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

7. Section 606 appears in Chapter 6 and provides,

"(1) A person who—

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

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

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

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

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

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

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

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

(c) whether the applicant or any other person—

(i) has performed in whole or in part, or is likely so to perform any such undertaking, or

(ii) has done or is likely to do any other thing in payment or part payment for the shares.

(3) In the case of a liability within subsection (1)(b), the court may exempt the applicant from the liability only if and to

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

Factual background

8. The factual background is set out in some detail in the judgment: [2021] EWHC 1526 (Ch) ("the Judgment"). For the purposes of the appeal, the relevant facts can be more shortly stated.

9. The underlying commercial background concerned three Malaysian companies which the Judge referred to as Zavarco Berhad (previously known as Vasseti Berhad) ("ZB"), V Telecoms Berhad ("VTEL"), and a company known as Open Fibre Sdn Berhad ("OFSB").

10. VTEL was a telecommunications company that had, by the mid-2000s, obtained licences to build and operate telecommunications infrastructure in Malaysia. It was controlled by Mr. Sidhu and a Mr. Shailen Gajera (also known as Shailen Popatlal) ("Mr. Gajera"). Mr. Gajera is a financial adviser in Malaysia who, as the Judge found, had sought to conceal his interests in VTEL by the use of nominee shareholdings.

11. Until late 2010, 91% of the shares in VTEL were owned by OFSB. The Judgment contains a detailed review of the evidence as to the true beneficial ownership of OFSB. Ultimately, the Judge found that both Mr. Sidhu and Mr. Gajera had a beneficial interest in shares in OFSB, together with some other unidentified third party stakeholders.

12. In late 2010, OFSB transferred its shareholding in VTEL to ZB in return for the issue of A Ordinary Shares of Malaysian Ringgit ("RM") 100 each in ZB, which became the holding company of VTEL. The Judge found that at the time of the subsequent

incorporation of the Company on 29 June 2011, the registered holders of the ordinary shares of RM 1 each and A ordinary shares of RM 100 each in ZB were as follows,

i) Mr. Sidhu held 9,999,999 ordinary shares;

ii) Tan Sri Syed Mohd Yusof Bin Tun Syed Nasir ("Mr. Nasir"), a Malaysian businessman, held 4 million ordinary shares;

iii) Dato M Harisharan Pal Singh ("Mr. Singh"), a friend of Mr. Sidhu, held 1 million ordinary shares as nominee for Mr. Sidhu;

iv) A retired army general held a single ordinary share as nominee for Mr. Sidhu; and

v) OFSB held 3,960,000 A ordinary shares.

13. There were, in addition, an unknown number (but thought to be about 40 million) of preference shares of ZB in issue. The Judge was unable to make any findings as to the precise nature or rights attaching to such shares.

14. The Judge found that when the efforts on behalf of ZB to raise money to finance the telecommunications business of VTEL proved less successful than planned, Mr. Sidhu and Mr. Gajera decided to take a different approach. The plan was to form a new English public company which would acquire the shares of ZB and thus become the holding company of ZB (and the indirect holding company of VTEL). That new English public company would then be listed on the Frankfurt Stock Exchange and offer shares to the public to be traded on the exchange. Mr. Sidhu and Mr. Gajera were attracted to this plan because the Frankfurt Stock Exchange would permit the underlying telecommunications business to be valued on the basis of VTEL's predicted future cash flows, rather than just current revenues.

15. As the Judge recorded in the judgment, both parties accepted that this plan was implemented too quickly and without proper care. In particular, and extraordinarily, no-one took any English legal advice even though the formation of an English public company was at the heart of the plan. Instead, the formation of the Company was attended to by a Mr. Nasir Mogul ("Mr. Mogul") who the Judge described as an American businessman and corporate adviser, who did not have the necessary expertise.

16. In the ordinary course of events (and especially given the terms of the Share Sale Agreement for the acquisition of ZB to which I shall refer below), it might have been expected that the Company would simply be incorporated with the minimum number of subscriber shares, and would then allot and issue a much larger number of shares to the shareholders of ZB as consideration for the acquisition of their shares in ZB. However, for reasons that the Judge was unable specifically to identify, but which he surmised might have been due to Mr. Mogul's lack of expertise and "some crossed wires" between those involved in the planning, the Company was in fact incorporated with a very substantial initial share capital of €120 million comprising 1.2 billion shares of €0.10 each.

17. It is that fact that has given rise to the issues in this case, because, as the Judge found, it was common ground among everyone involved that no-one was expected to pay cash

for the initial shares in the company, there was no indication that anyone turned their mind to the question of how those shares would be paid up, and there was no independent valuation of the shares in ZB that were acquired by the Company.

The Company

18. The Company was incorporated as a public limited company in England and Wales on 29 June 2011 under the 2006 Act. The application to the Registrar of Companies to register the Company was made electronically. The statement of capital stated that the share capital of the Company was 1.2 billion ordinary shares of €0.10 nominal value each, all of which shares were stated to be paid up in full, giving an aggregate nominal capital of €120 million. The statement of initial shareholdings identified Mr. Sidhu as the holder of 840 million ordinary shares with a nominal value of €84 million, and Mr. Nasir as the holder of 360 million ordinary shares with a nominal value of €36 million. The statement of compliance confirming that the requirements of the 2006 Act as to registration had been complied with was authenticated by Mr. Sidhu and Mr. Nasir.

19. The memorandum of association of the Company was in the form prescribed by Regulation 2 and Schedule 1 of the Companies (Registration) Regulations 2008 (SI 2008/3014). It stated,

> "Each subscriber to this memorandum of association wishes to form a company under the Companies Act 2006 and agrees to become a member of the company and to take at least one share.
>
> Name(s)
>
> Ranjeet Singh Sidhu
>
> Syed Mohd Yusof Bin Tun Syed Nasir
>
> Dated this 29th day of June 2011."

The acquisition of ZB

20. The Judge found that after its incorporation, on or about 25 July 2011, the Company acquired all of the ordinary and A ordinary shares in ZB (the "ZB Sale Shares"). After the acquisition had occurred, a document purporting to set out the terms of such acquisition (the "Share Sale Agreement") was executed on or about 8 August 2011 and backdated to 29 June 2011.

21. The Share Sale Agreement provided for the purchase by the Company (defined as "VUK or the Purchaser") of the ZB Sale Shares from the registered holders of those shares (defined as the "Vendors"). The purchase was said to be in return for what was referred to as the "Consideration", which was in turn defined as "the issuance [sic] of 1.5 billion ordinary shares of the Purchaser i.e. VUK".

22. Clause 4.2 of the Share Sale Agreement provided,

> "The Parties hereto hereby agree that the VUK Shares shall be issued to the persons mentioned in Schedule 2, which will be made available to the Purchaser by the 23 July 2011 or such other

> dates to be agreed by the Parties herein. The VUK Shares issued shall rank pari passu in all respects to the existing ordinary shares of the Purchaser. Schedule 2 shall consist of detailed particulars of the names and allotment of the Consideration for the 1.5 billion VUK Shares."

As the Judge recorded in paragraph [26] of his Judgment, Schedule 2 was in fact blank in the document as signed on 8 August 2011.

23. As the Judge also observed, the reference in clause 4.2 of the Share Sale Agreement to the VUK Shares to be issued ranking pari passu with the existing ordinary shares of the Purchaser raised the question of whether the 1.5 billion ordinary shares in the Company which were expressed to form the "Consideration" for the acquisition of the ZB Sale Shares were intended to be in addition to the initial 1.2 billion ordinary shares held by Mr. Sidhu and Mr. Nasir, or whether those 1.2 billion ordinary shares were to form part of the 1.5 billion Consideration shares.

24. As the Judge explained in paragraph [37] of the Judgment, the Company did not contend that it was expected that it would ever have 2.7 billion ordinary shares in issue. Accordingly, the Company accepted that the 1.5 billion ordinary shares forming the Consideration referred to in the Share Sale Agreement included the initial 1.2 billion ordinary shares held by Mr. Sidhu and Mr. Nasir on incorporation.

25. The Judge also recorded that it was common ground that the Company issued a further 300 million ordinary shares at some point, although neither side sought to establish the identity of the shareholders to whom those additional shares were issued, or on what terms.

The listing of the Company

26. The Company's listing on the Frankfurt Stock Exchange became effective on 23 August 2011. The Judge found that it was supported or procured by the use of three false or misleading documents. The first was a valuation of ZB as at 29 June 2011 at €2.38 billion by Ari & Co.. The Judge concluded that neither Mr. Gajera nor Mr. Sidhu had any belief that this was a realistic valuation of ZB. The second was a letter from Crilly & Co., a firm of UK chartered accountants which was dated 26 July 2011 and purported to confirm that the Company had an equity capital of €120 million which had been paid up in cash. That was untrue. The third was a letter dated 14 July 2011 bearing Mr. Sidhu's electronic signature which purported to confirm that as at that date the Company had at least 35 shareholders. At that date it would in fact appear that it only had Mr. Sidhu and Mr. Nasir as shareholders.

27. Following the listing on the Frankfurt exchange, there was a moratorium on dealings in the Company's shares by the majority shareholders, during which time its share price was stable. However, after that moratorium expired in January 2013, the share price collapsed. The detail and consequences of how the Company came to be listed on the Frankfurt exchange and the subsequent collapse of its share price are not relevant to the issues before us.

The litigation

28. The Company has brought claims against both Mr. Nasir and Mr. Sidhu in relation to the process by which it was incorporated and acquired the shares in ZB. Although the identity of those now controlling the affairs of the Company is unclear, it appears likely that the commencement of that litigation was at the instigation of Mr. Gajera who was a director of the Company at the relevant times until October 2021.

29. In particular, following a trial in October 2017 before Martin Griffiths QC (as he then was) sitting as a Deputy High Court Judge, the Company succeeded in obtaining declarations that the 360 million ordinary shares registered in Mr. Nasir's name were unpaid, and were liable to be forfeited: see Zavarco plc v Nasir [2017] EWHC 2877 (Ch).

30. However, as the Judge in the instant case noted in paragraph [37] of his Judgment, the Company's case against Mr. Nasir proceeded on a very different factual footing from the instant case. In contrast to the instant case, Martin Griffiths QC found that the 360 million ordinary shares registered in the name of Mr. Nasir stood apart from the 1.5 billion ordinary shares which formed the consideration for the Company's acquisition of the ZB Sale Shares. For that and other reasons, although some of the same issues that were decided by Martin Griffiths QC also arise in this case, the parties before us were agreed that his decision was not binding upon the Judge in the instant case.

31. Permission to appeal the decision of Martin Griffiths QC was refused in May 2018. The Company then issued a second set of proceedings against Mr. Nasir for €36 million plus interest, being the nominal value of the initial 360 million ordinary shares in the Company which were held by him. Mr. Nasir sought to have the second claim struck out on the basis that the Company's cause of action had merged in the first declaratory judgment, or that it was an abuse of process on Henderson v Henderson grounds. The Company's claim was initially struck out by Chief Master Marsh, but reinstated on appeal by Birss J (as he then was), whose decision was upheld by this Court last year: see Zavarco v Nasir [2021] EWCA Civ 1217. None of the issues arising on that appeal are relevant to the decision in the instant case.

32. As indicated above, in the instant proceedings brought against Mr. Sidhu, the Company claims the €84 million nominal value of the 840 million shares held by him on incorporation, together with interest.

The Judgment

33. In his Judgment, the Judge first conducted a detailed review of the evidence and made some factual findings as to the beneficial interests of the various persons involved in the shares in ZB. The Judge found on the evidence that each of Mr. Sidhu, Mr. Gajera and Mr. Nasir had a beneficial interest in the ordinary shares in ZB, and that it had been agreed that the interests of Mr. Sidhu and Mr. Gajera were to be broadly equal. He could not, however, more precisely quantify the extent of those beneficial interests.

34. The Judge then addressed the arrangements in existence on or prior to the incorporation of the Company on 29 June 2011. Both sides accepted that this was the relevant date upon which to test whether sections 584 and 593-594 of the 2006 Act applied to the 840 million shares held by Mr. Sidhu on incorporation.

35. In that latter respect, the Judge held as follows,

> "75. No-one expected that [Mr. Sidhu] or [Mr. Nasir] would actually pay cash for their Z plc shares, or even give any undertakings to pay cash. … [T]he provision of the Share Sale Agreement that could, at first sight, be read as suggesting that the 1.5 billion Z plc shares to be issued as consideration for the acquisition of ZB shares were in addition to 1.2 billion other shares for which cash was subscribed. However, that was simply attributable to a lack of clarity in the drafting of the Share Sale Agreement. The whole rationale for the involvement of [Mr. Sidhu] and [Mr. Nasir] in both ZB and Z plc was that their names, networks and reputations would enable those companies to be successful by raising money from others. It was not envisaged that [Mr. Sidhu] or [Mr. Nasir] would themselves subscribe any material cash on Z plc's incorporation. It was for that reason that none of the 1.2 billion shares issued to [Mr. Sidhu] or [Mr. Nasir] were issued for cash consideration.
>
> 76. I also consider all parties were proceeding on the basis of a general assumption that there would be a share-for-share exchange under which existing holders of ZB shares (with the possible exception of holders of preference shares) would transfer their shares to Z plc and Z plc would issue some ordinary shares as consideration. As noted further below, however, while it was understood that Z plc would issue consideration shares, it was far from clear, both at 29 June 2011 and subsequently, who would have the beneficial interest in those consideration shares."

36. The Judge elaborated the point about the lack of clarity as to who was to have a beneficial interest in the shares which were to be issued as the consideration for the acquisition of the ZB Sale Shares in paragraphs [80]-[83] of his Judgment as follows,

> "80. … Since [OFSB] held a large number of shares in ZB it might naturally be expected that it would acquire a large number of shares in Z plc after it transferred its ZB shares to Z plc. But the contemporaneous documentation shows uncertainty as to the position with OFSB. … I have inferred that, as at 29 June 2011, there was no clear understanding or arrangement as to the extent to which any of the 1.2 billion shares held by [Mr. Sidhu] or [Mr. Nasir] were held beneficially on behalf of OFSB.
>
> 81. There was, however, an understanding that [Mr. Sidhu] and [Mr. Nasir] would hold some of their 1.2 billion Z plc shares beneficially since it was understood that they would be transferring their entire holdings of ZB shares to Z plc and could scarcely be expected to do so without obtaining any consideration for themselves. However, it was not known, on 29 June 2011, how many shares they were to hold beneficially. Moreover, it followed that, to the extent [Mr. Sidhu] and [Mr. Nasir] did not hold their shares beneficially, they must have been

> holding them as nominees for others. Neither the identity of those other persons, or the extent of their beneficial interest, was known on 29 June 2011.
>
> …
>
> 83. The point I have made at paragraph 80 above was a specific instance of a more general uncertainty. As at 29 June 2011, no-one seemed to know how many shares in Z plc were to be owned (beneficially) by any of its shareholders. Even by 8 August 2011, when the Share Sale Agreement was signed, it was not possible to provide a completed Schedule 2 setting out how many shares in Z plc were to be held by each shareholder and this issue cannot, therefore, have been any more certain on 29 June 2011…."

37. In his legal analysis, the Judge first noted that he had raised the question at the outset of whether the 840 million shares taken by Mr. Sidhu on incorporation had been "allotted" to him within the meaning of section 593 of the 2006 Act. The Judge simply recorded that the parties had agreed that this was so, and stated that he was content to proceed on the basis of that common approach. For reasons that I shall explain below, I consider that this is an incorrect reading of the 2006 Act and that the parties were incorrect to invite the Judge to proceed on that basis.

38. The Judge then addressed the question of what was required to take advantage of the exemption for share-for-share exchanges in section 594. He held in paragraph [95] that although there could be an "arrangement" within the meaning of section 594 where no contractually binding agreement has been entered into,

> "in order to constitute an "arrangement", there must be a certain bare minimum of coherence",

and,

> "in order for something to constitute an "arrangement" it must be possible to say, at least in relation to its key aspects, what the arrangement consisted of."

39. The Judge then held that this test was not satisfied on the facts. He stated, at paragraphs [97]-[101],

> "97. … The contemporaneous evidence paints a vivid picture of transactions leading up to the listing of Z plc being performed at breakneck speed, without proper consideration, by people who lacked necessary expertise, particularly in the sphere of UK company law. Against that background, the very idea of an "arrangement" being in existence on 29 June 2011 represents an after-the-event rationalisation of what actually happened which was chaotic and largely unstructured. I agree with the submission of Mr. Lawrence QC to the effect that this was not a case of an

arrangement being drawn up on the back of an envelope; it was a case of there being no envelope at all.

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

(i) Z plc would be incorporated and issue shares to [Mr. Sidhu] and [Mr. Nasir].

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

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

(i) It was not known how many of their 1.2 billion shares [Mr. Sidhu] and [Mr. Nasir] held beneficially for themselves and how many they held as nominee for others. To the extent that they held shares as nominee it was not known who the beneficial owners of those shares were.

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

100. As I have noted, to fall within section 594, the arrangement needed to be for both the transfer of ZB shares and the allotment of Z plc shares. Yet the consequence of the points made at 99(i) and 99(ii) was that the nature of the arrangement could not be set out with any coherence. It was anticipated that [Mr. Sidhu] and [Mr. Nasir] would transfer shares in ZB and be allotted shares in Z plc, but it was not possible to say how many of those allotted shares they held beneficially. OFSB was expected to transfer its A Shares, but would not be allotted any shares in Z plc, since [Mr. Sidhu] and [Mr. Nasir] were to be the sole registered shareholders of Z plc. Nor was it possible even to say that there was a scheme or arrangement for shares to be allotted at OFSB's direction. OFSB made no express direction that Z plc shares were to be allotted to [Mr. Sidhu] or [Mr. Nasir] to hold as nominees. It could not have made any such direction since no-one knew how many shares (if any) [Mr. Sidhu] and [Mr. Nasir] were to hold for OFSB."

40. The Judge thus concluded,

> "Accordingly, I conclude that there was no "arrangement" to which section 594 applied. Therefore, since it was not disputed that [Mr. Sidhu] did not pay up his 840 million shares in cash, and that no valuation complying with section 593 was obtained …, it follows that [Mr. Sidhu] is liable, under section 593(3) to pay Z plc the sum of €84 million being the entire nominal value of those shares (it not being suggested that the shares were issued at a premium)."

41. The Judge then dismissed an argument by Mr. Sidhu that the Company was estopped by convention from asserting that he was liable to pay €84 million for the shares held by him. There is no appeal against that decision.

42. The Judge then moved to consider whether to grant Mr. Sidhu relief from his liability to pay €84 million pursuant to section 606 of the 2006 Act. The Judge held that if Mr. Sidhu's liability arose under section 593, section 606(1)(a) would apply. That is plainly correct. However, the Judge also stated (without giving any further explanation) that if Mr. Sidhu's liability arose under a contractual undertaking or by virtue of any obligation imposed by section 584 of the 2006 Act, that would be within the scope of section 606(1)(b). I shall return to consider that assumption as to the application of section 606(1)(b) below.

43. The Judge held that the overriding principles to be applied in exercising a discretion under section 606 were those set out in section 606(4), which he summarised as follows in paragraph [114(v)] of his Judgment,

> "The effect of the overriding principle in section 606(4)(a) is that Z plc should receive money or money's worth on the allotment of 840 million shares to [Mr. Sidhu] at least equal to those shares' nominal value of €84 million. That money or money's worth need not all come from [Mr. Sidhu] himself (since both section 606(2) and section 606(3) permit account to be taken of contributions made by other persons). However, this principle is "overriding" in the sense that, no matter how just and equitable it might otherwise appear to grant relief, if Z plc has not, and will not, receive money or money's worth to the value of at least €84 million in return for the allotment of the shares, [Mr. Sidhu] should not be granted any relief."

44. The Judge first relied on the primacy of the "overriding principle" to reject a submission on behalf of Mr. Sidhu that it would be unjust not to grant relief because Mr. Gajera would be the main beneficiary of such an order (via the Company).

45. The Judge then assessed the evidence before him as to the value of the ZB Sale Shares. In that exercise, the Judge was hampered by the fact that in spite of Mr. Sidhu having been given permission at an earlier stage in the proceedings to adduce expert evidence as to the valuation of ZB, no such expert evidence had been put forward. Instead, Mr. Sidhu argued that the value of the ZB Sale Shares could simply be ascertained from the audited accounts for the group headed by ZB for the year ending 31 December 2011, which, on a consolidated basis, showed total assets of the group of about RM753 million and total liabilities of about RM98 million. At an exchange rate of about €1:

RM4.8, that equated to net assets of more than €130 million, which Mr. Sidhu contended exceeded the nominal value of the 840 million ordinary shares issued to him.

46. The Judge rejected those submissions, holding that he could not be satisfied on the balance of probabilities that the shares in ZB acquired by the Company were worth at least €84 million. He stated, at paragraphs [120]-[121],

> "120. I am prepared to accept that the value of shares in some companies can safely be ascertained by reference to audited accounts. For example, if a company's audited accounts show that its sole asset consists of a holding of £10 million in nominal amount of UK government gilts, and that it has no liabilities or other activities, it could safely be inferred that the value of its issued share capital is equal to that of the gilts the company holds. But in its accounting period ended 31 December 2011, ZB was a complicated company. Its accounts showed that its fixed assets consisted of assets as diverse as computers, motor vehicles, interests in a golf course and subsidiaries of which VTEL was the most significant. The majority of ZB's assets were attributable to its holding of shares in VTEL. However, as I have already noted, the valuation of VTEL and its business was by no means a straightforward or uncontroversial matter….
>
> 121. I acknowledge that the value for which [Mr. Sidhu] argues in the context of section 606 is much lower than the valuation established by Ari & Co. However, what the above discussion demonstrates is that the valuation of a telecoms company which is presently making modest revenues, but which holds a licence that, following significant capital investment, might enable it to generate significant revenues, is not a straightforward exercise. Moreover, the accuracy of any valuation will depend on the assumptions that underpin it. Without expert evidence as to the kind of assumptions that would be needed to underpin the values appearing on ZB's balance sheet, I cannot be satisfied, on a balance of probabilities that the ZB shares did have the minimum value for which [Mr. Sidhu] argues….
>
> 122. In urging me to a different conclusion, [Mr. Sidhu] pointed out that ZB's accounts have been subjected to an audit by an independent accounting firm and that even though subsequent accounts (whether of Z plc or ZB) might have been the subject of qualifications, the value of underlying assets has not been written down. However, that does not address the concern. The primary focus of an auditor is to express an opinion that the accounts prepared by directors show a true and fair view. That is not the same as a guarantee of the value of every asset on a company's balance sheet. Even audited accounts can be incorrect in material respects. Moreover, while expert evidence could be subjected to the scrutiny of another expert, or challenged in cross-examination, the statements as to value

> appearing in the audited accounts could only be the subject of comment or submissions by counsel and the assumptions underpinning them would be correspondingly difficult to either understand or challenge."

47. The Judge then also rejected a submission that Mr. Sidhu should be relieved of his liability in part. He explained, at paragraph [124],

> "(i) First, the reasons I have already given for concluding that a value of €84 million apply equally to any attempt to establish a specific value lower than €84 million. Although it might be said as a matter of pure impression that the shares must have been worth something, the absence of any expert evidence and the inconclusive nature of the accounting evidence make it impossible to substantiate any specific lower value.
>
> (ii) Second, considerations of justice and equity point against the court attempting a broad-brush attempt to identify some value to those shares that is only loosely supported in evidence. The shareholders in Z plc can be presumed to include some persons who bought their shares at what may well have been a material overvalue…The evidence demonstrates that, in 2011, [Mr. Sidhu] was quite content to allow Z plc shares to be offered to public investors at a price with which he and [Mr. Gajera] had reservations. [Mr. Sidhu] has chosen now to advance no expert evidence as to the value of the ZB shares, even though he is well resourced and well advised. It would be wrong in principle for him to be able to benefit from a reduction in his liability to pay Z plc, which has the ability at least to provide some compensation to shareholders, in the absence of clear evidence as to the precise reduction that should be made.
>
> (iii) Finally, I consider that a broad-brush attempt to discern some value for the ZB shares would be procedurally unfair. [Mr. Sidhu] is both well-advised and well resourced, accepting in cross-examination that he has spent hundreds of thousands of pounds on legal fees in this dispute. His decision not to rely on expert evidence must have been deliberate, and not one forced on him by lack of resources. Moreover, [Mr. Sidhu]'s decision has had consequences for Z plc which has had no opportunity to call expert evidence of its own … Mr Temmink QC accepted that the first notice that Z plc had of [Mr. Sidhu's] argument that the value of the ZB shares could be established by reference to its audited accounts alone was in the oral submissions he advanced by way of opening. Accordingly, the late deployment of this argument has resulted in Z plc being denied the ability to address it in expert evidence, to say nothing of the limited time Z plc has had to meet it on the basis of the factual evidence already before the court."

48. At the end of his Judgment, the Judge also addressed an issue which he indicated he did not need to decide in light of his decision in relation to sections 593 and 594, namely the question of whether Mr. Sidhu was liable under section 584 of the 2006 Act. The Judge identified that the issue arose because section 584 required shares taken by a subscriber "in pursuance of an undertaking of his in the memorandum" to be paid up in cash. Mr. Sidhu argued that the undertaking which he gave in the memorandum to subscribe for "at least one share" could be fulfilled by taking only one share and hence he was not liable under section 584 in respect of more than one ordinary share.

49. The Judge did not accept that argument but also did not consider that Mr. Sidhu's undertaking could be construed as an undertaking to take however many shares the Company chose to allot to him. The Judge stated, at paragraph [133],

> "Therefore, it is necessary to look elsewhere than the wording of the undertaking in the memorandum in order to determine precisely how many shares were to be taken in pursuance of that undertaking. I do not think that the answer is conclusively given by the statement of capital and initial shareholdings delivered by Z plc under section 10 of the 2006 Act. The function of that statement is to tell the world at large, among other matters, "the total number of shares of the company to be taken on formation by the subscribers to the memorandum" (see s10(2)(a)). Certainly, the relevant statement in these proceedings showed [Mr. Sidhu] as taking 840 million shares. However, that statement simply records (correctly) the number of shares that [Mr. Sidhu] took "on formation". It does not itself determine how many were taken pursuant to his undertaking in the memorandum."

50. The Judge then concluded, at paragraph [134],

> "In my judgment, the answer is to be found in the entirety of the course of dealing between [Mr. Sidhu] and Z plc. [Mr. Sidhu] undertook to take "at least one" share. He was issued 840 million. At no point did he indicate to Z plc that he had received more shares than he had undertaken to accept. Nor do I accept [Mr. Sidhu's] argument that he took one share pursuant to the undertaking and the remaining 839,999,999 pursuant to the averred arrangement analysed in connection with section 594. There is no meaningful distinction between the undertaking in the memorandum and the broad arrangement for ZB shares to be contributed to Z plc on a share-for-share basis. The undertaking in the memorandum was simply the first step in a chain of transactions that enabled [Mr. Sidhu] to obtain 840 million shares in Z plc that he was intended to obtain. Accordingly, [Mr. Sidhu] complied with his undertaking to take "at least one" share by taking 840 million."

The Appeal

51. At the hearing of the appeal, the parties argued the case on the same basis as before the Judge at trial. Mr. Sidhu contended that the Judge was wrong to reject his argument that the 840 million ordinary shares in the Company were allotted to him in connection with an arrangement falling within the exception in section 594(2)(a) of the 2006 Act. He contended that the arrangement was one under which the consideration for the allotment of those shares was to be provided by the transfer to the Company of the ZB Sale Shares – i.e. the ordinary and A ordinary shares in ZB, and that this arrangement was sufficiently certain to satisfy the requirements for the exception in section 594(2)(a). In the alternative, he contended that the Judge was wrong to refuse to grant him relief under section 606 of the 2006 Act. He argued that the Judge should have found, on the strength of ZB's audited accounts for 2011, that the Company received consideration for the allotment of the ordinary shares at least equal to €84 million.

52. The Company resisted the appeal and, by a respondent's notice, contended that the Judge's decision should be upheld on the alternative grounds that Mr. Sidhu was in any event liable as a subscriber pursuant to his undertaking in the memorandum and section 584 of the 2006 Act to take and pay cash for 840 million shares.

53. Mr. Sidhu responded that his undertaking in the memorandum could be fulfilled by only taking and paying for one share in cash, that the remaining 839,999,999 shares which he held on incorporation were not taken in pursuance of his undertaking in the memorandum so that there was no obligation for them to be paid in cash, and that section 584 in any event imposes no civil liability on a subscriber.

54. After hearing oral argument, reserving judgment, and having had the opportunity to consider the matter further, we provided the parties with a note which set out an analysis of the statutory provisions which differed in some respects from that which either of them had advanced. We asked for, and in due course received their written submissions on the points that we had raised.

Discussion

55. For reasons that follow, I consider that, regrettably, the parties agreed that the Judge should determine the case on an incorrect legal basis. In my judgment,

    i) the Judge was right initially to question whether section 593 of the 2006 Act had any application to this case, and he was wrongly invited by the parties to deal with the case on the basis that it applied. Section 593 had no application because the subscriber shares were not allotted by the Company within the meaning of that section;

    ii) on the true construction of Mr. Sidhu's undertaking in the memorandum and the terms of section 584 of the 2006 Act, Mr. Sidhu had an obligation to the Company to pay cash for the 840 million shares that he took on incorporation; and

    iii) section 606 of the 2006 Act did not apply and the court had no power to relieve Mr. Sidhu from such liability.

Liability to pay for subscriber shares prior to 2006

56. It is convenient to begin by analysing the nature of a subscriber's undertaking in the memorandum to take shares on incorporation of a public company prior to 2006.

57. When the distinction between "private companies" and "public limited companies" was first introduced in the Companies Act 1980 (the "1980 Act"), section 2(4) of the 1980 Act required the memorandum of a public company to be in a prescribed form that closely reflected the conventional form of memorandum that had been in use by private companies for decades under earlier Companies Acts. That form of memorandum included a statement of the initial authorised share capital of the company, and the concept of a "subscriber" was, quite literally, a person who signed his name underneath an agreement to take a specified number of those shares in the company.

58. Accordingly, the prescribed form for a public limited company in the 1980 Act included the following paragraph 6,

> "The share capital of the company is £50,000 divided into 50,000 shares of £1 each.
>
> We, the several persons whose names and addresses are subscribed are desirous of being formed into a company, in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, Addresses and Descriptions of Subscribers	Number of Shares taken by each Subscriber
Thomas Jones in the county of merchant	1
Andrew Smith In the county of merchant	1
Total shares taken	2

> Dated day of 19
>
> Witness to the above signatures
>
> A.B., 13, Hute Street, Clerkenwell, London."

59. Sections 2(5) and (6) of the Companies Act 1985 followed the same structure as the 1980 Act, by providing that,

> "(5) In the case of a company having a share capital—
>
> (a) the memorandum must also (unless it is an unlimited company) state the amount of the share capital with which the

company proposes to be registered and the division of the share capital into shares of a fixed amount;

(b) no subscriber of the memorandum may take less than one share; and

(c) there must be shown in the memorandum against the name of each subscriber the number of shares he takes.

(6) The memorandum must be signed by each subscriber in the presence of at least one witness, who must attest the signature; and that attestation is sufficient in Scotland as well as in England and Wales."

60. Table F of the Companies (Tables A to F) Regulations 1985 (SI 1985/805) was also in a similar form to the prescribed memorandum for a public company in the 1980 Act. The standard form memorandum under the 1985 legislation included an agreement by the subscribers as follows,

> "The company's share capital is £5,000,000 divided into 5,000,000 shares of £1 each.
>
> We, the subscribers to this memorandum of association, wish to be formed into a company pursuant to this memorandum; and we agree to take the number of shares shown opposite our respective names.

Names and Addresses of Subscribers	Number of Shares taken by each Subscriber
James White, 12 Broadmead, Birmingham	1
Patrick Smith, 145A Huntley House, London Wall, London EC2	1
Total shares taken	2

> Dated 19 .
>
> Witness to the above signatures,
>
> Anne Brown, 13 Hute Street, London WC2."

61. In this way, under the 1980 and 1985 Acts, the extent of an undertaking given by a subscriber in the memorandum of association of a public limited company was very clear. The undertaking was to take the number of shares set out against each subscriber's name in the memorandum. Under the 1985 Act, by reason of section 2(5)(b), this could not be less than one.

62. The legal nature of a subscriber's undertaking in the memorandum had also long been settled by a series of decisions under the early Companies Acts. The undertaking in the memorandum amounted to a contract by the subscriber with the company to take and pay for the number and type of shares specified in the memorandum. That contract took effect when the company was incorporated and the subscriber had an immediate obligation to pay without any further action being required by the company.

63. The subscriber's obligation to pay cash for the shares was either the result of interpretation of the memorandum or was the result of the application of section 25 of the Companies Act 1867. That section provided,

> "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint Stock Companies at or before the issue of such shares."

64. Although section 25 of the 1867 Act contained a statutory exception where a contract had been filed prior to issue of the shares, that exception was held to be incapable of applying to the shares taken on incorporation by a subscriber.

65. These principles were established in re Pen'Allt Silver Lead Mining Company, Fothergill's Case (1872-1873) LR 8 Ch. App. 270. The defendant, Mr. Fothergill, had subscribed for 1,000 ordinary shares in the company at £2 per share. The question was whether he was to be treated as having paid £2,000 to the company by a contract for sale to the company of an interest which he had in a mine in exchange for fully paid shares. The contract for sale had been entered into between the defendant (and two others) and a trustee for the intended company prior to its formation; and it was expressed to be contingent on being adopted by the directors after the formation of the company.

66. The Court of Appeal held that the defendant's undertaking in the memorandum to take 1,000 shares of £2 each was separate from and independent of the agreement for sale of the mine to the company, and that the defendant could not escape his liability to pay for the shares in cash. The judgments in the Court of Appeal were based on the interpretation of the memorandum and the agreement for sale of the mine, supplemented by the provisions of section 25 of the Companies Act 1867.

67. As to the first basis for the decision, Lord Selborne stated,

> "By the subscription to the memorandum of association, under sections 7, 11 and 23 of the Companies Act 1862 … Mr. Fothergill not merely agreed to take, but actually did take, and immediately on the registration of the company became the actual and legal holder of 1000 ordinary shares, in respect of which he was thenceforth liable absolutely and unconditionally to contribute to the funds of the company the full sum of £2000. By the agreement for the sale of the mine three persons jointly (of whom Mr. Fothergill was one) became entitled, not absolutely and immediately, but conditionally on certain events,

> which afterwards happened, to 5000 shares, without liability to pay anything upon them, the land with which the vendors parted by the contract being agreed to be taken by the company in lieu of the full amount of those shares. Shares cannot be set off against a money demand; a joint contract cannot be set off against a separate contract."

68. The analysis in relation to the second basis for the decision appears most clearly from the judgment of Mellish LJ, who stated,

> "I entirely agree that the effect of the 25th section of the Act of 1867 is that the shares are to be deemed to be payable in cash. Indeed I think that would have been the effect before, because all shares subscribed for under the memorandum of association were deemed to be payable in cash; but the effect of this section is, that the liability to pay in cash cannot be altered at all by subsequent agreement and arrangement with the directors, it can only be affected by a written agreement, which written agreement must be entered into before the shares are issued, and must be registered."

69. The decision and reasoning in Fothergill's Case was applied in a series of later decisions, most notably by the Court of Appeal in The Dalton Time Lock Company v Dalton (1892) 66 LT 704 and by Buckley J in re Ebenezer Timmins & Sons Limited [1902] 1 Ch 238.[1]

70. Fothergill's Case was also referred to by Romer J in Re F.W. Jarvis & Co Limited [1899] 1 Ch 193, the facts of which have some parallels with the instant case. Mr. Jarvis was a businessman who decided to incorporate his business. He registered his new company on 4 October 1897 and signed the memorandum agreeing to subscribe for 6,500 shares of £1 each. Four days later, on 8 October 1897, he executed an agreement to sell his business and buildings to the company for £6,500 to be satisfied by the allotment to him of 6,500 shares of £1 each. He filed the sale agreement with the Registrar of Companies, transferred the business and property to the company and was issued with a share certificate for 6,500 shares.

71. The company subsequently applied for a declaration under section 1 of the Companies Act 1898 that Mr. Jarvis was not liable to pay cash for his shares pursuant to his undertaking in the memorandum. That statute had been enacted to enable the court to grant relief in relation to any inadvertent non-compliance with the requirements for filing a contract under section 25 of the 1867 Act. Mr. Jarvis supported the application and filed evidence that he did not intend, by signing the memorandum, to become liable to take any shares in the company other than the 6,500 referred to in the sale agreement.

72. Romer J held that the scope of section 1 of the 1898 Act did not give him the power to grant the relief sought and that in any event Mr. Jarvis's liability to pay cash pursuant

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[1] Although these authorities decided that a subscriber would be immediately liable to pay cash pursuant to his undertaking in the memorandum, the courts also acknowledged that if, unusually, the company failed to register the subscriber and instead allotted and issued all of its authorised shares to third parties, that would release the subscriber from his obligation: see re Tal y Drws Slate Company, Mackley's Case (1875) 1 Ch D 247 and re Florence Land and Public Works Co. (Nicol's Case) (1885) 29 Ch D 421 at 427.

to his undertaking in the memorandum could not have been satisfied by the subsequent agreement to sell the property to the company,

> "… Directly the memorandum and articles of association were filed, there was at once a binding contract between Jarvis and the company that he should take these 6,500 shares directly from the company, and the shares are in one sense of the term to be deemed issued immediately. How did matters stand at that time? There was no other contract in existence between Jarvis and the company. In the nature of things there could not have been, and there was not. It was contemplated that a contract would be made between him and the company by which he was to sell property to the company and take fully paid-up shares for the property; but that was a proposed contract which never could become a contract unless it was ratified and approved of by the company and finally entered into. Of course, it might never be entered into … But the contract created by the signature of the memorandum and the filing of the memorandum arose at once, and had nothing to do, so far as its validity was concerned, with regard to any other contract that might subsequently be entered into between Jarvis and the company. There was then of necessity, immediately the memorandum was filed, a contract by Jarvis to take shares from the company.
>
> What was the contract as to payment of those shares? That is settled by section 25 of the Act of 1867. It is to be deemed a contract to pay for the shares in cash; because, as I have pointed out in this case, there could be no compliance with what I may call the saving clause in section 25 for two reasons. There could be, in the first place, no other contract, no prior contract, no co-existing contract, and still less could there have been any such contract filed. It follows, then, that before anything further was done there was a binding contract between Jarvis and the company to take these 6,500 shares and pay for them in cash.
>
> ….
>
> Now, as I have pointed out already, can you, by looking at the memorandum and articles of association, say that the shares for which he subscribed the memorandum are identified with the shares which had been subsequently the subject of a contract between him and the company? It could not be so. He could not have signed the memorandum of association for shares, conditional upon a contract being entered into between him and the company, for the company to take his property under certain conditions … there is nothing which would enable me to say that the shares for which he subscribed the memorandum must be, or could be taken to be, the shares which were to be the subject of the agreement, which it was hoped would be come to between him and the company.

> ….If a shareholder has once contracted to take shares and pay for them in cash, he can only pay for them in cash, or cash equivalent in the strict sense of the term - that is to say, by cash or by set-off - something which would amount to payment on the one hand in cash, and repayment on the other. You cannot satisfy the liability of a shareholder to pay for shares he has taken in cash by an arrangement to pay for them in land or property.
>
> For these reasons, it appears to me that if on this application I go into, as I have done, the merits of the case, I do not see my way to comply with the request, and I must therefore refuse the application.
>
> …I ought to say … that in my opinion this case is really governed by the principle laid down in Fothergill's Case."

The new regime under the 2006 Act

73. The 2006 Act made material changes to the method of formation of a company and the content and importance of a company's memorandum of association. These followed recommendations made by the Company Law Review (the "CLR").

74. Section 7 of the 2006 Act provides that a company is formed under the 2006 Act by one or more persons subscribing their names to a memorandum of association (see section 8), and complying with the requirements as to registration (see sections 9-13).

75. Section 8 of the 2006 Act provides for a more limited form of memorandum of association than in the earlier Companies Acts,

> "(1) A memorandum of association is a memorandum stating that the subscribers–
>
> (a) wish to form a company under this Act, and
>
> (b) agree to become members of the company and, in the case of a company that is to have a share capital, to take at least one share each.
>
> (2) The memorandum must be in the prescribed form and must be authenticated by each subscriber."

76. Consistent with the new limited content, the prescribed form for the memorandum of a public company after 2006 is much reduced. It is now to be found in the Companies (Registration) Regulations 2008 (SI 2008/3014). It simply follows the same wording as section 8(1) of the 2006 Act, namely,

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

77. The changes to the form and scope of a memorandum under the 2006 Act are reflected in consequential changes in the 2006 Act in respect of the documents to be delivered to

the Registrar when an application is made for registration of a company. In particular, as paragraph 37 of the Explanatory Notes to the 2006 Act explained,

> "The changes to the way in which certain information is delivered to the Registrar are required as a result of the changes that have been made to the memorandum. In future, information which is currently set out in the memorandum will be provided to the Registrar in accordance with the provisions of this section, which prescribes, amongst other things, the contents of the application for registration…"

78. Thus, section 10 of the 2006 Act sets out the requirements for the statement of capital and initial shareholdings to be delivered to the Registrar. Section 10(2) provides,

> "(2) [The statement of capital and initial shareholdings] must state -
>
> (a) the total number of shares of the company to be taken on formation by the subscribers to the memorandum of association, and
>
> (b) the aggregate nominal value of those shares."

79. Further, by section 10(4) of the 2006 Act,

> "(4) [The statement of capital and initial shareholdings] must state, with respect to each subscriber to the memorandum –
>
> (a) the number, nominal value (of each share) and class of shares to be taken by him on formation, and
>
> (b) the amount to be paid up and the amount (if any) to be unpaid on each share (whether on account of the nominal value of the share or by way of premium)."

80. Paragraphs 42-45 of the Explanatory Notes to the 2006 Act explain section 10 as follows,

> "42. This section is a new provision. It sets out the contents of the statement of capital and initial shareholdings.
>
> 43. Currently, in the case of a limited company with a share capital the memorandum is required to state the amount of the share capital with which the company proposes to be registered and the nominal amount of each of its shares. This is known as the "authorised share capital" and acts as a ceiling on the amount of capital which can be issued (although this limit can be increased by ordinary resolution). The CLR recommended that the requirement for a company to have an authorised share capital should be abolished (Final Report, paragraph 10.6).

> 44. The Act gives effect to this recommendation and in future, information about the shares subscribed for by the subscribers to the memorandum, which is currently set out in the memorandum itself, will be provided to the registrar in the statement of capital and initial shareholdings.
>
> 45. Like the statement of guarantee (see section 11), the statement of capital and initial shareholdings must contain such information as may be prescribed by the Secretary of State, in regulations made under the Act, for the purpose of identifying the subscribers to the memorandum (i.e. the founder members of the company)."
>
> (my emphasis)

81. The effect of registration of a company upon the subscribers to the memorandum is set out in section 112(1) of the 2006 Act,

> "The subscribers of a company's memorandum are deemed to have agreed to become members of the company, and on its registration become members and must be entered as such in its register of members."
>
> (my emphasis)

The underlined words are new, and represent a change from section 22 of the 1985 Act. Previously, the subscribers were deemed to have agreed to become members of the company but did not actually become members until their name was placed upon the register. Now, as paragraph 239 of the Explanatory Notes to the 2006 Act confirms, the subscribers become members of the company automatically on registration, even if the company fails to enter their names on the register of members.

82. In similar vein, and importantly, sections 16(1) and (5) of the 2006 Act are new provisions which state as follows,

> "(1) The registration of a company has the following effects as from the date of incorporation.
>
> …
>
> (5) In the case of a company having a share capital, the subscribers to the memorandum become holders of the shares specified in the statement of capital and initial shareholdings."

83. As I see it, this new legislative framework under the 2006 Act envisages that a subscriber will automatically become a member of the company as and when it is registered, and will from that time be the holder of the number of shares specified in the statement of capital and initial shareholdings. Under the 2006 Act, the only agreement under which the subscriber gives consent to take shares in the company is that contained in his undertaking in the memorandum. The 2006 Act also does not envisage that any subsequent allotment or issue of shares by the company should take

place after registration in order to constitute the subscriber the holder of the number of shares specified in the statement of capital and initial shareholdings.

The meaning of the undertaking in the memorandum

84. In my judgment, a subscriber's undertaking in the memorandum to take "at least one share" cannot mean that he agrees to take *only* one share. If that had been the legislative intention, section 8(1)(b) and the memorandum would simply have omitted the words "at least". It would also mean that, as a matter of law, every subscriber of every company formed under the 2006 Act would only have an obligation to take one share. Whilst in practice most companies are formed with a minimal share capital, there is nothing in the 2006 Act or the Explanatory Notes to suggest that such a change in the law was intended.

85. I also accept that the wording of section 8 and the memorandum does not expressly refer to an agreement by the subscribers to take the number of shares shown against their name in the statement of capital and initial shareholdings. Nonetheless I consider that this is the clear implication to be derived from the words used, construed in the context of the structure of the 2006 Act.

86. Specifically, the reference to the subscribers agreeing in the memorandum "to take at least one share each" plainly envisages that the undertaking in the memorandum could extend to taking more than just one share; there is no mechanism provided under the 2006 Act other than the undertaking in the memorandum for a subscriber to consent to take any additional shares on formation; and the only place to find the information about the number of shares which the subscriber will automatically become the holder of on incorporation is in the statement of capital and initial shareholdings.

87. In that regard, although Mr. Temmink submitted that Mr. Sidhu's undertaking only extended to one share, and that "any further shares that he took were not pursuant to any undertaking in the memorandum to do so", he did not explain how, if it were not pursuant to that undertaking, Mr. Sidhu otherwise consented to take the remaining 839,999,999 shares which were undoubtedly held by him in the Company.

88. The analysis that I have set out is, in my view, also supported by paragraph 44 of the Explanatory Notes. As set out above, that explains that the legislative intention was that the,

> "… information about the shares subscribed for by the subscribers to the memorandum, which is currently set out in the memorandum itself, will be provided to the registrar in the statement of capital and initial shareholdings".

That explanation is predicated upon the assumption that the subscribers to the memorandum subscribe for the number and type of shares identified in the statement of capital and initial shareholdings. It also does not indicate any intention to change the substance of the subscriber's undertaking as opposed to the presentation of the information.

89. For completeness, I should add that I consider that the Judge was wrong to look to the dealings between Mr. Sidhu and the Company after the incorporation of the Company

for the answer to the question of the number of shares that had been taken pursuant to Mr. Sidhu's undertaking in the memorandum. For reasons that I have explained, the subscriber's undertaking in the memorandum is a contractual promise, and on conventional principles of interpretation, the meaning of the contract is to be ascertained when the contract comes into existence, rather than being gleaned from subsequent events.

90. Moreover, the memorandum of association is a public document which is required to be registered and available to anyone who wishes to inspect it, so the admissible background for the purposes of construing the undertaking in it must therefore be limited to what any reader of the memorandum would reasonably be supposed to know. That admissible background accordingly cannot include extrinsic facts known only to some of the people involved in the formation of the company. See generally Bratton Seymour Service v Oxborough [1992] BCLC 693 and Attorney General of Belize v Belize Telecom [2009] 1 WLR 1988 (PC) at [35]-[37]. The admissible background could plainly include the statement of capital and initial shareholdings filed with the Registrar together with the memorandum and placed on the public register: but it could not include whether in private dealings with the company the subscriber had or had not "rejected" the number of shares which he had "received" as a matter of fact.

The effect of section 584

91. Section 584 contains an express requirement that shares taken by a subscriber in pursuance of his undertaking in the memorandum must be paid up in cash. Mr. Temmink submitted that section 584 did not create any civil liability at all and contrasted its wording with the provisions of section 585(2), 587(2) and 587(4) which create an express liability for contravention of sections 585(1), 587(1) and 587(3) to pay the nominal value of the shares, plus any share premium and interest. He suggested that if Parliament had wished to impose a civil liability upon the subscriber in section 584, it would have chosen to use the same formula as in those other sections.

92. I do not agree. Section 584 prescribes how a subscriber who has undertaken a contractual obligation to pay for shares in a public company must discharge that contractual obligation. Section 584 thereby operates directly on an existing contractual obligation and there is simply no need to create a separate civil liability over and above the existing contractual one. That is different from the other sections to which Mr. Temmink referred, which contain prohibitions on the allotment of shares in return for various types of consideration. In those cases it is necessary for the legislation to impose a civil liability on the allottee to pay an amount calculated in the appropriate amount and form which will be different from the prohibited consideration that had been agreed.

93. Mr. Temmink also submitted that since the vast majority of companies these days are incorporated with only a minimal share capital, section 584 is normally rendered "all but nugatory", so that there is no policy reason to interpret it broadly. I accept that in practice, most companies are incorporated with a minimal share capital so that section 584 will rarely require payment of more than a very small amount in cash by a subscriber. That is not, however, a reason to give section 584 an artificially narrow meaning. The same statutory wording has been in use since 1980 when it was perfectly obvious that if a subscriber undertook in the memorandum to take more than one share of £1, he would be liable to pay the larger amount in cash.

Does section 593 apply to subscriber shares?

94. It follows from the analysis that I have set out above, that section 593 does not apply to the shares taken by a subscriber on incorporation for the simple reason that there is no "allotment" of such shares to the subscribers under the 2006 Act. Section 16(5) simply provides that the shares are held by the subscriber as a result of registration of the company.

95. That conclusion is consistent with the provisions of section 559 of the 2006 Act. That section appears in Chapter 2 of Part 1 which is entitled "Allotment of shares: general provisions" and contains detailed provisions in sections 549 to 558 as to how the directors of a company can exercise the power of the company to allot shares. It also sets out the time at which shares are taken to have been allotted for the purposes of the Companies Acts. Section 559 is entitled "Provisions about allotment not applicable to shares taken on formation", and states,

> "The provisions of this Chapter have no application in relation to the taking of shares by the subscribers to the memorandum on the formation of the company."

96. Paragraph 864 of the Explanatory Notes to the 2006 Act explains why this should be so. It states,

> "This provision replicates the effect of section 80(2)(a) of the 1985 Act and provides that the allotment provisions in Chapter 2 of this Part do not apply to the shares taken by the subscribers to the memorandum on the formation of a company. <u>Such persons become members of the company in respect of the shares that are taken by them on formation by virtue of section 16 and the provisions of the Act on share allotments do not apply to them</u>."
>
> (my emphasis)

97. In response to this point, Mr. Temmink drew attention to section 546(2) of the 2006 Act. Section 546 is a new provision which states,

> "(1) References in the Companies Acts -
>
> (a) to "issued share capital" are to shares of a company that have been issued;
>
> (b) to "allotted share capital" are to shares of a company that have been allotted.
>
> (2) References in the Companies Acts to issued or allotted shares, or to issued or allotted share capital, include shares taken on the formation of the company by the subscribers to the company's memorandum."

98. Mr. Temmink submitted that section 546(2) deems subscriber shares to have been allotted and thus that section 593 applies to them. I reject that submission. In my view,

section 546(2) performs a limited function which is purely interpretative. Section 546(1) first explains what references to "issued share capital" and "allotted share capital" mean in the remainder of the 2006 Act. Section 546(2) then simply says that the references elsewhere in the Act to issued or allotted shares, or to issued or allotted share capital include the subscriber shares. Section 546(2) is needed precisely because, unlike other shares issued during the life of a company, the shares that are taken on incorporation by the subscribers are, for reasons that I have explained, not actually issued nor allotted, but are, without more, held by the subscribers by reason of the automatic operation of section 16(5). The purpose of section 546(2) is to ensure that where provisions of the 2006 Act are stated to apply to issued or allotted shares, all shares of the same class are treated in the same way, irrespective of whether they were the subscriber shares, or shares actually allotted or issued by the directors.

99. To take two examples, section 630 of the 2006 Act deals with the variation of class rights, and provides (inter alia) that consent in writing is required from "the holders of at least three-quarters in nominal value of the issued shares of that class". Without section 546(2), the subscriber shares would not be included in the computation because they are not issued in the same way as other shares.

100. Likewise, sections 761 and 763 contain the requirement for a public company to have a minimum share capital before it can do business. Section 761 provides,

> "(1) A company that is a public company (otherwise than by virtue of re-registration as a public company) must not do business or exercise any borrowing powers unless the registrar has issued it with a certificate under this section (a "trading certificate").
>
> (2) The registrar shall issue a trading certificate if, on an application made in accordance with section 762, he is satisfied that the nominal value of the company's allotted share capital is not less than [£50,000 or the prescribed euro equivalent]."

Without section 546(2), the shares taken by a subscriber would not count as part of the allotted share capital of the company for the purpose of meeting the prescribed minimum.

101. Although Mr. Temmink submitted that the effect of section 546(2) was that section 593 applied to subscriber shares taken on formation, it is notable that section 593 does not contain either of the descriptive expressions "allotted shares" or "allotted share capital" that are the subject of section 546(2). Rather, section 593 contains a prohibition that focuses on the action of a public company of allotting shares which are paid up otherwise than in cash.

102. Nor did Mr. Temmink explain how the mechanics of section 593 could apply to the subscriber shares, and I cannot see how they could. Specifically, section 593(1)(b) requires a valuer's report to be made "to the company during the six months immediately preceding the allotment of the shares". For much the same reason as prevented the exception in section 25 of the 1867 Act applying in the F.W. Jarvis case, I do not see how the requirements of section 593(1)(b) of the 2006 Act that a valuer's

report be made available to the company before the shares are allotted could be fulfilled before the company is incorporated and section 16(5) operates.

Conclusion on sections 584 and 593

103. The consequence is that I consider that the Judge was right initially to raise with the parties whether section 593 had any application to this case, and the parties were wrong to invite the Judge to proceed on the basis that what had occurred was an allotment of the 840 million shares by the Company within the meaning of that section. In my view, the Judge should simply have determined that Mr. Sidhu was liable pursuant to his undertaking in the memorandum to pay €84 million in cash for the 840 million shares that he took on incorporation as shown in the statement of capital and initial shareholdings filed in accordance with section 10 of the 2006 Act.

104. That being so, I do not propose to consider whether the Judge was right or wrong in his assessment of the requirements for an "arrangement" within the meaning of section 594 or the application of those requirements to the (highly unusual) facts of the instant case. That issue should await determination in a case in which the issue properly arises.

Relief under section 606

105. As indicated above, the Judge was of the view that because he had found that Mr. Sidhu's liability arose under section 593, the relevant section under which Mr. Sidhu could apply for relief was section 606(1)(a) of the 2006 Act, and the factors to which the court was to have regard in determining that application were those set out in section 606(2) together with the overriding principles in section 606(4).

106. In fact, for the reasons that I have indicated, I consider that Mr. Sidhu's liability arose under the undertaking which he had given in the memorandum of association, interpreted by reference to the statement of initial capital and shareholdings and the terms of section 584. This is an important distinction, because I do not consider that section 606 enables the court to grant relief to a subscriber in respect of his duty to pay cash for shares taken pursuant to his undertaking in the memorandum of association.

107. I say that, first, because it is clear on its terms that the ability to apply for relief under section 606(1)(a) is only available to a person who is liable under any provision of Chapter 6 of Part 17 of the 2006 Act. That does not include a person who is liable pursuant to his undertaking in the memorandum of association, not least because the requirement to pay cash for the relevant shares is imposed by section 584 which appears in Chapter 5 rather than Chapter 6.

108. I also do not consider that section 606(1)(b) was available to Mr. Sidhu. As indicated above, section 584 appears in Chapter 5 of Part 17 of the 2006 Act. That Chapter also contains sections 585 and 587 which prohibit a public company from accepting any undertaking to do work or perform services in payment for its shares or any premium on them, or from accepting any long-term undertaking in respect of any allotment of shares. Those sections expressly impose liabilities for contravention on the holder of shares or the allottee, and section 588 imposes joint and several liability on a subsequent holder of the shares (subject to defences).

109. Section 589 in Chapter 5 then expressly empowers the court to grant relief to persons liable under those sections 585, 587 and 588. Significantly, however, section 589 does not include a similar power to grant relief in relation to the obligation to pay cash for shares taken pursuant to an undertaking in the memorandum as a result of section 584.

110. If Parliament had intended the court to be able to grant relief in respect of a subscriber's obligation to pay cash in accordance with section 584, the natural place to include such power would have been in section 589 in Chapter 5. There is no such reference to section 584 in section 589, giving rise to the clear inference that Parliament did not intend the court to have any such power. I therefore see no reason to strain to interpret the words of section 606 in Chapter 6 to confer any such power.

111. That conclusion is strongly supported by reference to the equivalent provisions of the 1980 Act. The power to grant relief was contained in section 28 of the 1980 Act in materially the same terms as now appear in sections 589 and 606. By its express terms, section 28(1) of the 1980 Act applied to liabilities arising as a result of contravention of sections 20, 23, 24 or 26 of the 1980 Act. Those sections included prohibitions equating to those now to be found respectively in sections 585, 587, 593 and 598 of the 2006 Act.

112. By its express terms, the power to grant relief in section 28 of the 1980 Act manifestly did not apply to the requirement in section 29 of the 1980 Act that shares taken pursuant to an undertaking in the memorandum had to be paid up in cash. Indeed, after making the point that the duty to pay cash was imposed by section 29 on the subscriber, the commentary in *Buckley on the Companies Act*s (14th ed, 1981) on section 29 of the 1980 Act ended with the emphatic statement,

> "There is, of course, no question of any relief under section 28."

113. I therefore conclude that the Judge had no power to relieve Mr. Sidhu from his liability to the Company pursuant to the undertaking which he had given in the memorandum.

The exercise of discretion by the Judge

114. That conclusion makes it unnecessary to consider whether, if the power to grant relief had been available, the Judge exercised his discretion correctly in refusing to grant relief. However, since the point was argued, I should briefly indicate my conclusions on it.

115. Although Mr. Sidhu contended before us that the Judge was wrong not to accept the audited accounts of ZB as sufficient evidence of the value of the ZB shares that had been acquired by the Company, I consider that the Judge's decision in that regard was entirely correct, essentially for the reasons that he gave. The Judge explained the particular factors affecting the diverse businesses of the companies in the ZB group meant that it could not simply be assumed that the shares in ZB had the value of the consolidated group shown in its audited accounts. He also made the point that it would be procedurally unfair to the Company to permit Mr. Sidhu to rely on those accounts at trial without warning and in circumstances in which there had been provision for expert evidence to be adduced which he had not taken up.

116. The first point is obviously correct. In general terms, at least under English law, a company's financial statements are the responsibility of the directors and are prepared on the basis of certain accounting standards to show a "true and fair view" of the financial position and performance of a company; and the purpose of an audit is for the auditors to express an opinion on whether the accounts comply with those standards.

117. The position would appear to be similar in Malaysia. The auditors' report in the 2011 accounts of ZB stated as follows,

> "*Directors' Responsibility for the Financial Statements*
>
> The Directors of the Company are responsible for the preparation of financial statements that give a true and fair view in accordance with Financial Reporting Standards and the Companies Act 1965 in Malaysia, and for such internal controls as the Directors determine are necessary to enable the preparation of financial statements that are free from material misstatement, whether due to fraud or error.
>
> *Auditors' Responsibility*
>
> Our responsibility is to express and opinion on these financial statements based on our audit. We conducted our audit in accordance with approved standards on auditing in Malaysia. … Audit involves performing procedures to obtain audit evidence about the amount and disclosures in the financial statements. The procedures selected depend on our judgment, including the assessment of risks of material misstatement of the financial statements, whether due to fraud or error..
>
> *Opinion*
>
> In our opinion, the financial statements have been properly drawn up in accordance with Financial Reporting Standards and the Companies Act 1965 in Malaysia so as to give a true and fair view of the financial position of the Group and of the Company as of 31 December 2011 and of their financial performance and cash flows for the financial year then ended."

118. It is readily apparent from this that the accounts upon which Mr. Sidhu contends that the Judge should have relied were intended only to give a true and fair view of the company's financial position in accordance with Malaysian law and accounting standards, as to which there was no evidence. Moreover, even on their own terms, neither the accounts nor the auditors' opinion guaranteed the accuracy of the various figures contained therein. Still less did they certify or even express any opinion on the value of the shares in ZB that were acquired by the Company.

119. On a point of detail it is also the case that the figures relied upon by Mr. Sidhu and quoted by the Judge in his Judgment were those for the consolidated accounts of the ZB group. The figures for ZB alone show that the vast majority of its total assets of RM 471 million comprised its investment in its subsidiary companies, and taking into

account its liabilities of RM 46 million, ZB alone had net assets of about RM 425 million. That equated only to about €88.5 million, which is very close indeed to the nominal value of the shares held by Mr. Sidhu. That further emphasises the importance of the point made by the Judge that he was unable from the audited accounts alone accurately to assess the value of the underlying businesses of the subsidiary companies of the group which went to make up the consolidated figures.

120. The second point made by the Judge as to the unfairness to the Company of simply allowing Mr. Sidhu to rely upon ZB's 2011 accounts at trial without the Company having the opportunity to adduce expert evidence was, in my judgment, not only entirely correct, but well within the scope of reasonable case management decisions which were available to a trial judge and with which this court should not interfere.

The result

121. The result of the analysis above is that in my view, the decision of the Judge to give a judgment of €84 million plus interest in favour of the Company against Mr. Sidhu was correct, albeit arrived at by the wrong route.

122. I would therefore dismiss this appeal.

Lord Justice Males

123. I agree.

Lord Justice Lewison

124. I also agree.