Neutral Citation Number: [2022] EWHC 210 (Ch)

Case No: BL-2021-001263

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

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

Date: 3/2/2022

Before:

EASON RAJAH QC
Sitting as a Judge of the Chancery Division

- -

Between:

(1) NEJC KODRIČ

(2) WHITE WHALE CAPITAL SPF SA

Claimants

- and -

BITSTAMP HOLDINGS NV

Defendant

Andrew Thompson QC and Jack Rivett (instructed by **Addleshaw Goddard LLP**) for the **Claimants**
Richard Handyside QC and Simon Atrill (instructed by **Allen & Overy LLP**) for the **Defendant**

Hearing dates: 10, 13, 14, 15, 16 and 17 December 2021

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.
Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10.00 am on Thursday 3 Feb 2022.

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Eason Rajah QC

A) Introduction

1. The First Claimant (**"Mr Kodrič"**) is one of two co-founders of Bitstamp Limited ("**Bitstamp**"). Bitstamp is a cryptocurrency exchange. In October 2018, approximately 80% of the issued shares in Bitstamp Limited were acquired by NXMH BVBA (**"NXMH"**). The shares were acquired through the Defendant as an intermediate holding company ("**Holdings**"). As part of the acquisition, Mr Kodrič sold approximately two-thirds of his shares in Bitstamp to Holdings. He retained a 9.8% stake which he subsequently transferred to the Second Claimant (**"White Whale"**) which he owns.

2. The dispute relates to a side letter that was executed contemporaneously with the other acquisition documents in October 2018 ("**the Side Letter**"). The Side Letter provided for Mr Kodrič and Holdings to have reciprocal put and call options in relation to Mr Kodrič's remaining shares in Bitstamp (**"the Shares"**). By an Option Exercise Notice dated 21 July 2021, Holdings purported to exercise the call option under the Side Letter in relation to the Shares.

3. On 10 August 2021, the Claimants issued these proceedings challenging the purported exercise by Holdings of its call options and seeking injunctive relief. On 17 August 2021, Mr Justice Michael Green granted an interim injunction restraining Holdings from (in summary) taking any steps to effect the transfer to it of the Shares, and ordered that the claim be listed for an expedited trial. That trial was heard between 10 and 17 December 2021 and this is the resulting judgment.

B) Issues

4. The Claimants' case is that, under the terms of the Side Letter and the other acquisition documents, the put and call options terminated automatically on the transfer of the Shares to White Whale. The options in the Side Letter only apply while the shares are held by Mr Kodrič or a '*Permitted Transferee*' as defined in the acquisition documents. The Claimants contend that White Whale is not a Permitted Transferee of Mr Kodrič. Holdings do not admit that White Whale is not a Permitted Transferee but also rely upon alleged representations made by Mr Kodrič and the Claimants' then solicitors, Taylor Wessing, that White Whale was a '*Family Trust*' and therefore a Permitted Transferee within the meaning of the Side Letter. Holdings claims that the Claimants are now estopped from denying otherwise and/or are liable in damages for the tort of negligent misstatement.

5. The Claimants' alternative case is that Holdings gave binding assurances not to exercise its call option under the Side Letter in one or both of two oral conversations: one in May 2019 and one on 16 December 2019. These assurances are said to be binding on Holdings as a matter of contract or by way of an estoppel. Holdings disputes the assertion that binding assurances were given and also relies upon provisions of the Side Letter which stipulate that its provisions "*may be waived only in writing and specifically".*

C) Approach to the evidence

6. A number of witnesses were called to give evidence of their recollection of events, conversations and beliefs in the past. The approach I take to the assessment of that oral evidence is to weigh it in the context of the reliably established facts, including those to be distilled from contemporaneous documentation, the motives of the protagonists, the possible weakness of human memory and ultimately, the inherent probabilities.

7. This approach is uncontroversial. In *Bancoult, R (on the application of) (no3) v Secretary of State for Foreign and Commonwealth Affairs* [2018] UKSC 3, Lord Kerr at paragraphs 100-101 said:

> *"Case law emphasises the importance of documentary evidence in assessing the credibility of oral witnesses. In Onassis v Vergottis [1968] 2 Lloyd's Rep 403 Lord Pearce, having reviewed the various reasons that a witness's oral testimony might not*

be credible, stated, "all these problems compendiously are entailed when a judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part." In Armagas Ltd v Mundogas SA (The Ocean Frost) [1985] 1 Lloyd's Rep 1, 57 Robert Goff LJ made this observation:

> *"It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence … reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth."*

8. When it comes to the possible fallibility of human memory I have kept in mind, as a helpful reminder of the risks, the observations of Mr Justice Leggatt in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), at paras 15-20 in the context of commercial cases.

> *"15. An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.*
>
> *16. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.*
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> *17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).*

18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

19.The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been 'refreshed' by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

9. These observations in *Gestmin* are a reminder from an experienced judge of the risks of the fallibility of human memory, but they do not displace the need in each case for a proper assessment of the oral evidence and the weight to be placed on evidence of recollection. *Gestmin* lays down no general principle that no reliance is to be placed on the recollection of witnesses as the Court of Appeal made clear in *Martin v Kogan* [2019] EWCA Civ 1645 at paragraph 88.

D) <u>Witnesses</u>

10. Four witnesses were called and the evidence of a fifth was read. English was not the first language of any of the witnesses who were called.

Mr Kodrič

11. Mr Kodrič is the co-founder of Bitstamp and was and remains a director of Bitstamp. He is the sole owner of White Whale and is one of its directors. Slovenian is his first language but he is fluent in English. There was occasionally a turn of phrase or expression which he did not understand but it did not hamper his ability to give evidence without a translator.

12. There are a number of reasons, all connected, why I treat Mr Kodrič's evidence, particularly his apparently vivid recollection of undocumented events and conversations, with caution.

13. Firstly it was clear to me that Mr Kodrič believes (with some justification) that NXMH has taken advantage of him and has acted contrary to Mr Kodrič's business ethics. He feels strongly about this case and, to adopt a phrase used by Mr Handyside, he is heavily invested in his version of events. I was concerned that at times he was trying too hard to give evidence which helped his case.

14. Secondly, and linked to the first, there is a real issue as to the extent to which Mr Kodrič's memory has evolved and been reconstructed during the course of this dispute. Mr Kodrič prepared a 19-page witness statement in support of the Claimants' application for an injunction on 10 August 2021. For the trial he filed an expanded witness statement which ran to 43 pages. In the preparation of his second witness statement he was shown 168 documents, including documents disclosed by the Defendant which he had never seen before. He also said in cross examination that in between his first and his second witness statement he went back to his laptop and recreated a timeline based on the information on it. His witness statement said that he had needed the documents only to remind himself of dates and not the substance of the assurances he described. There were a number of instances on which he was cross examined where his second witness statement recounts matters which were not mentioned in his first witness statement or recounts them slightly differently. In many of these instances the second witness statement is tailored more closely to the documents. For example, Mr Kodrič's account of the oral conversation on the street in New York which forms the basis of the first assurance appears to have been adjusted in paragraph 167 of his second witness statement to be less inconsistent with an account in a contemporaneous email which Mr Kodrič had not seen until disclosure. His

second witness statement recollects many of the specific words used by Mr Ghys and Mr Hong in relation to the second assurance whereas in the first witness statement he set out the gist of what was said saying he could not recall all of the precise wording used (paras 73 and 74).

15. Allowances need to be made for the fact that Mr Kodrič may have been under time pressure in preparing his first witness statement, and genuine memories may have been prompted by time and the opportunity to go through contemporaneous documents but that is not in my judgment a complete answer to the points made about his improving memory.

16. A good insight into the fallibility of Mr Kodrič's evidence of recollection is obtained in the evidence relating to an unimportant call from Mr Hong to Mr Kodrič in October 2020. In Mr Kodrič's letter before action, Addleshaw Goddard said that he had a specific recollection of that call in which there had, they said, been no discussion of the call options but that Mr Hong had said reassuring words as to Mr Kodrič's importance to the success of Bitstamp. In his first witness statement Mr Kodrič's account made no mention of any discussion of the options and observed that he could not now recall all that was discussed, but he remembered the reassuring words. By the time the second witness statement was made Mr Kodrič made no mention of the reassuring words, but had apparently recollected that in this call Mr Hong had asked him to give away his put options and he had refused, saying it was his entitlement. In cross examination, Mr Kodrič accepted that these various accounts were inconsistent. That evolution of his recollection alone would be reason to treat his evidence of recollection on other matters with care, but it does not stop there. He was taken to documents which suggested, and he was willing to accept, that the call had actually been about something else (his continuation as a CSSF authorised manager until the new CEO was authorised). He maintained that at some point in the past he has had a telephone discussion with Mr Hong in which he was asked to give up his put option, and he had assumed it was this call because he thought he remembered that this call upset him. The basis for thinking that this call upset him appears to be that Mr Kodrič has a contemporaneous text from Mr Hong containing the reassuring words along the lines he had previously referred to. In paragraph 286 of his second witness statement Mr Kodrič speculated that this may have been sent to comfort him because Mr Hong felt that he (Mr Hong) had agitated Mr Kodrič in the call. What Mr Kodrič is describing is a process of reconstruction now of what Mr Kodrič thinks must have happened, and that reconstruction

is mistaken. Mr Kodrič clearly has no independent recollection at all of what the call in October 2020 was about or what was said in it.

17. Thirdly, and linked to both the previous points, it is striking that Mr Kodrič had an apparently vivid recollection of words used in oral conversations which might advance his case – for example whether he had described White Whale as a "family office" as opposed to a "family trust" in a conversation with Mr Ghys on 20 June 2019. It is inherently unlikely that Mr Kodrič can accurately recall the precise words used in conversations made two years ago which were not recorded in writing. He was much vaguer about oral conversations which might not advance his case – such as his conversation with Mr Ghys in October 2019 as to whether NXMH intended to call his shares, and his conversation with Mr Ghys the night before the December 16th meeting where again the put and call options were discussed. Other parts of his evidence about events which had happened were also much more imprecise, particularly where they were not helpful to his case – such as whether he had read the documents prepared by Taylor Wessing referring to White Whale as a family trust.

Mr Johnsen

18. Mr Johnsen has had a long career in the financial services sector and has been an independent director of Bitstamp Europe S.A. in May 2018. He is a director of White Whale. He describes himself as a Norwegian native who speaks Norwegian and German. English is the language he uses in business and has done so for over 30 years. He gave evidence without a translator.

19. Although there was one part of his evidence which was misleading I regard Mr Johnsen as an essentially honest witness. I do, however, treat his evidence of his recollection with caution.

20. While he has no apparent financial interest in this litigation, his allegiance is clearly to Mr Kodrič and he and Mr Kodrič have discussed the case and the evidence. He had also prepared a witness statement in support of the injunction and a second witness statement

for the purposes of the trial. He explained one change between his first and second witness statement (ostensibly an improved recollection that he was told by Mr Kodrič in 2019 that the trip to New York was for a conference) as probably because he had "*heard*" that it was, apparently between his first and second witness statement, possibly from his discussions about this case with Mr Kodrič. The fact that the trip was for a conference is immaterial to any of the issues in the case. The fact that what Mr Johnsen "*heard*" between his first and second witness statements in 2021 is being presented in his second witness statement as his recollection of what he was told in 2019 plainly undermines the weight which can be placed on his evidence of recollection.

21. Also, I found Mr Johnsen's evidence was misleading in relation to the transparency of ownership of White Whale. Since its incorporation there has been no information in the public domain as to the ownership of White Whale. In cross examination Mr Johnsen said that the ownership of a company like White Whale would be public information which could be inspected. That appears to be correct as a general proposition for companies of that nature. What he did not say until extracts of the registers for White Whale itself were later obtained and put to him, was that the ownership of White Whale was not public information because Mr Kodrič has applied for an exemption from having to identify himself as the ultimate beneficial owner of White Whale which application is still being considered. I regard that as an example of Mr Johnsen trying too hard to give only evidence which helped Mr Kodrič.

Mr Hong

22. Mr Hong is the managing director of NXMH and a board member of Bitstamp. English is not his first language although he has a good grasp of it. He gave evidence with a translator available who he asked for assistance as required. She was instructed that when asked for assistance she was to translate simply the question and not to elaborate. She expressed her concern during the course of her evidence that she felt that there were some questions that Mr Hong did not fully understand even though he answered them and that he was therefore vulnerable. That was my perception too. It means that in respect of Mr Hong's evidence I am particularly conscious of the need not to rely on his acceptance of carefully worded propositions put to him in cross examination, or to soundbites extracted from him, but to assess the thrust of what he was trying to communicate in his evidence on each issue. Overall I felt he was able to communicate his position on the relevant issues effectively.

23. I found him to be an honest witness although he gave his evidence carefully, with an eye to its impact on the Defendant's position.

Mr Ghys

24. Mr Ghys was employed by NXMH to work on sourcing and closing deals. He was involved in the acquisition of Bitstamp and when it went through, he became Chairman of Bitstamp. Mr Ghys has left NXMH but remains a director of Bitstamp where he sees his role as independent board member.

25. Mr Ghys was an honest witness with no financial interest in the litigation. He gave evidence for Holdings but declared his friendship with Mr Kodrič and the fact that he did not approve of Holdings' exercise of the call options. He gave his evidence openly and without regard to which side his evidence helped. He was realistic about what he could now recollect of past events and conversations. I found him a helpful witness.

Mr Pungerčar

26. Mr Pungerčar is a friend of Mr Kodrič and the Chief Executive and founder of GateHub. He was not required to attend for cross examination and his evidence was read.

E) <u>The Facts</u>

The business

27. Bitstamp is an EU-based exchange for the buying and selling of cryptocurrencies. It operates like a stock exchange by bringing buyers and sellers together. The buyer and seller wire (respectively) money and the relevant cryptocurrency (e.g. Bitcoin) to the exchange and the exchange swaps them at the price which they have agreed. Bitstamp charges a commission for every trade. The business does not itself buy and sell Bitcoin.

28. The growth of Bitstamp has been meteoric. The business was launched in August 2011 by Mr Kodrič and Damian Merlak with two laptops in a garage in Slovenia and €1,000. Approximately seven years later, Holdings acquired an 80% stake in Bitstamp, by then based in Luxembourg, for US$273,600,000 (thus valuing Bitstamp at US$342 million).

NXMH's investment in Bitstamp

29. In 2017, Bitstamp was approached by a number of prospective purchasers. Mr Kodrič did not want to sell, but his co-shareholders did. One of the parties which expressed an interest in Bitstamp was NXMH, an investment company incorporated in Belgium which acts as an investment vehicle for Jung-ju ("Jay") Kim ("**Mr Kim**"), a South Korean businessman.

30. There then followed several months of negotiations, during which time the board of Bitstamp also gave serious consideration to a competing bid from a Chicago-based firm. NXMH ultimately prevailed, and the parties entered into a share purchase agreement with NXMH on 31 March 2018. However, that agreement fell away because the financial market regulator in Luxembourg only gave approval for the deal on 31 July 2018, after the window for securing such approval under the terms of the share purchase agreement had expired.

31. Negotiations were reopened. There had been a gentleman's agreement between NXMH on the one hand, and Mr Kodrič and his fellow shareholders on the other, that if the deal fell through due to a failure to get regulatory approval in time it would be revived on the same terms. However, NXMH declined to proceed at the same price. Mr Kodrič was upset, and thought he had been a bit naïve to rely on an unenforceable gentleman's agreement, but wanted the deal done and so agreed to a renegotiated price. A further revised share purchase agreement was ultimately entered into on 25 October 2018, by which NXMH acquired (via Holdings) approximately 80% of the shares in Bitstamp for US$273,600,000. Mr Kodrič sold two-thirds of his shares but retained a 9.8% stake in Bitstamp. It is that retained stake of Mr Kodrič, comprising 14,351 B Ordinary Shares in Bitstamp, which comprise the Shares in dispute.

The SHA and Side Letter

32. At around the same time, Holdings, NXMH and the existing Bitstamp shareholders who were to remain as shareholders entered into a shareholders' deed (the "**SHA**") to regulate their relationship following the sale. The SHA provided that Mr Kodrič would remain as CEO and that for twelve months after the SHA Mr Kodrič could not be removed from office without cause, although he could resign.

33. Schedule 6 to the SHA is titled 'Transfer Provisions' and governs dealing with shares in Bitstamp by a shareholder. It includes restrictions on the transfer of shares. The relevant provisions are as follows:

(1) Paragraph 1.1 provides that: "*Except as otherwise provided in this Schedule 6, no person shall be entitled to transfer his or its Securities without Investor Consent*". 'Investor Consent' means, in summary, the consent of Holdings, which consent can be given by its nominated director to the board of Bitstamp.

(2) Paragraph 2.1 of Schedule 6 sets out exceptions from the restriction on transfers of shares in paragraph 1.1 which are described as '*Permitted Transfers'*. An individual shareholder may make a '*Permitted Transfer'* to a '*Relation*' or to the trustees of a '*Family Trust*' for tax planning purposes. Such a transferee is a '*Permitted Transferee'* and is required to execute a Deed of Adherence undertaking to be bound by the SHA. A Permitted Transferee is also required to execute a power of attorney in respect of the voting of the shares to the transferor.

(3) A '*Family Trust'* is defined as "*a trust (whether arising under a settlement, declaration of trust, testamentary disposition or on an intestacy) under which no immediate beneficial interest in the shares in question is for the time being or may in future be vested in any person, other than the relevant Shareholder and his Relations*".

(4) a '*Relation*" is defined as a spouse, child or remoter issue of an individual.

34. Paragraph 4 of Schedule 6 to the SHA granted a call option to Holdings in respect of the shareholdings of each of the other shareholders and any Permitted Transferees to whom their shares had been transferred, and a put option to each of the other shareholders and its Permitted Transferees. These options are, in broad terms, exercisable in a window in 2023.

35. Mr Kodrič was concerned that he should be able to sell his remaining shares in Bitstamp before 2023 in the event that the new arrangements with NXMH did not go to plan or if he needed to sell his shares for liquidity reasons. A Side Letter was negotiated and agreed between Mr Kodrič and NXMH by which a put option was granted to Mr Kodrič, exercisable in one month windows in 2020, 2021 and 2022 for any reason. The Side Letter also provided for Holdings to have a call option over Mr Kodrič's shares in the same windows for any reason; this was because NXMH wished Holdings to have reciprocity.

36. The mechanism of the put and call options in the Side Letter are broadly similar to the mechanism of the options in schedule 6 to the SHA save that they are exercisable in advance of 2023. The option price was to be pegged to Adjusted EBIT and Net Asset Value. However, rather than being based on the previous year alone as under the SHA option, the calculation under the Side Letter was based on the mean value over the previous two years for the 2021 and 2022 option windows. The suggestion that the option price be based on the average of two rather than one previous year was Mr Kodrič's because he thought that was fairer to both sides.

37. Clause 18.5 of the SHA (incorporated into the Side Letter by Clause 7.3) provides:

> "*The rights of each party under this deed may be exercised as often as necessary, are (unless otherwise expressly provided in this deed) cumulative and not exclusive of rights and remedies provided by law and may be waived only in writing and specifically*".

Clause 22 of the SHA provides:

> "*22.1 This deed may be amended by written agreement between the Company, the Majority A Holders and Majority B Holders, save in respect of any amendment that would materially affect the rights or interests of any other Shareholder in a manner which adversely impacts them disproportionately to any of the other Shareholders, which will require the written agreement of all Shareholders.*
>
> *22.2 Clause 22.1 also applies to any amending agreement entered into under clause 22.1.*
>
> *22.3 Notice of any alteration to this deed shall be given to each party as soon as practicable."*

I refer to these clauses as "**the "no oral modification" clauses**".

The First Assurance

38. Following the sale, in or around October 2018, Holdings and NXMH appointed Mr Hong and Mr Ghys as directors of Bitstamp. Mr Ghys and Mr Hong represented Holdings and NXMH in relation to Bitstamp's affairs. Mr Ghys was the "*point man*" in respect of Holdings' investment, taking an active role in the affairs of Bitstamp and liaising with its management following the sale. Mr Hong was a more senior figure with a supervisory role.

Mr Ghys was accustomed to provide a weekly update to Mr Kim and Mr Hong about the company.

39. In May 2019 Mr Ghys, Mr Kodrič and others from Bitstamp travelled to New York for a cryptocurrency conference. While in New York there were a number of meetings with investment banks in New York to discuss the possibility of fundraising for Bitstamp. Mr Ghys explained that these were meetings to help Bitstamp with its thinking on the issue and to get feedback as to the market appetite for such fundraising. Mr Ghys had an aspirational $1 billion valuation for Bitstamp for the purposes of such fundraising. In the end nothing came of these meetings, but they form the backdrop to the first assurance upon which Mr Kodrič relies.

40. Mr Kodrič says that the possibility that Bitstamp might be given such a high valuation in a fundraising exercise made him concerned about the call options held by Holdings over his shares. In that scenario, Holdings could exercise its call option and compel Mr Kodrič to sell his shares using the formula in the SHA and Side Letter for calculating the option price at a value less than the fundraising valuation, and make a profit on Mr Kodrič's shares as part of the fundraising.

41. Mr Kodrič raised his concern with Mr Ghys in New York. Mr Kodrič's evidence is that he and Mr Ghys were in between their meetings with the investment banks and were walking "*really fast*" to get to the next one. Mr Kodrič raised the issue as a hypothetical "*what if*" question. Mr Kodrič says that Mr Ghys squarely and confidently addressed his concerns by stating that Holdings or NXMH would never call Mr Kodrič's shares, and followed up by saying: "*we would never screw you*". This is the first disputed assurance upon which Mr Kodrič relies ("**the First Assurance**"). Mr Kodrič's evidence is that the First Assurance related only to Holdings' call option and there was no discussion about the reciprocal put options which Mr Kodrič had. Mr Kodrič says that Mr Ghys offered to change the option price formula to a higher multiple or to add a sentence to the Side Letter to make the option price the higher of the formula price and any market valuation confirmed for the purposes of fundraising or external investment.

42. Mr Ghys recalls the trip to New York. He does have a recollection of being asked a hypothetical question about whether NXMH would exercise its call option if an arbitrage opportunity presented itself as part of a funding round. He does not have any recollection

of the specifics of the conversation such as where or when it took place. He was confident in his evidence that he gave no assurance and expressed nothing more than his personal view that, in the hypothetical scenario Mr Kodrič was positing, it would not be commercially sensible for NXMH to exercise the options in the SHA and the Side Letter.

43. Mr Kodrič says that the First Assurance was touched upon in a general call between him and Mr Ghys not long after they returned from New York, but he was not seeking further re-assurance. The first assurance was not mentioned in any email or other document by Mr Kodrič.

44. In his next weekly report after the New York trip, Mr Ghys reported to Mr Hong and Mr Kim on the conference and the meetings with the investment banks. That weekly report on 19 May 2019 appears to contain a brief report of the conversation with Mr Kodrič in which it is said Mr Ghys gave the first assurance. Headed "*Nejc's Side-Letter*" it says:

> *" A benefit of the raise is that Nejc starts to "smell the money" and believes more in the upside. During our debrief Nejc brought up the 'unfair' 4x valuation of his put options if we can raise at higher valuations*
>
> *I said at first that it's too early to discuss when we have no idea of future valuations. He pushed back and said he doesn't want to wait for the raise to be nearly done to discuss this*
>
> *Answered that we can be reasonable but that ahead of this discussion it's in his interest to invest in goodwill of NXMH + collaborate very closely on the raise"*

45. There was clearly a conversation in New York about the options but I find that Mr Ghys made no promise and gave no assurance. My reasons are as follows.

    45.1 Holdings has 80% of the shareholding of Bitstamp. The options in the SHA form an important part of the structure of Holdings' investment giving it an ability to bring Bitstamp into 100% ownership by Holdings. The options in the Side Letter are consistent with that structure. The First Assurance is said to relate to the options in both the SHA and the Side Letter. It is inherently unlikely that Holdings would give up Mr Kodrič's options and interfere with that structure without careful consideration and legal advice. It is inherently unlikely that Holdings would give up its valuable rights without obtaining something in return. For example, there was it seems, no discussion of a release of the reciprocal put options. It is inherently unlikely that Holdings would give up its valuable rights without even a negotiation.

45.2 It is inherently unlikely that Mr Ghys would have given up Holdings' valuable rights in an informal conversation on the streets of New York while rushing from one meeting to another, with no written record that he had done so, and without drawing up legal documents to reflect the varied agreement. It is inherently unlikely that Mr Ghys would take it upon himself to give up Holdings' valuable rights without even a discussion with Mr Hong and Mr Kim.

45.3 Mr Ghys' evidence was that it was not his place to give up the options and he would not have done so without a discussion with Mr Hong. I accept that evidence. Mr Kodrič says that he believed that Mr Ghys made all the decisions in relation to Bitstamp but it is quite clear from the documents and the evidence of Mr Hong and Mr Ghys that Mr Kodrič knew that Mr Ghys was Mr Kodrič's principal point of contact but that he was supervised by Mr Hong. Mr Ghys' evidence which I prefer is that Mr Kodrič had plenty of conversations with Mr Hong directly and knew to speak to Mr Hong or both Mr Hong and Mr Ghys together if he wanted to obtain NXMH's view on an issue. For example, Mr Kodrič dealt directly with Mr Kim and Mr Hong (and not Mr Ghys) in connection with his removal as CEO and the possibility that he be appointed Chairman of Bitstamp. Mr Kodrič must have known that Mr Ghys would not have given up Holdings' options without authority from Mr Hong or Mr Kim to do so.

45.4 There is not a single document, email or text supporting Mr Kodrič's account of the First Assurance, and in a modern world where electronic communications are easy and readily available, that is remarkable. On the contrary Mr Ghys' weekly report of 6 January 2020 contradicts Mr Kodrič's contention that the First Assurance was given. That email makes clear that any conversation about the options was being deferred to a later date.

45.5 At the time, Mr Kodrič did not think he had received a binding assurance. As appears later in the chronology, he returned to the topic again and again. Mr Ghys' evidence was that Mr Kodrič from time to time would ask him whether he was aware of any intention on the part of Holdings to exercise the call options. One such conversation happened when Mr Kodrič realised he was being replaced as CEO – he expressed relief that his shares were not being called. His evidence as to why he felt the need to secure a further assurance in December 2019 is also completely at odds with the notion that he believed he had a binding assurance from this conversation in May 2019. As appears below, Mr Kodrič's reaction to

Mr Hong, Mr Ghys, Mr Morehead, and Mr Johnsen on the exercise of the options made no mention of any assurance or agreement, or indeed any legal impediment to the exercise of the option. If he believed he had a binding assurance that the options would not be exercised it would have been natural for him to have said so immediately to both Mr Hong and Mr Ghys.

45.6 Mr Kodrič's evidence that Mr Ghys suggested revisiting the option price formula to a higher multiple or to add a sentence to the Side Letter to make the option price the higher of the formula price and any market valuation is also inconsistent with any binding assurance having been given by Mr Ghys that the options would never be exercised. If the options were never to be exercised there was no need to revisit the option price.

45.7 Mr Ghys' evidence, which I accept, is that Mr Ghys gave no assurance and expressed nothing more than his personal view that it would not be commercially sensible for NXMH to exercise the options in the SHA and the Side Letter.

The transfer to White Whale

46. At Mr Johnsen's suggestion, Mr Kodrič created a '*Société Patrimoniale Familial*' ("*SPF*") in February 2019 under the name White Whale Capital SPF S.A ("White Whale") to hold and manage his wealth. An SPF is a corporate structure under Luxembourg law and Mr Johnsen says '*Société Patrimoniale Familial'* is the French translation for 'family office'. Mr Kodrič was the sole shareholder. Mr Kodrič, his girlfriend and Mr Johnsen were the directors. Since its incorporation there has been no information in the public domain as to the ownership of White Whale. Its constitution provides for a register of shares with the statutorily prescribed information to be available at its registered office, but only for inspection by a shareholder – i.e. Mr Kodrič. The entries on the registers at the Luxembourg Business Registry contain details of its directors but not its shareholder. This is because Mr Kodrič has applied for an exemption from having to identify himself as the ultimate beneficial owner of White Whale which application is still being considered.

47. There was, however, no attempt to keep secret from Holdings and NXMH that Mr Kodrič had formed White Whale. Mr Johnsen says that he had spoken to Mr Ghys about the set-up of a family office in Luxembourg for Mr Kodrič and Mr Ghys, while having no specific recollection, thought it was quite possible it was discussed early in 2019. Mr Hong says

that he knew Mr Johnsen had helped Mr Kodrič set up a family office in Luxembourg although he could not remember when he knew that.

48. After White Whale's incorporation Mr Kodrič transferred assets to it. The transfer of Mr Kodrič's shares in Bitstamp to the family office did not take place until June to September 2019. The impetus for the transfer at that time was the decision by Bitstamp to pay a $30m dividend to its shareholders in mid July 2019. The intention was to declare the dividend at a board meeting on 26th June 2019.

49. On 11th June 2019, Mr Kodrič emailed Mr Johnsen, saying:

> "*I am waiting for executed copy from our lawyers Taylor&Wessing. So that we can finally do the transfer of shares from me to WWC. After speaking to Hendrik today, it is clear that Bitstamp will distribute 30m USD of dividends in mid July. I want our transaction to take place prior*."

Mr Johnsen replied to Mr Kodrič's email asking what the SHA said about limitations on the transfer of shares. No further emails in this chain have been disclosed.

50. In the skeleton argument served on behalf of Mr Kodrič, his email to Mr Johnsen was quoted with an explanatory note that the "*executed copy*" was a reference to an executed copy of the SHA. Mr Kodrič's legal team presumably know what document was requested by him from Taylor Wessing although such communications are privileged from disclosure. In cross examination Mr Kodrič could not remember what document he was referring to but accepted that it "probably' was a reference to the SHA. That is consistent with Mr Johnsen's response to his email asking what it said about limitations on the transfer of shares. Nobody has identified any other document that it might be. No attempt has been made to correct Mr Kodrič's skeleton argument. I find it was a reference to the SHA. This exchange of emails indicates that Mr Kodrič informed himself of the terms of the Permitted Transfer provisions at this stage in anticipation of his proposed transfer to White Whale. Mr Kodrič's evidence is, however, that he did not look at the SHA. In cross-examination, he maintained that he would not have looked at the SHA if it had been sent to him by Taylor Wessing as he had asked, and he maintained that the first time he looked at the Permitted Transfer provisions was when he was taken through them in cross-examination. To the extent that this evidence is intended to suggest that Mr Kodrič did not know the terms of the Permitted Transfer provisions at this stage I do not accept it. Mr Kodrič had clearly asked for the SHA because he and Mr Johnsen had identified that it was

necessary to check whether it affected his intended transfer of his shares to WWC. Mr Kodrič in evidence said that he expected Mr Johnsen or his lawyers to digest the SHA. Whether Mr Kodrič read it himself or got someone else to read it and explain its provisions to him, I find that he must have been aware of the terms of the Permitted Transfer provisions soon after this email exchange on 11 June 2019.

51. On 20 June 2019 Mr Kodrič emailed his then solicitors, Taylor Wessing, as follows:

"Could you help me with transfer of my remaining shares to my family office? It should be pretty straight forward given that I am both sides of the transaction. After speaking to Hendrik about this, he believes it is a permitted transaction, so can you please check? NXMH will anyhow permit this."

52. Mr Kodrič says he remembers the conversation with Mr Ghys well and that he had asked Mr Ghys if NXMH and Holdings would allow him to transfer his shares to his family office. Mr Ghys did not see a problem with it. Mr Ghys' evidence is that he believed that the transfer to White Whale would be a Permitted Transfer because the purpose of the permitted transfer provision was to enable changes in ownership structures provided there was no change to the ultimate ownership of the shares.

53. Pausing there, some time was spent during the trial exploring when White Whale was first referred to as a family trust and by whom. Mr Kodrič claimed to have a clear recollection of using the term "family office" not "family trust" in his conversation with Mr Ghys. Mr Kodrič' may believe that he has a clear recollection of the conversation with Mr Ghys but it is inherently unlikely that he could now remember the precise words used in a brief oral conversation three years ago which was not recorded in writing and which was not (at the time) particularly momentous. Mr Ghys was cross examined about the conversation and whether Mr Kodrič had referred to a family office or a family trust. Much more realistically, Mr Ghys did not claim to remember the words used. A family office is not a term of art in English law and it is capable of encapsulating a wide range of different arrangements. Mr Ghys regarded the term "*family office*" as a broad term and said that at the time he did not pay much attention to the terminology being used. Mr Johnsen's evidence was that while he himself would not have referred to White Whale as a "*family trust*", the terms "*family trust*" and "*family office*" were used interchangeably by others at the time such that he would not react to the term "*family trust*" being used in relation to White Whale and he did not ever correct its use. I find that none of Mr Ghys, Mr Johnsen, Mr Hong and Mr Kodrič were paying any attention to the terminology used to describe

White Whale and that the terms '*family trust*' and '*family office*' were being used interchangeably in communications between them.

54. On 25 June 2019 Taylor Wessing sent Allen & Overy an email. It said:

"*As you may be aware, Nejc wishes to transfer his remaining B shares in the Company to his family trust, White Whale Capital SPF SA. This falls under a Permitted Transfer for the purposes of the Articles/SHD.*"

The email attached the documents required to effect the transfer (referred to below) and explained that the consideration for the transfer was to be at the same price per share as NXMH had paid in 2018. It invited any comments as soon as possible as Mr Kodrič was looking to effect the transfer by the end of the week.

55. The documents sent by Taylor Wessing comprised Board Resolutions, a Stock Transfer Form, Voting Power of Attorney and a Deed of Adherence. The Board Resolution to be signed by Mr Ghys, Mr Hong and Mr Kodrič was drafted on the basis that White Whale was Mr Kodrič's family trust and that therefore the proposed transfer was a Permitted Transfer under the SHA.

55.1 Paragraphs 1.5 and 1.6 of the Board Resolution provided that Mr Ghys, Mr Hong and Mr Kodrič :

"*1.5 note that it is proposed that 14351 B ordinary shares of £0.01 each in the Company (the "**B Shares**") be transferred by Nejc Kodrič ("**NK**") to his family trust, White Whale Capital SPF SA ("**White Whale**"), a new shareholder of the Company for an aggregate purchase price of $32,786,043.20 (the "**Transfer**");*

*1.6 note that pursuant to Article 42 of the Articles and paragraph 2 of schedule 6 of the shareholders' deed of the Company dated 25 October 2018 (the "**SHD**""), and individual shareholder may transfer any of their shares to a Relation or the trustees of a Family Trust (each such term as defined in the Articles and SHD) and that no transfer shall be registered by the Directors (without Investor Consent) unless the transferee executes and delivers: (i) a power of attorney in respect of voting such shares in favour of the transferor; and (ii) a deed of adherence to the SHD, each in a form that the Company (acting with Investor Consent) may reasonably require (the "Transfer Documents")".*

55.2 Paragraph 1.8 provided that Investor Consent to the Transfer Documents would be provided by Mr Ghys and Mr Hong signing the resolution.

56. The Power of Attorney drafted by Taylor Wessing appointed Mr Kodrič as White Whale's attorney to exercise all rights in relation to its shares. This is a document which was only required under the SHA in respect of a Permitted Transfer.

57. Pausing there, Mr Kodrič had asked Taylor Wessing to check whether White Whale was a Permitted Transferee. Taylor Wessing's source of information about White Whale is likely to have been Mr Kodrič and Mr Johnsen (who was also liaising with Taylor Wessing for Mr Kodrič). There had until this point been no communication about the White Whale transfer by Taylor Wessing with Allen & Overy or their clients Holdings and NXMH. Taylor Wessing appear to have concluded that White Whale was a Family Trust as defined in the SHA. That is advice which must have been communicated to Mr Kodrič and Mr Johnsen and Taylor Wessing were presumably authorised by Mr Kodrič to draft the necessary documentation on that premise, which they did. I find that there was therefore a consensus by this point on the part of Mr Kodrič, Mr Johnsen and Taylor Wessing that White Whale was a Family Trust for the purposes of the SHA and therefore a Permitted Transferee.

58. It is a puzzle which I do not need to solve as to how Taylor Wessing came to the conclusion that White Whale was a Permitted Transferee. For the reasons outlined later in this judgment, it is clear that it was not because it is not a Family Trust as defined in the SHA. Mr Johnsen gave evidence that he clearly understood that White Whale was not "*an Anglo Saxon trust*". Mr Johnsen confirmed in his evidence that he had read the draft documents prepared by Taylor Wessing. He accepted that he understood that the documentation had been drafted on the basis that White Whale was a Family Trust, but that at the time he just did not pay any attention to whether it was a trust:

"*We didn't pay attention −− or I didn't pay attention, and I don't think many others paid attention, to the fact that our White Whale Capital SA is not a trust . That's the fact.*"

59. So far as Holdings and Allen & Overy were concerned they did not have the information to form an independent view as to whether White Whale was a Permitted Transferee. Holdings first saw the constitutional documents of White Whale as part of the disclosure in these proceedings. Even if Mr Ghys or Mr Hong had been told that White Whale was a corporate structure wholly owned by Mr Kodrič this did not preclude White Whale being a trustee of a trust which qualified as a Family Trust and therefore a Permitted Transferee.

60. On 26 June 2019 Allen & Overy replied to Taylor Wessing thanking them for sharing the relevant documents "*to effect the transfer you describe*" and confirming they had no comments on the documents which had been passed on to NXMH for review.

61. Also on 26 June 2019, the day of the Board meeting to declare the dividend, Mr Kodrič emailed Mr Ghys asking if the dividend payout could be deferred as he was in the middle of transferring shares to his family office. There was a conversation between Mr Ghys and Mr Johnsen about this – in his next weekly report to Mr Hong and Mr Kim, Mr Ghys reported that on the morning of the board meeting Mr Johnsen notified him that Mr Kodrič was transferring shares "*to a family trust*" and would have an additional tax burden if the dividend was declared that day. Mr Johnsen then forwarded an email from Taylor Wessing attaching the draft documents which had been sent to Allen & Overy, saying that these were the documents they had discussed. Mr Ghys emailed Mr Kodrič, Mr Johnsen, Taylor Wessing and Allen & Overy saying:

> "*This morning we've learned how the transfer of Nejc's shares to his family trust has to be taken into account in light of the recent amendment of Bitstamp's articles and upcoming dividend.*
>
> *Are you all available for a short chat so we can understand the interrelations and get a sense of how best to proceed?"*

62. Later in the day on the 27 June there appears to have been a call between Mr Ghys, Allen & Overy and Taylor Wessing to which no privilege attaches. There are no disclosed notes of that call. Mr Ghys could not remember it. It is reasonable to infer that in any such call Taylor Wessing will have confirmed that White Whale was a family trust and this was a Permitted Transfer as that is the premise of the documents they had drafted.

63. Mr Johnsen also could not remember the call or if he was on it. In cross examination Mr Johnsen volunteered that he recalled Allen & Overy once asked Mr Kodrič's team to confirm that he was "100% shareholder". This was not mentioned in his witness statement. No document containing such a request has been disclosed by either side. Mr Johnsen did not say who at Allen & Overy asked this question or when. He did not say whether it was before or after the transfer, or indeed before or after the purported exercise of the call options and this dispute. It was a throw away remark in the middle of cross examination. The only opportunity for such a question before the transfer appears to be this call which

Mr Johnsen does not remember. I do not accept on the basis of this one remark that Allen & Overy asked this question prior to the transfer of White Whale.

64. A decision was taken to postpone the payment of the dividend pending the transfer of Mr Kodrič's shares to White Whale.

65. On 27 June Mr Ghys sent Mr Hong an email. It is part of a chain which has been heavily redacted because, fairly obviously, it contained advice from Allen & Overy to Holdings which is privileged and not disclosable. Mr Ghys forwarded the draft Board resolution saying

"*This is the Board Resolution to confirm Nejc transferring shares to his family trust. This is a permitted transfer under SHA, [redaction]. Please sign where your name indicated."*

It is clear, and I find, that Mr Ghys and Mr Hong (and therefore Holdings) now shared Mr Kodrič's assumption that White Whale was a Permitted Transferee.

66. The Board resolution was signed by Mr Hong, Mr Ghys and Mr Kodrič (in that order) and dated 28 June 2019.

Decision to replace Mr Kodrič as CEO

67. In September 2019, Mr Hong expressed concerns to Bitstamp's COO, Mr Zupan, about Mr Kodrič's commitment to Bitstamp. Mr Kodrič sought to allay those concerns in an email which he sent to Mr Hong on 19 September 2019, and engaged with Mr Kim directly by email. Mr Kim floated the idea of Mr Kodrič becoming Chairman instead of CEO. Mr Kodrič was attracted by the prospect of assuming the chairmanship and discussed it further with Mr Hong after a board meeting on 16 October 2019.

68. In his weekly report of 21 October 2019 Mr Ghys reported that he had communicated to Mr Kodrič that Bitstamp wanted to initiate the search for a new CEO. He said that Mr Kodrič had taken the news well and was "*relieved that we're not calling his shares in the process*". Mr Kodrič was unable in cross examination to explain how this was consistent with his evidence that he believed he had a binding assurance (the first assurance) that his shares would not be called, saying that he had just wanted to check whether anything had changed. The reality is that it is not consistent with a belief on his part that Holdings could not call his shares because of the First Assurance. It is also clear that Mr Ghys did not

think that any binding assurance had previously been given preventing the shares being called.

The November 2019 workshop and its aftermath

69. The next assurance relied on by the Claimants is said to have been made at a workshop in December 2019. The background to that workshop begins with an earlier 'strategy alignment workshop' for the management team at Bitstamp which took place on 27 and 28 November 2019. Mr Hong was in attendance as was Mr Oliver Blower, who had just been recruited to join the Board of Bitstamp as a non-executive director. The workshop went badly. Concerns, whether or not justified, arose as to what NXMH intended to do with Bitstamp and its management in the future. By the end of the first day of the workshop Bitstamp's management was very upset with Mr Hong. Such was the level of upset, that Mr Kodrič submitted his written resignation as CEO the following morning.

70. Mr Kodrič later withdrew his resignation. However the impact of his attempted resignation was keenly felt by Mr Ghys and by Mr Blower. Mr Blower provided feedback to Mr Ghys and Mr Hong in a lengthy email on 30 November 2019 expressing his shock at Mr Kodrič's resignation and his short notice period, and emphasised the need for short term stability while searching for a new CEO. He also expressed concerns at the "*misalignment*" of Mr Ghys and Mr Hong with the rest of the management team and his view that the management team had "*absolutely no clue*" what NXMH's objectives were. The strength of Mr Blower's concern at the state of affairs in Bitstamp's management is reflected by a warning in his last paragraph:

"…I continue to be excited by the challenge that Bitstamp presents but without significant and rapid change I will find my position with the company untenable."

Mr Ghys in his evidence said that he shared Mr Blower's concerns and that he and Mr Blower were working together at this time to persuade Mr Hong to take these concerns more seriously. Mr Hong in his evidence recognised that Mr Ghys and Mr Blower had concerns but said that with his greater experience he did not regard them as as serious as Mr Ghys and Mr Blower did.

71. The following Monday (2 December 2019), Messrs. Blower, Ghys and Hong arranged a conference call to take place on 3 December 2019, the agenda for which included the "*CEO Position & Search*" and "*Management retention*". In an email sent following the conference call on 3 December 2019, Mr Ghys summarised the "current situation" as follows:

> *"- Nejc's resignation sent a shockwave through the company. The feedback from management is that they feel disposable and vulnerable given the apparent wish of the owner to gain control on operational matters + uncertainty as which metrics they will be evaluated on.*
>
> *- Several key management people (David, Edward, Vasja) have contacted headhunters last week.*
>
> *- Nejc leaving prior to a new CEO being onboarded and / or several key people of the management team leaving in the short term could have very negative consequences on how Bitstamp is perceived by employees, customers and regulators and jeopardize the odds of success of Bitstamp as an investment*."

72. Accordingly the three men agreed on a number of proposals to stabilise the current situation including measures designed to incentivise the management team (other than Mr Kodrič), comprising the extension of notice periods, the offer of 'retention' cash bonuses and a long-term incentive plan. A further meeting with management was arranged for 16 December 2019 to communicate the management retention plan, and to clarify NXMH's ambition and commitment to improve governance and communication. The meeting was to be split into two sessions: a joint session followed by individual sessions with each member of the management team.

The lead-up to the December 2019 meeting

73. In the run up to the meeting Mr Blower and Mr Ghys regarded the retention of Mr Kodrič as key to preventing the departure of other members of the management team before a new CEO was found and installed. Mr Ghys noted his view in an aide memoire on 13 December 2019 that as regards the objective of retaining members of the management team prior to the appointment of a new CEO, success would be: "*Sufficient retention not to alert regulators/customers/employees. Crucial that Nejc stays and that not more than one member of the management team leaves in next 6 months*".

74. Mr Ghys also identified that Mr Kodrič had a bargaining chip because of the regulatory position in Luxembourg. Bitstamp's activities (through Bitstamp Europe SA) are regulated

by the Luxembourg regulator, the Commission de Surveillance du Secteur Financier ("**CSSF**"), and there is a requirement for there to be CSSF authorised managers and CSSF approved board members. Mr Kodrič was one of three authorised managers and, as CEO, an approved board member. Mr Ghys was concerned that Mr Kodrič could potentially "*strong-arm*" NXMH as it may take months to get approval to a replacement and there might not be quorum on the board of Bitstamp Europe SA in the interim if Mr Kodrič left.

75. Mr Hong's evidence is that while Mr Kodrič's departure would have caused disruption he did not regard it as causing problems which could not be overcome, having faced similar situations before in other investments. He was wary about the regulatory dimension, however, which he had not previously encountered. Mr Hong's evidence was that communication of a proposed change of CEO with the CSSF was necessary to secure its approval and an orderly transition.

76. Mr Blower proposed that the first individual session after the joint presentation would be with Mr Kodrič and Mr Ghys proposed that Mr Kodrič should then sit in on the subsequent individual sessions with the management team to demonstrate his support of NXMH. Mr Ghys prepared an agenda for the individual meetings which in relation to Mr Kodrič, included obtaining a verbal commitment from Mr Kodrič to stay in place until a new CEO was appointed and to agree to adjust his notice period from one month to six months. In relation to the other members of the management, Mr Ghys proposed that the first item on the agenda should be to announce Mr Kodrič's intention to stay in place until a new CEO was appointed.

77. Mr Ghys spoke to Mr Kodrič the night before the meeting to "*warm him up*" and reported back to Mr Blower and Mr Hong as follows:

> *"Spoke to Nejc. He sounded positive and agreed on the proposed agenda / sitting in on 1-1s. He reminded that his 10% stake means he's very aligned with us on restoring trust.*
>
> *He did anticipate that as part of adjusting his agreement he wants to discuss the call/put option structure where he could be undercut by us if we exercise at lower multiple on the way to successful IPO. I think that's reasonable."*

The Second Assurance

78. The meeting on the 16 December 2019 was held at the hotel 'Le Royal' in Luxembourg. As planned, the first part of the meeting was a group session in which Mr Ghys delivered a presentation on Holdings' intentions, including its ambition to undertake an IPO within 3 years. The presentation was well received.

79. The plenary session was followed by a series of individual meetings with the members of the management team. The first was with Mr Kodrič who says there was a discussion about a new contract with a six month notice period. Thereafter there were individual meetings with the rest of the management team in which Mr Kodrič sat in and supported Mr Hong and Mr Ghys.

80. Mr Kodrič says the disputed second assurance was given in a discussion at the end of the meeting, and after all the individual meetings had finished. He says that after everyone had left he had a private discussion with Mr Ghys and Mr Hong, in which he raised his concerns about the call options over the shares now held by White Whale being triggered at a lower multiple than their actual value. Mr Kodrič says Mr Ghys assured him that Holdings would not exercise the options, saying "*we would never do it*". Mr Kodrič says that while Mr Ghys was talking, Mr Hong was nodding. Mr Kodrič says Mr Hong also said "*We don't want to call your shares. We need you*." This is the "**Second Assurance**" which forms another disputed aspect of the claim. Mr Kodrič says that it is only because of the Second Assurance that he stayed on as CEO.

81. Mr Ghys has no recollection of a conversation with Mr Kodrič about the call options on the day but says that he would not have given an assurance that NXMH would not exercise its valuable options and that it was not his place to do so, being a matter for Mr Hong in consultation with Mr Kim. Mr Hong says he is sure he was not present at any discussion about the call options and that no assurances were given by him or by anyone else in his presence that NXMH would not exercise those options. He says that even if he had the authority to do so he would not have authorised any such promises to be made as the options were commercially valuable and there was no reason to give them away.

82. In Mr Ghys' weekly update email on 6 January 2020 stated:

> "***Nejc***
>
> *Nejc was appreciative after the workshop and vocalized his support to stay in the interim & support CEO transition.*

- *To address this legally, we've instructed A&O to draft a new agreement with Nejc to implement 6-month notice (so he can't again bargain with his resignation) and document an orderly transition to new CEO*

- *Once new CEO is hired, Nejc will take the title of Chairman of the board.*

- *One open-ended point is that Nejc indicated he will want to re-negotiate the call/put option clauses in his side letter. Simple approach (if we don't intend to call Nejc's 10% at a discount) is to put Nejc on the same 5Y timeline as Pantera. This balances incentivising Nejc in the medium-term while not mutually locking each other in indefinitely.*"

83. No drafts of a new employment agreement for Mr Kodrič were ever prepared or sent to him. Mr Ghys said that the December meeting had been successful in stabilising the management team and the new employment agreement became a low priority, particularly after the impact of the pandemic at the beginning of 2020.

84. I find that that any conversation at the end of the meeting on the 16 December was not as described by Mr Kodrič and there was no Second Assurance. My reasons are as follows.

    84.1 As I have said earlier in this judgment, the options in the SHA and the Side Letter form an important part of the structure of Holdings' investment. It is inherently unlikely that Holdings would give up Mr Kodrič's options and interfere with that structure without careful consideration and legal advice. It is inherently unlikely that Mr Ghys and Mr Hong would have given up Holdings' valuable rights in an informal encounter at the end of a day of formal meetings, with no written record that they had done so, and without drawing up legal documents to reflect the varied agreement. It is inherently unlikely that Mr Ghys or Mr Hong would take it upon themselves to give up Holdings' valuable rights without even a discussion with Mr Kim.

    84.2 It is inherently unlikely that Holdings would give up its valuable rights without obtaining something in return. Mr Thompson argued that Holdings secured Mr Kodrič's continuation as CEO until a replacement was found. This is not right. From the terms of Mr Ghys' email about the "*warm up*" conversation between Mr Ghys and Mr Kodrič on 15 December 2019 it is clear that Mr Kodrič had already indicated before the meeting that he was agreeable to staying on as CEO, to sitting in on the individual meetings with management and to showing his support of NXMH. The first individual meeting was held with Mr Kodrič and thereafter he

sat in on each individual meeting with management, confirming that he was staying on as CEO and supporting NXMH. It makes no commercial sense that he would have done this if he intended to use his continuation as CEO and his support of NXMH as a bargaining chip in a conversation at the end of the meeting about renegotiating the options. I also accept Mr Hong's evidence that he did not regard it as a disaster if Mr Kodrič left before a new CEO was in place, so it is inherently implausible that Mr Hong would have allowed the options to be given up simply to keep Mr Kodrič as CEO for a few more months.

84.3 It is inherently unlikely that Holdings would give up its valuable rights without even a negotiation. According to Mr Kodrič no attempt was made to limit the Second Assurance to the Side Letter (leaving the later options in the SHA unaffected), or to seek the release of Mr Kodrič's reciprocal put options.

84.4 If they had given up Holdings' valuable rights without a negotiation, without obtaining anything in return, without Mr Kim's authority, without Allen & Overy's advice and without any formal or informal written record of doing so, it is inherently unlikely that Mr Hong and Mr Ghys would both have forgotten that they had acted so boldly – which Mr Thompson confirmed is his contention as to why their evidence is that they do not recall the Second Assurance. He made clear that he did not suggest that either man was dissembling. In Mr Hong's case he was actively exploring the exercise of the call options in January 2021 and it is inherently unlikely that he had forgotten that he had been party to a conversation in which they had been given up just over 12 months previously. In Mr Ghys' case, it is inherently unlikely that he had forgotten that he had given up Holdings options when he counselled Mr Kodrič on ways of persuading Holdings to change its mind after it had exercised the options in July 2021.

84.5 As appears below, Mr Kodrič's own reaction to Mr Hong, Mr Ghys, Mr Morehead, and Mr Johnsen on the exercise of the options made no mention of any assurance or agreement, or indeed any legal impediment to the exercise of the option. If he believed he had been given a binding assurance by Mr Hong and Mr Ghys that the options would not be exercised it would have been natural for him to have said so immediately to both Mr Hong and Mr Ghys.

84.6 It is inherently unlikely that there is not a single document, email or text referring to the Second Assurance if it was made. On the contrary Mr Ghys' weekly report of 6 January 2020 contradicts and is irreconcilable with the Second Assurance

having been given. Mr Ghys rejected the suggestion that his 6 January weekly report was carefully worded to soften up Mr Kim to the idea of giving up the options because Mr Hong and Mr Ghys realised they had gone too far in giving the Second Assurance without discussing it with Mr Kim. I accept Mr Ghys' evidence on that. I also observe that if in fact Mr Hong and Mr Ghys were colluding to manipulate Mr Kim, and were fearful that they had done wrong, it is even more incredible that they would have forgotten that they gave the Second Assurance, and even now be unable to have any recollection of it.

84.7 There was clearly a conversation on 15 December 2019 about Mr Kodrič's desire to revisit the options but Mr Ghys' emails of 15 December and 6 January indicate, and I find, that Mr Kodrič simply put down a marker that he wished that to be an issue for discussion when renegotiating a revised employment agreement with a longer notice period. For one reason or another, including the onset of the Covid 19 pandemic, no further discussions in relation to a revised employment agreement ever happened.

Mr Kodrič's efforts and subsequent resignation in 2020

85. Following the meeting on 16 December 2019 Mr Kodrič devoted a considerable amount of time and effort to Bitstamp, in addition to the day-to-day management of the business, as CEO, including helping with the search for his replacement as CEO, and reassuring candidates by his involvement in the process.

86. Mr Kodrič's evidence was that he was approached with investment and business opportunities, including opportunities to get involved in other successful cryptocurrency ventures, but he declined them due to his commitment to Bitstamp. He also said that if he had no longer been involved in Bitstamp, he would have triggered his put options to sell his shares and put the sale proceeds directly into Bitcoin, the price of which escalated during the second half of 2020, rising from US$11,000 for one Bitcoin in August 2020 to c. US$66,000 at the date of the trial. Mr Kodrič was bullish on a rally at the time, and had invested a substantial amount in Bitcoin through 2019 and 2020.

87. In early May 2020, Mr Hong informed Mr Kodrič that he would not be appointed Chairman of the business after all. Soon after, Mr Hong proposed that Mr Kodrič extend his term as

CEO pending the start date of a new permanent CEO. However Mr Kodrič became increasingly unhappy with the proposals for his role and by letter dated 3 June 2020 he resigned as CEO with effect from 15 July 2020.

88. Julian Sawyer agreed to take up the position of CEO at Bitstamp on or around 17 July 2020 but for various reasons was unable to start until April 2021. Until then, Bitstamp's Chief Technology Officer, David Osojnik, took over as interim CEO with support from Mr Kodrič

89. Mr Kodrič also continued to be one of the CSSF-approved authorised managers of Bitstamp Europe S.A. It was not until 15 June 2021 that the business' newly appointed CFO, Stephen Bearpark, received approval and Mr Kodrič was able to resign his position as an authorised manager, which he duly did on 8 July 2021.

Exercise of the call options

90. On 5 January 2021, Mr Hong sent a copy of the Side Letter to an employee of NXMH and asked him to prepare a valuation based on an assumption that "*we use the call option to buy his shares during this year*". Shortly afterwards, Mr Lefevre of NXMH emailed Mr Hong about an opportunity to make a corporate acquisition. In that email, he proposed exercising the call option, taking the profit by selling Mr Kodrič's stake at a higher valuation, and then using the profit to make an acquisition so as to catch up with the "*bigger players*".

91. These discussions about exercising the call option, and particularly its timing, continued during 2021 and included the new CEO, Mr Sawyer. The timing of the exercise of the option depended on when the audited financial statements became available (which would determine the valuation of the exercise price).

92. On 21st July 2021 (soon after Mr Kodrič had resigned as authorised manager), Mr Hong told Mr Kodrič for the first time that Holdings had decided to exercise the call options. The same day, Allen & Overy served by email an option notice (the "**Exercise Notice**") together with a draft share purchase agreement.

93. Mr Kodrič's reaction made no mention of any assurance or agreement, or indeed any legal bar to the exercise of the option.

93.1 To Mr Hong, he simply said "*I am very very disappointed Jamie! Hope you think it is worth it. I don't think it is. I don't know what I did wrong. But if it is just money, I think you are making a mistake.*" He did not suggest it broke any agreement, let alone one that Mr Kodrič claims he had reached with Mr Hong on 16 December 2019.

93.2 To Mr Ghys, who had by this stage left NXMH, Mr Kodrič said: "*Jamie is calling my options … I mean my stock. Very disappinted* [sic]." He did not suggest this broke a binding assurance which Mr Ghys had given him in May 2019 or December 2019.

93.3 To Mr Dan Morehead (of Pantera, a minority shareholder) who queried whether NXMH was buying his shares, Mr Kodrič said:

> *"Yes, looks like Jamie is forcing me out. I just learned today and I don't know why. Very disapointed!" [sic]*
>
> and
>
> "*yeah, I guess Jamie is getting rid of me from board as well. None of which makes sense besides economics … they had a call option which they triggered while it was still "cheap" – based on 2020 results.*
>
> *Not a good signal to rest of employees. This is how NXMH threats* [sic] *people.*"

94. Mr Kodrič exchanged text messages with Mr Ghys in which Mr Ghys referred to ways of persuading Holdings to change its mind, but through commercial pressure applied by Mr Dan Morehead and "*management*" – not by standing on any legal rights. Again, Mr Kodrič did not suggest Holdings had broken any agreement. According to an email Mr Johnsen sent to Mr Kodrič, Mr Ghys thought the options should be renegotiated so as to pay Mr Kodrič more (i.e. higher multiples used in the formula calculating the price) and that it was contrary to the "*faith of the agreement*" (i.e. the Side Letter). He was cross examined about that statement and about his reaction to the news that the call option had been exercised. He said he was talking to Mr Kodrič as the friend he had become and was empathising with him. His personal view, which he thought was biased towards Mr Kodrič as his friend, was that it was unethical for NXMH to exercise the call options and he was "*not a fan*" of

NXMH's decision. However, he clearly did not think there was any legal impediment to NXMH exercising the options: "*of course, the contractual stipulations are clear, right, and it's also NXMH who has warehoused the risk of a put and Nejc has warehoused the risk of a call*."

F) <u>Impact of the White Whale transfer on the options</u>

95. The call options in the SHA and Side Letter are only exercisable in respect of the Shares if they are held by Mr Kodrič or a Permitted Transferee in relation to him. The Claimants' case is that the call options in the Side Letter and the SHA terminated automatically on the transfer of the Shares from Mr Kodrič to White Whale since White Whale is not a Permitted Transferee in relation to Mr Kodrič. This is because the Claimants say that White Whale is not a trustee of a Family Trust within the meaning of the SHA.

96. Although not formally admitted by the Defendant, it is clear that White Whale is not a trustee of a Family Trust within the meaning of the definition in the SHA. As set out earlier in this judgment a Family Trust is defined as "*a trust (whether arising under a settlement, declaration of trust, testamentary disposition or on an intestacy) under which no immediate beneficial interest in the shares in question is for the time being or may in future be vested in any person, other than the relevant Shareholder and his Relations*". White Whale is a corporate entity not a trust. On the transfer of the Shares, White Whale became the legal and beneficial owner of the Shares – it did not hold the Shares as trustee on a trust of any kind. Under the constitutional documents of White Whale there are no restrictions prohibiting the transfer of the Shares to a person other than Mr Kodrič or one of his Relations (as defined in the SHA). It follows that White Whale is not a Permitted Transferee.

97. The Defendant's answer to this point is to say that Mr Kodrič is estopped from denying that White Whale is a Permitted Transferee. Holdings relies primarily on an alleged estoppel by convention, but if necessary also on an estoppel by representation. The Claimants say that the requirements of those estoppels are not satisfied in this case and in any event would be barred by the "no oral modification" clauses in the SHA.

Estoppel by convention – the law

98. In *Revenue and Customs Comrs v Benchdollar Ltd* [2010] 1 All ER 174, in the context of non-contractual dealings between HMRC and a taxpayer, Briggs J set out the following statement of the principles of estoppel by convention derived from the authorities:

> "*In my judgment, the principles applicable to the assertion of an estoppel by convention arising out of non-contractual dealings . . . are as follows. (i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them. (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it. (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter. (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties. (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."*

99. The first of those principles was amended soon after by Briggs J in *Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd* [2010] Pens LR 411 as it ought to have referred to the need for conduct that "crossed the line". He accepted that his first principle should be amended to include that "*the crossing of the line between the parties may consist either of words, or conduct from which the necessary sharing can properly be inferred*" (at para 137). In *Blindley Heath Investments Ltd v Bass* [2015] EWCA Civ 1023 Hildyard J cited Briggs J's statement of the principles in *Benchdollar* with apparent approval but making clear in relation to the first principle that "*something must be shown to have 'crossed the line' sufficient to manifest an assent to the assumption*".

100. In *Tinkler v HMRC* [2021] 3 WLR 697 the Supreme Court affirmed that the *Benchdollar* principles, as amended by *Blindley Heath*, were a correct statement of the law on estoppel by convention in the context of non-contractual dealings. Lord Burrows JSC who gave the judgment of the Court expressed the view, although not necessary to be decided in that case, that the principles also applied to contractual dealings. Neither party has sought to argue otherwise in these proceedings.

101. Lord Burrows JSC expanded on the "*important ideas*" that lie behind the first three *Benchdollar* principles at paras 51 and 52:

> *"51 ...Those ideas are as follows. The person raising the estoppel (who I shall refer to as "C") must know that the person against whom the estoppel is raised (who I shall refer to as "D") shares the common assumption and must be strengthened, or influenced, in its reliance on that common assumption by that knowledge; and D must (objectively) intend, or expect, that that will be the effect on C of its conduct crossing the line so that one can say that D has assumed some element of responsibility for C's reliance on the common assumption.*
>
> *52 It will be apparent from that explanation of the ideas underpinning the first three Benchdollar principles that C must rely to some extent on D's affirmation of the common assumption and D must (objectively) intend or expect that reliance. This is in line with the paragraph from Spencer Bower, The Law Relating to Estoppel by Representation, 4th ed (2004) p 189, which was cited by Briggs J just before his statement of principles:*
>
> > *"In the context of estoppel by convention, the question here is whether the party estopped actually (or as reasonably understood by the estoppel raiser) intended the estoppel raiser to rely on the subscription of the party estopped to their common view (as opposed to each, keeping his own counsel, being responsible for his own view)."*
>
> *For a similar statement, using the same wording of C's reliance on "the subscription" of D to the common assumption, see the present edition of that work, Spencer Bower, Reliance-Based Estoppel, 5th ed (2017), para 8.26. But this is not to suggest that C must be relying solely on D's affirmation of, or subscription to, the common assumption as opposed to C relying on its own mistaken assumption. It is sufficient that, as D intended or expected, D's affirmation of, or subscription to, the common assumption strengthened, or influenced, C in thereafter relying on the common assumption."*

<u>Estoppel by convention – application</u>

Common assumption

102. I have found that there was a common assumption at the time of the White Whale transfer by Mr Kodrič on the one hand and Holdings (through Mr Hong and Mr Ghys) on the other that White Whale was a Permitted Transferee. The transfer documentation is premised on White Whale being a Permitted Transferee and in their subsequent dealings everyone has assumed that the call options continue to apply to the Shares now in the

hands of White Whale – see for example Mr Kodrič's relief in October 2019 that the shares were not being called on his replacement as CEO and, of course, the discussions between Mr Kodrič and Holdings about renegotiating the call options in December 2019.

Crossing the line

103. The assumption on the part of Mr Kodrič's team crossed the line to Holdings' team because Mr Kodrič represented to Holdings through his lawyers that White Whale was a Permitted Transferee. Taylor Wessing's email of 25 June 2019 said that the transfer to White Whale was a Permitted Transfer for the purposes of the SHA and Side Letter and the draft documentation for the transfer accompanying that email was drafted on the premise that White Whale was a Permitted Transferee. That was a clear representation to Holdings, through its lawyers Allen & Overy, that Mr Kodrič believed White Whale was a Permitted Transferee.

Assumption of responsibility

104. In circumstances where Holdings did not have the information upon which to form an independent view, the objective intention of Taylor Wessing's email and the draft transfer documentation accompanying it was to influence Holdings by encouraging it to accept and share Taylor Wessing and Mr Kodrič's belief that White Whale was a Permitted Transferee and therefore to execute the documentation permitting the transfer to White Whale. That was a sufficient assumption of responsibility on the part of Mr Kodrič for any reliance which Holdings placed on Mr Kodrič's belief that White Whale was a Permitted Transferee.

105. For the reasons outlined below at paragraph 118 in relation to estoppel by representation, I do not accept the proposition that looked at objectively Taylor Wessing cannot have intended Allen & Overy to rely on anything they said in their email or accompanying documentation simply because they were on opposite sides of a transaction.

Reliance

106. It was argued on behalf of Mr Kodrič that Holdings cannot prove that it relied on anything said or done by Mr Kodrič's team rather than its own independent view. The evidence of Mr Ghys and Mr Hong is that they relied on Allen & Overy to advise them in relation to the transfer and to approve the transfer documentation. Mr Handyside submitted that it is obvious that Allen & Overy relied on Taylor Wessing's representation that White Whale was a Permitted Transferee. Mr Thompson pointed out that there was no evidence in this trial from any solicitor at Allen & Overy to that effect. Nor could reliance by Allen & Overy be inferred because, he submitted, that would be improperly inferring matters which were "behind the cloak of privilege", and Holdings had chosen not to waive privilege.

107. No authority was cited by Mr Thompson in support of this proposition which is far too wide. The primary function of a trial judge is to determine the facts and to draw reasoned inferences from the facts determined. It is well established that no adverse inference should be drawn from the assertion of privilege, as that would undermine the right to assert privilege. Subject to respecting that principle, I do not see why in appropriate circumstances the Court should not be able to draw a reasoned inference of a fact, for example that particular advice was or was not given, simply because a party is not obliged to disclose privileged documents relating to that fact or to answer questions about it. That would be an artificial and undesirable restriction on the judge's function which is ultimately to determine what has actually happened.

108. I find that Allen & Overy relied on Taylor Wessing's representation that White Whale was a Permitted Transferee. Only Mr Kodrič and his team had the information to assess whether White Whale was a Permitted Transferee. As I have already observed, there is barely any information about White Whale in the public domain. Neither Holdings nor Allen & Overy asked for any information to verify that White Whale was a Permitted Transferee nor did Mr Kodrič or Taylor Wessing send any information to Holdings or Allen & Overy to form their own view. In the absence of such information Allen & Overy were in no position to form an independent view as to whether White Whale was a Permitted Transferee. Allen & Overy accepted the Taylor Wessing drafts of the transfer documentation without amendment. They responded in open correspondence to Taylor Wessing thanking them for the draft documentation "*to effect the transfer you describe*"

on which they had no comments. It seems to me to be clear that Allen & Overy, and therefore Holdings, relied on the representation by Mr Kodrič's team that White Whale was a Permitted Transferee and not on any independent view of their own.

109. I do not regard that inference, drawn from open correspondence between solicitors, and facts established at trial, as an inference of a fact "behind the cloak of privilege". Privilege applies to communications, and an inference that Allen & Overy relied on Taylor Wessing is not an inference as to the content of a privileged communication. Holdings have not waived privilege and Mr Thompson says he is not therefore able to test whether Allen & Overy did in fact rely on what they were told by Taylor Wessing. That may be true, but any perceived procedural unfairness is a consequence of the assertion of privilege. It is the right of Holdings to assert its privilege, as it is the right of the Claimants. Unremarkably both sides have asserted their right to privilege in this case.

110. Mr Thompson also submitted that Holdings has not pleaded that Allen & Overy had relied on Taylor Wessing. Holdings has pleaded in paragraph 5.5.2 of its Defence that it relied amongst other matters on Taylor Wessing's email and accompanying documentation. That in my judgment is a good plea that Holdings, through its intermediary agents such as directors and lawyers, relied upon Taylor Wessing's email and accompanying documentation.

Mutual dealing

111. The subsequent mutual dealing is the authorisation of the transfer of the Shares to White Whale and approval of the documentation to give effect to it.

Detriment

112. If Mr Kodrič is not estopped from asserting that White Whale is not a Permitted Transferee in relation to him Holdings will have lost the benefit of its options in the Side Letter and the SHA.

Conclusion on estoppel by convention

113. Subject to the Claimants arguments on the "no oral modification" clauses which I consider below Holdings have established an estoppel by convention which binds Mr

Kodrič. In *Steria Ltd v Hutchison* [2006] EWCA Civ 1551, Neuberger LJ observed that the one single factor central to a successful estoppel claim is unconscionability. In my judgment it would be unconscionable for Mr Kodrič to now be free to assert that White Whale is not a Permitted Transferee.

Estoppel by representation

114. Holdings relied in the alternative on an estoppel by representation which I am also satisfied is made out.

115. In Spencer-Bower: Reliance-Based estoppel (5th ed: 2017), the elements which must be established in order to constitute a valid estoppel by representation of fact are described as follows:

> *"(1) The alleged representation of the party sought to be estopped was a representation of fact.*
>
> *(2) The precise representation relied upon was in fact made.*
>
> *(3) The case which the party is to be estopped from making contradicts in substance his original representation.*
>
> *(4) The representation was made with the intention (actual or as reasonably understood) and the result of inducing the estoppel raiser to alter his position on the faith thereof to his detriment.*
>
> *(5) The representation was made by the party to be estopped, or by some person for whose representations he is deemed in law responsible, and was made to the estoppel raiser, or to some person in right of whom he claims." (para 1.18)*

116. Taylor Wessing's email of 25 June 2019 said that the transfer to White Whale was a Permitted Transfer for the purposes of the SHA and Side Letter and the draft documentation for the transfer accompanying that email was drafted on the premise that White Whale was a Permitted Transferee. That was a clear representation to Holdings, through its lawyers Allen & Overy, of a fact, namely that White Whale was a Permitted Transferee. Looked at objectively, the representation was intended to encourage Holdings to sign the documentation to permit the transfer of the Shares to White Whale. Holdings' lawyers relied on that representation and Holdings permitted the transfer of

the Shares. Mr Kodrič now seeks to contradict that representation by asserting that White Whale is not a Permitted Transferee. Holdings would suffer detriment, in the shape of the loss of its call options if Mr Kodrič is not held to his representation.

117. It was submitted on behalf of Mr Kodrič that it was not reasonable for Holdings or its lawyers to rely on a representation by Taylor Wessing who acted for Mr Kodrič. In *Steria Ltd v Hutchison* [2006] EWCA Civ 1551, Neuberger LJ described the three "classic" requirements of an estoppel by representation and a promissory estoppel as follows:

> *" They are (a) a clear representation or promise made by the defendant upon which it is reasonably foreseeable that the claimant will act, (b) an act on the part of the claimant which was reasonably taken in reliance upon the representation or promise, and (c) after the act has been taken, the claimant being able to show that he will suffer detriment if the defendant is not held to the representation or promise. Even this formulation is relatively broad brush, and it should be emphasised that there are many qualifications or refinements which can be made to it."* (emphasis added)

118. This was a non-contentious transaction. Whether looked at objectively or subjectively, Taylor Wessing's email and the draft transfer documentation accompanying it was intended to confirm to Holdings that White Whale was a Permitted Transferee. Allen & Overy had no means of verifying whether that statement of fact was true. Taylor Wessing did not volunteer information so that Allen & Overy could satisfy itself that White Whale was a Permitted Transferee. It was reasonably foreseeable that Allen & Overy would accept that representation of fact from another firm of respectable solicitors and Holdings would act on it by executing the documentation permitting the transfer to White Whale. Allen & Overy could have asked for information to satisfy themselves that White Whale was a Permitted Transferee but in my judgment it was not unreasonable or unforeseeable that they might instead rely on the representations made by Taylor Wessing.

119. In my judgment, subject to the Claimants' arguments on the "no oral modification" clauses which I consider next, Mr Kodrič is estopped from resiling from the representation that White Whale is a Permitted Transferee.

The "No oral modification" clauses

120. In *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24 the Supreme Court held that "no oral modification" clauses are legally effective. Lord Sumption in his leading judgment identified at least three legitimate commercial reasons for such a clause:

> *"The first is that it prevents attempts to undermine written agreements by informal means, a possibility which is open to abuse, for example in raising defences to summary judgment. Secondly, in circumstances where oral discussions can easily give rise to misunderstandings and crossed purposes, it avoids disputes not just about whether a variation was intended but also about its exact terms. Thirdly, a measure of formality in recording variations makes it easier for corporations to police internal rules restricting the authority to agree them."*

121. Lord Sumption recognised that there might be circumstances in which a party was precluded by conduct from relying on a "no oral modification" clause but stated at paragraph 16 that this would require an estoppel to be established. Without examining in detail what would be required for such an estoppel he observed:

> "*the scope of the estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself; see Actionstrength Ltd v International Glass Engineering IN.G.LEN SpA [2003] 2 AC 541, paras 9, 51, per Lord Bingham of Cornhill and Lord Walker of Gestingthorpe."*

122. In *A v B* [2020] EWHC 2790 Foxton J held that a "no oral modification" clause precluded reliance on an informal promise as one of the ingredients of an estoppel claim.

123. I make two general observations. Firstly, Lord Sumption's observations provide important guidance but every case requires consideration of the terms of the particular clause in issue and the circumstances giving rise to the estoppel relied upon. Secondly, Lord Sumption, at least, appears to have been contemplating a possible estoppel arising from an informal promise or agreement which varies a contract. I can see a potential

difference between an estoppel as to the existence of a fact and an estoppel arising from an informal promise or agreement to vary a contract. Take this case, for example. At the time the parties acted on the basis that White Whale was a Permitted Transferee there was no intention by either Holdings or Mr Kodrič to modify the SHA and Side Letter at all. Preventing Mr Kodrič from denying that White Whale is a Permitted Transferee simply deems a factual circumstance for the purposes of the application of the SHA and Side Letter.

124. Looking more specifically at clause 18.5 it provides:

> "*The rights of each party under this deed may be exercised as often as necessary, are (unless otherwise expressly provided in this deed) cumulative and not exclusive of rights and remedies provided by law and may be waived only in writing and specifically*".

Clause 18.5 expressly preserves rights and remedies provided by law, at least if they do not impinge on the intention that any waiver of rights is to be in writing. When the parties acted on the common assumption or representation that White Whale was a Permitted Transferee neither Holdings nor Mr Kodrič waived any rights they had under the SHA or Side Letter. They did not modify the SHA or the Side Letter in any way. A determination by a Court that Mr Kodrič is not permitted to deny that White Whale was a Permitted Transferee would have implications for the legal rights that flow from the Side Letter and SHA, but that flows from a remedy provided by law, and the Court's determination, not a mutual dealing between the parties which clause 18.5 requires to be in writing.

125. Clause 22.1 of the SHA is not incorporated into the Side Letter. It defines which parties can make certain types of amendments to the SHA; some require the approval of all shareholders, some do not. Such amendments have to be in writing. But there was no amendment of the SHA at the time of the White Whale transfer. A determination by a Court that Mr Kodrič is not permitted to deny that White Whale was a Permitted Transferee simply does not engage clause 22.1.

126. I conclude that the "no oral modification" clauses in the SHA do not prevent Holdings from asserting, or the Court determining, that Mr Kodrič is estopped from denying that White Whale is a Permitted Transferee.

G) The claims based on the alleged First and Second Assurance

127. The Claimants contend that Holdings is estopped from exercising the call options in the Side Letter and the SHA because of the First Assurance. They say a promissory estoppel or an estoppel by convention arises. The Defendant disputes that the requirements for an estoppel are satisfied and also rely on the "no oral modification" clauses.

128. In light of the findings I have made I can deal with these contentions relatively briefly.

129. I have already outlined the requirements for an estoppel by convention. The doctrine of promissory estoppel applies to prevent a party who promises not to enforce their contractual rights from going back on that promise where certain requirements are met. Snell's Equity (34th ed; 2019), para 12-018 sets out the requirements as follows:

> *"Where, by his words or conduct, one party to a transaction (A) freely makes to the other (B) a clear and unequivocal promise or assurance that he or she will not enforce his or her strict legal rights, and that promise or assurance is intended to affect the legal relations between them (whether contractual or otherwise) or was reasonably understood by B to have that effect, and, before it is withdrawn, B acts upon it, altering his or her position, so that it would be inequitable to permit the first party to withdraw the promise, the party making the promise or assurance will not be permitted to act inconsistently with it. B must also show that the promise was intended to be binding in the sense that (judged on an objective basis) it was intended to affect the legal relationships between the parties and A either knew or could have reasonably foreseen that B would act on it. Yet B's conduct need not derive its origins solely from A's encouragement or representation. The principal issue is whether A's representation had a sufficiently material influence on B's conduct to make it inequitable for A to depart from it."*

130. In light of the findings I have made in relation to the First Assurance there was no clear and unequivocal promise by Mr Ghys that Holdings would not exercise the call options. Whatever was said was not intended to affect the legal relations between Holdings and Mr Kodrič and Mr Kodrič cannot have reasonably understood otherwise. Whatever was said has had no material influence on Mr Kodrič's conduct, because as I have found he did not at the time believe that he had received a binding assurance.

131. The Claimants' alternative reliance on estoppel by convention adds nothing to their claim based on promissory estoppel. This is because the supposed common assumption

is that Holdings had promised not to exercise its call options. In light of the findings I have made there was no such promise and no shared assumption to this effect. The conversation in New York had no material influence on Mr Kodrič's conduct.

132. The Claimants say that the Second Assurance amounted to a collateral contract or a contractual release of Holdings' call options. In light of my finding that there was no conversation at the end of the meeting on the 16 December in the way described by Mr Kodrič and there was no Second Assurance, these claims fail. There was no intention to contract. There was no bargain at all. Nor was there any unilateral waiver of rights by Holdings, or clear and unequivocal promise or assurance which might found an estoppel.

133. In light of the findings I have made there was no informal waiver of rights under the SHA in May or December 2019 which might have engaged the "no oral modification" clauses.

H) Conclusion

134. For the reasons I have given I conclude that the Claimants' claims fail and the Defendant's counterclaim succeeds. I will declare that Mr Kodrič is estopped from denying that White Whale is a Permitted Transferee for the purposes of the SHA and Side Letter and make orders requiring him to procure a sale of the Shares by White Whale to Holdings as he is required to do under the Side Letter in respect of a Permitted Transferee on the exercise by Holdings of its call options.

I) Postscript

135. After this judgment was provided in draft to the parties pursuant Practice Direction 40E of the Civil Procedure Rules, I received a Note on behalf of the Defendant inviting me to consider amending this judgment to make clear that Mr Kodrič and White Whale are estopped from denying that White Whale is a Permitted Transferee for the purposes of the SHA and Side Letter. The Note disclaims any attempt to re-argue the case, and it is presented on the basis that it might be an oversight that the judgment does not refer to White Whale being estopped. It is not. Suffice it to say that White Whale can only be estopped (assuming the other requirements of an estoppel are separately satisfied in respect of it, as opposed to Mr Kodrič, on which no submissions were made) if the email from Taylor Wessing was sent on behalf of White Whale (as well as Mr Kodrič) and

understood by Holdings to have been sent on behalf of White Whale. The Claimants do not admit the email was sent on behalf of White Whale in their Reply, and on the first day Mr Thompson made clear that his case was that it was not. The issue was thereafter barely touched upon in evidence, and where it did I was not satisfied that it established that the email was sent and understood to have been sent on behalf of White Whale. I will therefore not amend the judgment.