Neutral Citation Number: [2023] EWHC 1340 (Ch)

Case No: BL-2020-002146

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

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

Date: 5 June 2023

Before :

Sarah Worthington DBE KC(Hon) sitting as a Deputy High Court Judge

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Between :

HIKARI MISO (UK) LIMITED **Claimant**

- and –

(1) DAVID KNIBBS
(2) LYDIA SMITH
(3) PETER CONWAY
(4) PAUL NEWBERRY
(5) DAPHNE SMITH
(6) TIMOTHY LEVY
(7) ROXANA NICU
(8) SIMON BROWN
(9) STEPHEN KNIBBS
(10) CRAIG BURROWS
(11) SARAH BURROWS
(12) JAMES ATLAS
(13) GERRY TOMLINSON
(14) AMANDA COWBURN
(15) IAN YORK
(16) HAYLEY TIDESWELL
(17) LOGICAL RESOURCES FMCG

Defendants

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Mr Stephen Moverley Smith KC and Mr Edward Knight (instructed by **Pillsbury Winthrop Shaw Pittman LLP**) for the **Claimant**
Mr Graham Chapman KC and Mr Matthew Bradley KC (instructed by **Tyr Law**) for **D1 and D2**

and Mr Graham Chapman KC and Mr Matthew Bradley KC (instructed by **Gateley PLC**)
for **D3 to D17**

Hearing dates: 8, 9, 10, 14, 15, 16 March 2023

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FINAL JUDGMENT

Sarah Worthington DBE KC(Hon):

1. This case concerns the proper construction of a shareholder agreement, and a determination of whether there have been breaches of that agreement by any of the parties such as to trigger a compulsory buy-out of either the Claimant's or the First Defendant's shares. The only remedies sought by the parties are declarations in respect of these matters.

2. The parties to the dispute are all shareholders of R&R Tofu Ltd (the "**Company**"). On 10 October 2016, the parties and the Company entered into a Subscription and Shareholders' Agreement (the "**SSA**") pursuant to which the Claimant, Hikari Miso (UK) Ltd ("**HMUK**" or "**the Claimant**"), purchased 32.8% of the shares of the Company. The **Defendants** between them own all the remaining shares in the Company.

3. Under the SSA, certain corporate decisions are characterised as "**Reserved Matters**", with the Company unable to take any action in relation to those matters without the prior written consent of the holders of either 75% or 70% of the Company's shares, depending on the matter in issue. The relevant provisions in the SSA and the Company's Articles are set out in the **Appendix** to this judgment.

4. The parties have provided a comprehensive **Joint Statement of Issues** for the Court. The Court's conclusions on those issues are listed at the end of this judgment. For present purposes these issues can be briefly summarised under four principal headings:

   (i) How is shareholder consent to a Reserved Matter manifested?

   (ii) How, if at all, are individual shareholders and their nominee directors constrained in their voting on Reserved Matters?

   (iii) Which matters fall within the definition of Reserved Matters?

   (iv) Are the facts such that either the Claimant, HMUK, or the First Defendant, Mr Knibbs ("**D1**"), is in breach of the SSA such as to trigger the possibility of a compulsory buy-out of either the Claimant's or the First Defendant's shares?

5. The first three issues are almost entirely matters of construction applied to undisputed facts and aided by the relevant law on shareholder and director voting powers. The fourth issue requires those findings to be applied to the facts.

6. The Court was provided with a great deal of written evidence, including Board papers, minutes of Board meetings and emails between the parties and/or relevant third parties. Given the volume, it is impossible to rehearse exhaustively all the evidence put before me, but I endeavour to provide the essential background flavour to the dispute as well as referring to the evidence that is directly material to resolving the issues.

FACTUAL BACKGROUND

7. The Company's business is the production and distribution of tofu via its wholly-owned subsidiary, The Tofoo Company Limited. D1 and his wife, Ms Smith ("**D2**"), initiated the purchase of the Company in January 2016, when its turnover was c. £500,000 p.a. They had ambitious growth plans, and effected the purchase with the help of family and friends, who all became "**the B Shareholders**".

8. Several months later, in October 2016, HMUK invested c.£505,000 in the Company and became a shareholder, with all the shareholders thereafter holding their shares pursuant to the SSA. The SSA was drafted by HMUK's lawyers and thereafter negotiated by the Defendants' lawyers. The Company is also a signatory.

9. The Claimant and D1 and D2 hold "A" shares in the Company and the Third to Seventeenth Defendants, the B Shareholders, hold "B" shares, as follows:

    - the Claimant holds 32.8% in "A" shares;
    - D1 and D2 each hold 20.24% in "A" shares, for a total of 40.48%; and
    - the B Shareholders each hold in varying amounts the remaining 26.72% as "B" shares.

10. The Board comprises:

    - D1 as managing director of the Company;
    - D2 as executive director/commercial director of the Company;
    - Mr Hayashi ("**H**") as non-executive director and chairman of the Company, and HMUK's nominated representative on the Board; and
    - **Mr York** (D15) as non-executive director of the Company, and the Third to Seventeenth Defendants' nominated representative on the Board.

11. H is a Japanese businessman involved in the tofu and miso business in Japan, with plans to expand in the UK and Europe. He is the 80.8% beneficial owner of HMUK, which is itself wholly owned by a Japanese company called Hikari Miso Co., Ltd ("**Hikari Miso**"), of which H is the President and Representative Director (i.e. the CEO). Mr Takashi Hirono is another HMUK director.

12. HMUK is the sole owner of Dragonfly Foods Limited ("**DFL**"), which is another tofu products producer and distributor based in the UK. It produces a traditional, water-packed style of tofu popular in Japan, whereas The Tofoo Company product is a handmade artisanal style, marinated and more highly flavoured.

13. D1 and D2 are the husband-and-wife team providing the driving force behind the Company and its success.

14. As noted earlier, the SSA, in Schedule 3, lists certain Reserved Matters. The Company is unable to take any action in relation to those matters without the prior written consent of the holders of either 75% or 70% of the Company's shares,

depending on the matter in issue. The SSA in Clause 6.1 then obliges the shareholders to procure that the Company complies with this restriction.

15. Since HMUK holds over 30% of the total share capital in the Company, decisions in relation to all Reserved Matters will require its prior consent.

16. Whilst the SSA provides (at Clause 6.1(a)) that the prior written consent of shareholders is required if decisions on Reserved Matters are to be taken, Clauses 6.1(a) and 6.2 provide for such consent in writing to be deemed to have been given in certain circumstances, including (among other things) if a shareholder's nominated director present at a meeting of the Company's Board has approved the relevant action at a Board meeting (Clause 6.2(a)).

17. Until 2020, the Company's decision-making was relatively uncomplicated. Both HMUK and H participated in taking decisions in relation to Reserved Matters without any prior written request for consent (a "**Request for Consent**") being issued. Instead, they took such decisions by means of the shareholders' appointed directors approving such matters within the context of the Company's Board meetings – as provided for in Clause 6.2(a) of the SSA (on the Ds' case), although notably these decisions were invariably minuted specifically and distinctively as decisions on Reserved Matters requiring shareholder consent (although without a completely standard form of words being used in every case).

18. From early 2020, coinciding with the outbreak of the Covid pandemic, the Parties fell into dispute about certain Reserved Matters and the respective obligations of shareholders and directors in relation these. HMUK maintained (and continues to maintain) that the provisions of the SSA confers upon it a veto on Reserved Matters by virtue of the size of its shareholding. The Defendants, by contrast, insisted (and continue to insist) that the directors' fiduciary/statutory obligations under the Companies Act 2006 oblige the directors to act only in the best interests of the Company, and the SSA obliges the shareholders to procure that their nominee directors act accordingly. By extension, the Defendants insist that the Shareholders are obliged to procure that their nominee directors disregard, and re-decide, the outcome of a shareholder vote on a Reserved Matter if their nominee directors would *otherwise* consider the transaction to be in the best interests of the Company.

19. During the course of the dispute, D1, purportedly on behalf of the Company (although this is a matter of dispute), obtained legal opinions from Queen's Counsel; HMUK did likewise. The respective opinions failed to resolve the dispute.

20. The dispute continued to the issue of these proceedings, initially seeking only declaratory relief as to the effect of the SSA, and now including questions of whether compulsory buy-out rights have been triggered.

WITNESSES

21. H, D1, D2 and Mr York all appeared as witnesses within a four-day period. In summarising their evidence I have collated the principal issues addressed in each cross-examination regardless of the order in which the matters emerged. I have omitted issues which are not material to the decisions I am required to make.

Mr Hayashi

22. As already noted, Mr Hayashi (H) is a non-executive director of the Company and HMUK's nominee. He owns 80.8% of the shares in Hikari Miso, which is the sole owner of HMUK. H is thus in effective control of both these companies, although he made the point that he did not try to force his way in the decisions of either. Before his involvement in these companies, he worked in the IT industry.

23. H gave evidence for one and a half days via interpreters and simultaneous translation. He was calm and composed, and spoke slowly, deliberately and precisely. For example, he noted when two questions had been asked rather than one, and gave answers to each.

24. Language ability. The initial stages of questioning sought to establish that H's English was better than he was suggesting, and perhaps, by inference, that his claims in this regard were merely part of his, and HMUK's, "Strategy of Disruption" (see below, at [33]). H had spent a year in the US and 5 years in the UK. However, he indicated that his reading of English was far better than his spoken English, and that during his periods in the US and the UK all of his family life, much of his social life and some part (up to half) of his working life was conducted in Japanese.

25. From 2016-2020 all the contract negotiations and Board discussions had been conducted in English, but in 2020 when (as counsel for the Defendants put it) "the relationship broke down" H requested an interpreter. Under cross-examination, H agreed with the timing but not the reason, indicating that he needed assistance because there were increasing numbers of financial matters in issue. This is consistent with the facts: the Company's success posed increasing demands for additional resources to fund the planned growth. In addition, the SSA itself provided for H to be accompanied by an "HMUK Observer" at Board meetings, and the interpreter was only requested when Covid rules meant that this in-person Observer could no longer be present with him. In short, if the suggestion is that this move was part of the alleged "Strategy of Disruption", then I am not persuaded on this aspect of it. Wherever the realities lie, the language issue is not material to the matters before the court, although, for what it is worth, I consider that H is unlikely to be a fluent English speaker.

26. Means of agreeing Reserved Matters. The next set of questions was directed at showing that the usual means of agreeing Reserved Matters from 2016-2020 was by agreement between the relevant nominee directors given at the Company Board meetings, not by separate notification to the individual shareholders and then delivery by them of their written consents or vetoes: i.e. it was via some version of the deeming provisions in SSA Clause 6.2(a), not via Clause 6.1(a).

27. I accept this as a fact. The Board minutes confirm this. It is notable, however, that the occasions where this happened were invariably (it seems) minuted specifically as agreements on Reserved Matters, rather than the mere or usual decisions of the Company Board.

28. H agreed this was so. H was insistent that he, personally, did not have the authority to decide on HMUK's stance, but could only report the company's decision to the

Company Board, with that decision having been established in earlier discussions with HMUK's directors, and with those discussions made possible because notice had been given to H – via the Company Board papers – that this would be required. When he had the authority of HMUK to report their decision, he did so to the Company Board.

29. By contrast, in answer to the initial more general cross-examination questions, H was – as I understood the series of questions and answers – insistent that he could act personally, without recourse to others, in his role as a director of the Company at Company Board meetings. This was, I suggest, an example of H being careful to answer the precise questions asked of him. Legally, of course, his distinction is correct.

30. Growth plans. The next set of questions was directed at showing that, from the outset, H had had ambitions to expand the tofu business empire for the Japanese parent company, initially in the UK and then perhaps later in Europe, and that this was to be achieved via the acquisition of a majority stake in the Company. H acknowledged this ambition, and the desire to achieve 51% ownership of the Company, with the negotiated SSA giving HMUK an option (only open for a specified time) to purchase the B shares, with that acquisition, if successful, bringing the HMUK shareholding to exactly 51%.

31. H was particular in his evidence to note that he understood this to be an option only, not a right to purchase: i.e. after 3 years HMUK would have a right to acquire the B shares if, but only if, the B Shareholders desired or agreed to sell. By August 2019, as the three-year anniversary of the SSA approached, this was a material issue because of the timing limits in the Investor Option offer clause (Clause 11.15).

32. On the other hand, Brexit made the advantages of an acquisition less clear (as did Covid in early 2020). In addition, if the Company was to remain successful after HMUK's acquisition of the B shares, H would need D1 and D2 to remain fully engaged, since without them the business would not succeed. On the other hand, one clear advantage of a 51% holding, according to H, was that the three major banks in Japan that lend to Japanese companies invariably want those companies to have majority stakes in any overseas corporate interests.

33. A "**Strategy of Disruption**". The next series of questions was directed at showing that, if acquisition of the B shares could not be achieved via the Investor Offer Clause in the SSA, then it would be achieved by a "Strategy of Disruption". Counsel for the Defendants suggested this plan was to be achieved by relying on the Reserved Matters provisions in the SSA: HMUK would refuse to agree to any dividend distributions (at this stage all parties considered this to be a Reserved Matter, but see the discussion below) or to any further loans or capital expenditure. That would disappoint the B Shareholders, who were entitled to a priority dividend under the SSA, and would stunt the Company's growth, thereby reducing the value of the Company's shares, making HMUK's acquisition of a majority stake easier. For this plan to work it was necessary to convince the Defendants (especially D1 and D2) that HMUK would continue this stance until HMUK acquired a majority stake in the Company, and would do so notwithstanding that this might be seen as a "self-destructive" approach. In short, there was to be a "carrot and stick" strategy, which would at worst bleed the Company

dry, stunting its growth, so that its share price would drop, making acquisition by HMUK cheaper.

34. This Strategy of Disruption was said to be evident in a series of negative responses to Reserved Matter issues, all discussed later in this judgment.

35. The other major strand of evidence relating to this alleged Strategy of Disruption concerned a long run of emails between H and Mr Hirono. Mr Hirono was a director of HMUK, a paid consultant to HMUK and a person with extensive M&A experience. According to H, he was well-experienced in advising aggressively on the financing of share acquisitions and the options which might be open for acquisition at the lowest possible price. H was keen to insist – and repeated his insistence in response to almost every question – that Mr Hirono was speaking as an adviser, and that it was then up to H personally, or up to HMUK as a shareholder in the Company, to decide whether to act on that advice. In short, Mr Hirono's job, it was suggested, was to advise on the most aggressive strategy for acquisitions, even if the decision subsequently taken by H or by HMUK was not to accept that advice.

36. In support of this being an accurate reflection of the relationship, H indicated that Mr Hirono's strategy was to starve the company of capital, yet from 2018-2020 every single request for capital had been agreed, and in 2021 87% had been agreed, and in 2022 73% had been agreed.

37. By contrast, counsel for the Defendants noted in detail the aggressive language used by Mr Hirono: he had described the BDO valuation of R&R, leading to an estimated share price of £6-£8 per share (compared with HMUK's contemplated offer of £4 per share) as "total fantasy", accused D1 of "childishness" and being "paranoid", and threatened "psychological warfare" and "hog-tying management" until they complied with HMUK requirements, and further suggesting dissembling that the real reason for refusing dividends and debt finance was the external economic environment, not this strategy to bleed the Company dry.

38. In response to all this, H maintained his insistence that this *was* advice only, the advice was frequently not followed, and that, in those few instances where HMUK had refused to agree to Reserved Matters, the timing was a mere coincidence and the real reason for the decision was indeed the external economic environment in 2020 when Covid was bringing great uncertainty.

39. Challenging this, counsel for the Defendants noted that H had often seemed to agree with Mr Hirono's proposals, wording his replies in the vein of – to take one illustration – "Thank you for your help. I agree with the direction that you have advise[d]". In response, H said that, in the Japanese context, this does not mean that there is agreement with the whole message, only that writer agrees to "consider"; here all that H was conceding was that he understood the "methodology" behind the advice, not that he agreed that the advice should be followed. Indeed, he pointed out he had no authority to follow the advice on behalf of HMUK without the consent of the HMUK board, and the facts suggest that the HMUK Board often *declined* to follow this advice, as they gave their agreement to Budget plans, capital expenditure and bank loans in whole or in substantial part, admittedly (but quite properly)

sometimes only after receiving further information as requested from the Company on some of these matters.

40. H also noted that Mr Hirono's advice could not have been directed solely to H for use by H on the Company Board, since these were Reserved Matters, not matters to be decided by the Company Board on which H sat as an individual.

41. H's role as a director. The next issue addressed in questioning was the suggestion that, in acting as he did in refusing to give consent to "**the Five Reserved Matters**" (described and discussed later in this judgment) H was, and knew he was, acting against the interests of Company and thus in breach of his fiduciary duties as a director.

42. This line of questioning raised one of the email exchanges where Mr Hirono had noted that the strategy of refusing to agree to external finance was not in the interests of the Company. H repeated that this was advice, not HMUK's strategy, and that although a refusal would be detrimental to the Company, HMUK had, to the contrary, approved a good number of external loans. Counsel for the Defendants persisted, asking whether a refusal to agree to increase external financing was inconsistent with "the spirit and intent" of the SSA, which was to "grow" the Company. H's response was indicative of his care in these matters. He noted there were two questions here, one on the strategy to grow the Company and one on the place of Reserved Matters, and counsel's questions were mixing objectives and process as if they were one and the same thing. Instead, whatever the objectives, the SSA set out a process for decision-making, giving the shareholders a veto over Reserved Matters.

43. In the many follow-up questions on this matter it was clear that H appreciated the duties imposed on directors, but insisted that decisions on Reserved Matters were for the shareholders, not for the Board, and that maintaining this clear separation of issues – as had been done even in the more informal practice in earlier Board meetings on Reserved Matters – was more "efficient".

44. This clear separation was the intent behind the prepared statement which H subsequently read out to a 2020 Board meeting indicating that he would appear at the Board only as a director of the Company and not as the representative of HMUK, who would need to provide its own response to Reserved Matters directly to the Company: see the discussion below.

45. Other issues raised in cross-examination are either dealt with below or are not essential to the decisions which need to be made by the Court.

Mr Knibbs

46. As already noted, Mr Knibbs (D1) is the Managing Director of the Company and owns 20.24% of the Company's shares. He gave his evidence calmly and confidently, without hesitating over his answers. He was quick to accept points that were plain on the face of the evidence, whether they went against him or not, and yet equally quick to expand where he thought nuance was needed. He was in command of the detail of documents relating to the business, with this same approach to the Company's business reflected in the detail that had been delivered over the life of the Company in

Board papers, Board minutes, and emails explaining the issues to directors or shareholders. He was cross-examined for a little over half a day.

47. Tensions between D1, D2 and HMUK. The first series of questions was directed at D1's understanding of the tensions in the relationship between D1 and D2 and HMUK right from the outset, with the two sides having opposing interests to the knowledge of both. On one side, it was suggested, D1 and D2 needed further funding of £0.5m to operate their newly acquired Company, yet they both wanted to be "dancing to the beat of our own drum", be "our own boss", be "masters of our own destiny", whereas an equity funder would impose limits on that. Moreover, after the initial essential investment by HMUK, D1 and D2 did not want their interests in the Company further diluted: the Company was their retirement pot, and so – it was suggested – they preferred non-equity financing in their own interests rather than taking on what would be, for the Company, cheaper alternative equity financing. On the other side, HMUK was, from the outset (at least by the time of the actual investment, although perhaps not during negotiations), both a competitor company (given its interest in DFL) and a company intent on obtaining a majority stake in the Company. This latter ambition was evidenced by the negotiated right to make an offer for the purchase of the B shares after 3 years (SSA Clause 11.15), and the ability to then appoint three directors (SSA Clause 8.2(a)). It was also evident more generally in the strict terms of the SSA which had been drafted by HMUK's lawyers and fully negotiated by both sides. This protected HMUK's position within very tight financial constraints (especially given the low financial limits on hire purchase and other loans, employee remuneration and capital expenditure as set out in the Reserved Matter clauses). There were also provisions in both the SSA and the Articles which acknowledged and accepted that HMUK's fully owned subsidiary, DFL, could compete with the Company (SSA Clause 14.4 and Articles Clause 17).

48. D1 responded that the idea of "dancing to our own drum", and so on, were *Company* values, and had been from the outset, with the intention that the Company could act independently and be fleet of foot in growing in a rapidly expanding market; that initially HMUK had not taken an initial higher equity stake as that could have changed the nature of the endeavour, but that from then on (and bar HMUK's negotiated Investor Offer Clause) no shareholders wanted to be diluted, as all wanted a substantial share of the early rapid market growth; that it was for that reason that he preferred debt funding or differently structured private equity funding in the early stages, but equity funding later, within the three year plan, although he had always been open to all options (noting that this open approach was reflected in the report requested from BDO, which covered all options); that he understood the DFL competition aspect, but both he and HMUK were intent on growing the tofu market generally, and there was space for everyone to operate, and no need to worry about divergent views; that he understood the SSA could be used aggressively, and in HMUK's own interests, and was written that way; that the B Shareholders *might* all sell, leaving D1 and D2 with a minority stake which would change the landscape (but noting that this was a possibility, not a settled outcome, and both HMUK and D1 and D2 had put option backstops which entitled them to exit at fair market value if they remained or became minority shareholders (SSA Clause 11.16 and 11.17); that D1 and D2 had day-to-day management, within the parameters of the SSA constraints, and their focus was on Company growth, not their own separate and different

interests; that he was *not* minded to run the Company informally, as suggested by counsel, and that could be seen from Board papers and minutes, although it was also true, especially in the early stages, that the SSA and Reserved Matters were not to the forefront in thinking about governance and impediments to operations.

49. Given this mood between the parties, D1 indicated that he was then "absolutely stunned" and "completely and utterly shocked" to receive the 2020 email from H which indicated, in short, that, at law, the shareholders controlled the management, and if D1 and D2 wanted the independence they desired they could have that only through 100% shareholder ownership. This email exchange continued until March 2020, with a file note of a conversation between D1, D2, H and Mr Hirono indicating that if D1 and D2 did not do what was wanted there would be shareholder management according to the strict terms of the SSA. The result was to make D1 and D2 feel that a "threat" had been issued, and they were "gobsmacked" after 4 years of cordial relationships.

50. Whether D1 had resisted equity financing in 2020 and 2021 for self-interested reasons. This series of questions began by noting a February 2020 email between D1, D2, H and Mr Hirono. The relevant discussion centred on D1 and D2 wishing to understand their own position if HMUK became a majority shareholder. This strikes me as a perfectly predictable discussion, whether as between shareholders or as between shareholder and management, in the context of a shareholder moving from minority to majority ownership. As D1 pointed out, the SSA did not provide for this situation: D1 and D2 had a put option enabling exit (see above), but otherwise no planned outcome was laid out in the SSA.

51. The "surprise" presentation by BDO to the Board. This presentation took place in November 2019, and included an estimated share valuation for the Company which gave what HMUK thought was an unrealistically high valuation. The suggestion was that this had been sprung on H without notice, and was done in order to deter the B Shareholders from accepting an offer from HMUK, which was likely to be far lower (and indeed, when made, was far lower). However, the contemporaneous documentary evidence is to the contrary. There was a minuted Board discussion concerning the need to obtain advice on the financing options to fill a £2m funding gap, BDO was asked to provide that advice, and that advice included an indicative share price, but not a formal valuation. In any event, this issue is not material to the decisions the Court is asked to make.

52. The usual manner of agreeing to Reserved Matters at Board meetings. D1 indicated that there was no standard language used at Board meetings or in the Board minutes, but it was always clear that the parties appreciated what they were doing, and whether they were agreeing to a matter as a Board issue or alternatively agreeing to a Reserved Matter as shareholders, with the directors merely reporting shareholder views. The minutes support that distinction. As D1 said in evidence, it was recognised that the shareholders needed to vote, and that was ensured by the process they adopted.

53. Further questions. D1 was asked a good number of further questions on the decisions taken in relation to dividend distributions, the employment of Mr Eastwood, issues of capital expenditure (whether as Reserved Matters or otherwise) and the associated hire purchase agreements, and on seeking legal advice from Eversheds in 2020. This

evidence is all picked up later in this judgment in the context of those specific issues. The closing questions related to D1's plans in respect of any buy-out if he wins the case: his intentions are not material to the issues before the Court.

Ms Lydia Smith

54. Ms Smith (D2) was cross-examined only briefly. As already noted, D2 is the other executive director of the Company. She gave her evidence confidently and concisely, even when she needed to correct herself (see below).

55. The employment of Mr Surry and Ms Smith. The first issue raised in questioning was the employment of two people by the Company in 2020, both on salaries over £35,000, and so both engagements being Reserved Matters under the SSA Schedule 3 Part D. These two roles were a Head of Purchasing (£52k pa, eventually filled by Mr Surry) and a Business Manager (£55k pa, eventually filled by Ms Simone Smith, D2's sister).

56. D2 was taken through various documents which indicated the chronology of these appointments, starting with the February 2020 documents for the intended Budget Presentation to the Board on 23 March 2020. These documents named the two roles to be filled, but did not specify the intended individuals to be appointed, although the Head of Purchasing was noted as already identified. The salaries and on-costs, and how those would be funded, were noted briefly, as was the fact that both appointments needed approval as Reserved Matters.

57. The subsequent minutes of this 23 March 2020 Board meeting were sent out on 8 April, and record these plans at paragraph 9. This paragraph notes H's request that any decisions in relation to the issue of employee shares after the 6-month qualifying period should be brought back to the Board. (I note that this would in any event have been required under the SSA Schedule 3 Part D, Clause 26, as a distinct Reserved Matter.) Finally, paragraph 9.3 records that "It was unanimously agreed under reserved matters that the Management could hire these two new roles." This becomes important to later disputed matters, since H denies that such an agreement had been reached.

58. The legal issues relating to these employment contracts are considered later in this judgment. Here I note only one further point. In the exchange of emails whereby D1, D2 and Mr York all confirmed that the agreement to appoint had been unanimous, D2's reply said that she had made a note accordingly and that "then I did the offer letters and sent out following the board meeting". As counsel for the Claimant noted, and D2 herself immediately conceded, she should not have said "letters" as she had sent out only one letter, to Mr Surry, but no letter to her sister, Ms Smith. If this need for correction was implicitly intended to raise an inference of more general unreliability, or even dishonesty, I did not find it did so.

59. The further brief questions put to D2 concerned D1's instructions to Eversheds in 2020, with that detail noted later in this judgment, and questions on her plans to sell her shares, perhaps to private equity parties. Again, the latter is not material to the issues before the court.

Mr Ian York

60. Mr York (D15) is a non-executive director of the Company and the Third to Seventeenth Defendants' nominated representative on the Board.

61. He was cross-examined for only a very short time. I found him straightforward in his answers, although perhaps more inclined than the other witnesses to want his answers to favour the Defendants. As matters would have it, there are no issues on which his evidence is material to the decisions needing to be made; he merely corroborated matters already exposed in the written evidence or explored with the other witnesses.

Mr Stephen Wickham

62. Mr Wickham was not cross-examined, but the evidence for this hearing included his witness statement. Mr Wickham was the Managing Director of DFL from January 2019 to January 2022. His witness statement was confined to specific matters deemed relevant to these proceedings. Its delivery required a court order with associated special arrangements in respect of Mr Wickham's non-disclosure agreement with DFL. Since Mr Wickham was not cross-examined, counsel for the Defendants requested me to note Mr Wickham's evidence as admitted, unchallenged. Even on that basis, however, I did not find it assisted the Defendants' case.

63. In applying to the court for permission to obtain Mr Wickham's witness statement, D1 and D2 indicated that Mr Wickham could give evidence on the Claimant's implementation of its Disruptive Strategy. In particular, he could give evidence that HMUK had pursued this strategy by means of an aggressive expansion of DFL operations that was deliberately intended to be detrimental to the Company. This strategy was further evidenced, it was suggested, because "the Claimant took a different view of macro-economic factors in one company than the other … advocat[ing] a highly cautious approach to capital investment and expenditure in relation to the Company, whilst implementing a far more expansive approach to the same matters in relation to [DFL]".

64. I do not regard Mr Wickham's witness statement as providing the support anticipated. Mr Wickham says "I wasn't aware of any strategy of HMUK's as regards [the Company] as such", which is notable in itself, and then immediately continued, "but I was frequently reminded in conversations I had with [H and Mr Hirono] that I had an "A class" site and that I should therefore be stealing sales and making significant progress as against [the Company]." This too is unsurprising, given the two companies are both in the market for tofu, and that direct competition between the Company and DFL was specifically noted and permitted in the SSA and in the Articles (SSA Clause 14.4 and Articles art 15). Active competition is thus to be expected, and thus cannot itself be evidence of a "Strategy of Disruption".

65. Mr Wickham then continued, "I remember a call where Takashi Hirono told me that they were holding back on their investment in [the Company] and that they were going to actively restrict that investment so that we had the best chance of securing sales." This approach is expressly attributed to Mr Hirono, not to H or HMUK. Regardless, Mr Wickham's further evidence fails to indicate any relative favouring of DFL over the Company. Instead, despite an initial £4.5 million investment in DFL,

Mr Wickham was by April 2021 subject to a spending restriction of £1000 without director approval (i.e. a dramatically more constrained financial position than that imposed on the Company by the Reserved Matters provisions), and, although all requests were agreed, Mr Wickham's list of four illustrative expenditures amount in total to only £102,000. This is hardly illustrative of a strategy of aggressive expansion of DFL operations that was deliberately intended to be detrimental to the Company, or of an expansive approach to capital expenditure in DFL when compared with the approach taken in relation to the Company.

66. The concluding section of Mr Wickham's witness statement is headed "Personal vendetta", but notes only that "Without a doubt, there was an expectation that HMUK would become the owners of [the Company]", that a new managing director would then be put in place, but not while D1 and D2 were there, and that "I know [D1's] character and how driven he is. I have little doubt that he would be a difficult person to influence and that he would stand his ground on a point of disagreement." None of this is evidence of a personal vendetta between the parties.

FINDINGS

Contractual interpretation of the SSA: the relevant law

67. The issues to be decided by the court were outlined briefly at paragraph [4] above. The first three matters are largely questions of law relating to the interpretation of the SSA, especially Clause 6 and certain clauses of Schedule 3. Since the law on contractual interpretation is not disputed by the parties, the authorities need not be cited in detail. The Supreme Court in *Sara & Hossein Asset Holdings Ltd* v *Blacks Outdoor Retail Ltd* [2023] UKSC 2, at [29], confirms that the relevant principles of interpretation are authoritatively set out by Lord Hodge in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173, at [10]-[15]. The Supreme Court's earlier decision in *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619, at [15]-[23], also assists.

68. So far as material to the present case, the relevant principles may be summarised as follows:

> (1) The contract must be interpreted objectively by asking what a reasonable person, armed with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean.
>
> (2) The court must consider the contract as a whole and, depending on the nature, formality and quality of its drafting, give more or less weight to elements of the wider context and commercial common sense in reaching a view as to its objective meaning.
>
> (3) In adopting this approach, interpretation is a unitary exercise which involves an iterative process by which each suggested textual interpretation of the natural language is checked against the provisions of the contract, and its practical implications and consequences are investigated.

(4) Used in this way, textualism and contextualism are not conflicting paradigms, but merely tools to ascertain the objective meaning of the language the parties have chosen. The usefulness of each will vary according to the circumstances. Some agreements, because of their sophistication and complexity, and because they have been negotiated and prepared with the assistance of skilled professionals, may be successfully interpreted principally by textual analysis. Others, perhaps because of their informality, brevity, absence of professional assistance or, even with professional assistance, textual infelicities and uncertainties, may require greater emphasis on the factual matrix.

(5) Importantly, however, contextualism should not be invoked retrospectively to depart from the clear natural meaning of a provision: the court must be alive to the possibility that one side may have agreed to something which is, or turns out to be, imprudent, even disastrously so; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise, or that the negotiators were not able to agree more precise terms (see *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619, [18]-[20]).

The contextual detail evident from the SSA itself

69. Here, the SSA is skilfully drafted and notably detailed, perhaps surprisingly so for what was in 2016 a relatively small corporate endeavour. D1's evidence is that the Defendants appreciated this at the time. Both the SSA and the Company's Articles were tightly negotiated by the parties' lawyers. The SSA contains an entire agreement clause, a non-reliance clause with an associated waiver of rights, a clause denying that the SSA creates any partnership between any of the signatories, and a clause giving the SSA supremacy over the Articles if there is any inconsistency. This latter clause also obliges the shareholders to amend the Articles to conform with the SSA, and prohibits them, to the extent permitted by law, from exercising any rights under the Articles which are or may be inconsistent with the SSA. The proposed Articles (in the same form as those adopted) are included in the SSA in Schedule 4, and the SSA is signed by all the shareholders and by the Company. All of this suggests that the textual analysis of the SSA should be the primary guide to its interpretation unless there are insoluble ambiguities.

70. So far as is material to this hearing, the SSA makes detailed provision for the management of the Company, including provisions relating to voting on Reserved Matters, being matters which the Company cannot undertake without the consent of holders of either 75% or 70% of the shares in the Company, the percentage depending on the Reserved Matter in issue: in relation to these Reserved Matters, see especially Clause 6 (over 3 pages long) and Schedule 3 (2 pages long), considered in detail below.

71. The SSA also makes detailed provisions for many other matters, including:

(1) The *appointment and replacement of directors*, including provision for an increase in the number of HMUK-nominated directors should HMUK acquire a 51% stake in the Company (Clause 8, especially Clause 8.2).

(2) The *transfer of shares* in all manner of circumstances, including a clause making it a condition precedent to any transfer to a third party that the third party agrees in writing to a Deed of Adherence to the SSA (set out in Schedule 6). These share transfer provisions occupy 10 pages of the SSA, and include details of HMUK's exceptional option to purchase the B shares after the three-year anniversary of entering into the SSA (exceptional in the face of the pre-emption rights otherwise applying to transfers), HMUK's time-limited Put Option if for any reason HMUK did not then acquire 51% (even if it had made no offer to purchase the B shares), and D1 and D2's time-limited Put Option should HMUK acquire 51% by this route. (See Clause 11, especially Clauses 11.15-11.17.)

(3) The *employment of D1 and D2* by the Company (with their proposed Service Agreements included in Schedules 8 and 9 of the SSA), with future matters (subject to the Reserved Matters in Schedule 3) determined by a Remuneration Committee made up of H and Mr York (for so long as they are directors), and otherwise by an HMUK director and a B Shareholders' director, with D1 and D2 not entitled to make any decisions in relation to these contracts (Clauses 6.10 and 6.1(b)).

(4) A wide prohibition on the shareholders, or their associates, engaging in any way in *competing businesses* while they are shareholders and for 18 months thereafter, but with an exception for HMUK so far as it is interested in DFL (acknowledged in the SSA to be in "direct competition" with the Company) or is interested in any other businesses which do not produce or sell tofu products.

72. The Articles are less detailed, but they too make specific provision for directors' conflicts of duty and interest in various circumstances, including those arising from transactions or arrangements with the Company, and from the nomination of the director by one or more shareholders, all this occupying over 2½ pages of the document.

73. It is thus plain on the face of the SSA that the parties contemplated the current shareholding would likely continue from the signing of the SSA for a period of 3 years, that then HMUK would have the right to make an offer for the B shares, which, if accepted by a sufficient number of B Shareholders, might give HMUK a 51% stake in the Company (and perhaps a 59.52% stake if all the B Shareholders sold their shares). At that stage, HMUK would be entitled to appoint three directors rather than one, D1 and D2 would remain as directors (or be entitled to appoint directors in their place, subject to the SSA rules on that), and the B Shareholders would have necessarily dropped below a 5% holding and would not be entitled to appoint a director at all. At that stage, therefore, HMUK would have a majority of shares and a majority on the Board. In those circumstances, however, D1 and D2 would have the protection of the veto power delivered by the Reserved Matters in Schedule 3, or, alternatively, the benefit of a time-limited Put Option, requiring HMUK to buy them out at the same Fair Market Value that HMUK had paid the B Shareholders (Clause 11.17). If D1 and D2 adopted this approach, then HMUK could become the 100% owner of the Company. But none of this was guaranteed.

74. The SSA also made provision for the alternative scenario. If the three-year trigger point did not deliver 51% of the shares to HMUK, either because HMUK made no

offer to the B Shareholders or because insufficient B Shareholders accepted its offer, then HMUK would have the benefit of a time-limited Put Option requiring either D1 and D2 or the Company to purchase all its shares (Clauses 11.15 and 11.16).

75. In short, HMUK had the *right* to an exit strategy if its possibility of acquiring majority ownership failed at the three-year point, but, if that possibility succeeded, then it perhaps also had a reasonable chance of becoming the 100% owner of HMUK, given the evidence that, from the outset, D1 and D2 wanted to be their own bosses, and in any event had plans at some stage to cash in their "pension pot" investment in the Company, and might therefore decide do that early. But, again, none of these steps to 100% ownership by HMUK was guaranteed. Moreover, as matters now stand, the time frame for the Put Options on either side has well and truly passed, and the SSA has no equivalent on-going provisions for a neat SSA-managed exit by HMUK or D1 and D2.

76. In summary, and as reflected in the SSA, the shareholders were clearly interested in the success of the Company, otherwise they would not have made the investments they did. But they were also interested in their own respective further acquisitions or dispositions of shares. Both have significant financial consequences for the individual shareholders concerned, and the SSA is an agreement which gives significant prominence to both issues.

Construction of the SSA and its operation

77. I turn now to the detailed analysis of the construction of the relevant SSA provisions. Given the focus of the disputes between the parties, Clause 6 and Schedule 3 are the most significant parts of the SSA for present purposes, alongside a number of other related provisions. The SSA must be construed in order to determine (i) the *significance* of a matter being designated a "Reserved Matter" (see especially Clauses 6.1(a) and 6.7, and Schedule 3); (ii) the ways in which shareholder consent to a Reserved Matter is *manifested* (see especially Clauses 6.1 and 6.2); (iii) the constraints, if any, imposed on shareholders or their nominee directors via the SSA, the Articles or the general law in exercising their powers to consent to or veto Reserved Matters (see especially Clauses 6.4, 6.7 and 15.1(b)); and, of course, (iv) whether the matter in issue does in fact fall within the *definition* of a Reserved Matter. All the relevant parts of these provisions are set out in the Appendix to this judgment.

The significance of "Reserved Matters" in the management of the Company

78. The first issue in dispute between the parties is whether shareholders holding more than 25% or 30% of the shares (as applicable to the particular Reserved Matter) have the right to veto any activity that falls within the definition of a Reserved Matter. This is a self-standing issue. *If* there is such a veto right, it will then be necessary to consider the other matters noted in the previous paragraph.

79. Here, as is common with most shareholder agreements, the SSA provides for a number of Reserved Matters. These are listed in the SSA, Schedule 3, Parts C and D. According to the bold text in those two Parts, these are "matters which no Group Company [i.e. for present purposes the Company and its trading subsidiary] can

undertake without the consent of the holders of [75% or 70% respectively] of the shares". The plain meaning of that assertion is obvious. The Company *cannot* – and so *must not*, whether via its Board or any Board delegate or any other agent of the Company – undertake any of the matters listed in Schedule 3 without the requisite consent of the shareholders.

80. Clause 6.1(a) is the provision in the SSA which initiates resort to Schedule 3. So far as relevant it provides that:

> "**6 MANAGEMENT**
>
> **6.1 Board and Shareholder approval**
>
> (a) The overall management of the Business shall be carried out by the Board and, to the extent permitted by law and without prejudice to any other provisions of this Agreement, the Shareholders shall procure that no Group Company shall take or agree to take any action referred to in Schedule 3 (*Reserved Matters*) except with the prior written consent of [the holders of the requisite percentage of the Shares at any one time in respect of the matters listed in Parts C or D of Schedule 3 (*Reserved Matters*)] …
>
> **6.7 Reasonable endeavours**
>
> Where, under this Agreement, any Shareholder undertakes to procure any action on the part of the Company, that Shareholder shall be deemed to have complied with that undertaking if it has used its reasonable endeavours to procure such action including, without limitation, proposing and voting in favour of all relevant and necessary resolutions."

81. Again, the meaning of Clause 6.1(a) is plain on its face. Although the overall management of the Company's business lies with the Board, the shareholders are to procure that "no Group Company shall take or agree to take any action" in relation to a Reserved Matter without the requisite consent of the shareholders. Without such consent, the Company cannot act, and the shareholders must procure that it does not so act, and, by necessary implication, that its Board or other agents do not so act.

82. Further, since the necessary consent to act must meet a percentage threshold, a shareholder who holds sufficient shares to block that consent can, effectively, veto the required consent. Such a veto will deny the Company the ability to undertake any action on the relevant Reserved Matter, and, equally, will require those parties who are also signatories to the SSA to procure that the Company does not "take or agree to take" such action if they do not wish to be in breach of their obligations under the SSA.

83. The practical ramifications of this veto power are potentially dramatic. That merits consideration of the wider context of the SSA agreement, and the context in which it was negotiated.

84. Schedule 3 Part C (75% consent required) lists six Reserved Matters, all being matters typically found in shareholder agreements. These cover variations to the Company's articles or to class rights; ceding control over material parts of the business, or publicly listing or winding up the business; or distributing dividends in a manner not covered by the SSA or the Articles. This provision on dividends is considered later. On current Company shareholdings (unchanged from the date of commencement of the SSA), HMUK acting alone could block any of these matters, as could D1 and D2 acting together, or the B Shareholders acting together (they hold 26.72% of the shares).

85. By contrast, Schedule 3 Part D Reserved Matters (70% consent required) is much more focused. It lists 28 Reserved Matters, all primarily operational matters. Some of these describe activities which would be contrary to specific provisions in the SSA, or not in the ordinary course of business of the Company, but many others simply impose strict financial limits on the activities which may be undertaken by the Company without first obtaining the consent of 70% of the shareholders. These include paragraphs prohibiting the Company from entering into loans over £30,000, or agreements to pay remuneration in excess of £35,000, or capital expenditure in excess of £100,000, or property transactions with a value or annual rental in excess of £10,000 (with these examples omitting any nuance in the drafting, but that is discussed later). In addition, the Company cannot make any material changes to its business, or establish or close any business operations, or make any payments or awards pursuant to its agreed employee option and incentives scheme without the consent of 70% of the shareholders. Finally, the Company must have an annual Business Plan (or Budget), and this cannot be adopted or varied without the consent of 70% of the shareholders. All these Reserved Matters can be blocked by HMUK acting alone, or otherwise by various combinations of the Company's shareholders acting together.

86. These operational matters all impose tight limits on what would otherwise be the usual freedom of the Company to undertake the activities in question, whether through its Board or its authorised executives. These types of reserved matters are not uncommon levers of control when an outsider injects equity capital into a company in circumstances where the new investor will have no executive role and no control of Board decisions.

87. In cross-examination, D1 agreed that the SSA, taken as a whole, represented a negotiated quid pro quo, whereby HMUK, being an investor injecting c.£500,000 into the company, and indeed taking fewer shares than that input might seem to represent, would agree to leave day-to-day management of the Company to D1 and D2, and yet would retain a degree of at-a-distance control over the Company's operations. As D1 noted in his 26 August 2020 email to Eversheds, this is "the tight set of reserved matters we have (that were written for a fledgling Company of £600k turnover)." D1 could not remember quite how the financial limits had been settled, or who had first proposed the figures, but he agreed that for a business that was turning over half a million pounds (as the Company was at that initial stage), and with the sort of business plan it had in place, "those sorts of numbers seemed sensible". They may have seemed less sensible several years later for a company turning over c.£18 million pa, and yet amendments to the SSA would require the agreement of all the parties to it.

88. Thus the Reserved Matters gave HMUK a powerful means of control over the Company's activities. This protection, negotiated when HMUK was a minority shareholder with only one director on the Company's Board, might seem less necessary should HMUK ever become a majority shareholder with the power to nominate three of the five Board directors. At that stage, however, D1 and D2 would be minority shareholders with a minority on the Board, and they might find value in the control delivered by having these same means of limiting the Company's activities. Given the clear evidence that HMUK wished at the outset (and still wishes) to become a majority shareholder in the Company, the drafting of the provision on Reserved Matters, giving veto powers on important operational and growth matters to a shareholder cohort commanding more than 30% of the vote, provides its own "checks and balances" in protecting both sides to the deal as their circumstances changed.

89. It is worth pausing here to highlight one strand in the Defendants' argument that is material in the later discussion of the possible constraints on the exercise by shareholders of this veto power. Counsel for the Defendants, in closing, suggested that the plain meaning of the words, giving such a such a powerful means of control to HMUK, *must* come with a severe constraint or fetter on the exercise of that power (a matter considered later) because otherwise the SSA provides a purely one-sided protection for HMUK alone, and a one-sided right of veto which it could potentially use to destroy the Company. That possibility, counsel for the Defendants suggested, raises the question of "whether the parties really did make such an extraordinary bargain which permits such an extraordinarily unjust result". They suggest the parties did not, and it was preferable to see the SSA as "providing for checks and balances for the benefit [and] protection of all parties to the SSA". As explained above, however, although the power delivered by way of the Reserved Matters is undoubtedly substantial, it does work both ways in the clearly contemplated possible futures for the shareholders, and cannot therefore be said to deliver "an extraordinarily unjust result". The fact that the present situation may not have been anticipated does not change matters: see paragraph [68(5)] above.

90. In short, there is nothing in the broader context of the SSA, or in the evidence presented at trial, which suggests that the straightforward and unambiguous textual construction of the SSA in relation to Reserved Matters should be revisited.

91. It therefore follows that the answer to Issue 1(a) is clear:

> **Issue 1(a)**: "Whether the Shareholders of more than 25% or 30% of the shares (as applicable) have the right to veto any activity that falls within the definition of Reserved Matters."
>
> **Answer: Yes.**

Means of manifesting shareholder consent to Reserved Matters

92. The previous discussion makes it plain that the Company cannot take action in relation to a Reserved Matter unless it has the consent of the required majority of shareholders. The SSA then focuses on how consent is manifested. The terms of the

relevant clauses appear straightforward, but the parties have asked for determinations on specific matters and so I examine the provisions in more detail that would otherwise be necessary.

93. Clauses 6.1(a) and 6.2 are the only relevant clauses in respect of this issue. They provide as follows:

> "**6 MANAGEMENT**
>
> **6.1 Board and Shareholder approval**
>
> (a) The overall management of the Business shall be carried out by the Board and, to the extent permitted by law and without prejudice to any other provisions of this Agreement, the Shareholders shall procure that no Group Company shall take or agree to take any action referred to in Schedule 3 (*Reserved Matters*) except with the prior written consent of (a) the holders of 75% of the Shares at any one time in respect of the matters listed in Part C of Schedule 3 (*Reserved Matters*) and (b) the holders of 70% of the Shares at any one time in respect of the matters listed in Part D of Schedule 3 (*Reserved Matters*). The Shareholders agree that they shall communicate their decision in respect of any request for consent to any of the matters referred to in Schedule 3 (*Reserved Matters*) not later than 14 days after receipt of a written request specifying the matter in respect of which consent is requested, failing which they shall be deemed to have consented to the relevant matter.
>
> …
>
> **6.2 Deemed Shareholder approval**
>
> For the purpose of Clause 6.1 (*Board and Shareholder approval*) a Shareholder shall be deemed to have consented in writing to any action referred to in Schedule 3 (*Reserved Matters*) if:
>
> (a) all of the Directors appointed by it under Clause 8 (*Appointment of Directors*) present at any meeting of the Board, have approved such action at such meeting (whether in writing or not); or
>
> (b) the consent in writing is signed by that Shareholder or on behalf of that Shareholder by any of the Directors appointed by it under Clause 8 (*Appointment of Directors*) or any other person notified in writing by the Shareholder to the other parties for the purposes of this Clause; or
>
> (c) the consent in writing is signed, in the case of a B Shareholder, by the Existing B Shareholders' Representative; or
>
> (d) such action is specifically provided for in the Business Plan."

94. It is plain from the language of Clause 6.1(a) that in neither the first or second sentences of that Clause is there a *requirement* for anyone to issue the shareholders

with "a written request specifying the [Reserved Matter] in respect of which consent is requested". Of course, until there is the requisite written consent, the Company will be constrained in the activities it can undertake in respect of any Reserved Matters. The Board (or its delegates) will therefore be motivated to communicate with the shareholders by appropriate means, but the SSA does not specify what those means must be.

95. Instead, the SSA, in Clauses 6.1(a) and 6.2, focuses on how the requisite written consent may be manifested. If written consent (or refusal) is received from the shareholders themselves, then there is no issue: the position in respect of any proposed action on the relevant Reserved Matter is clear. But written consent is also *deemed* to be given by the shareholder in the five ways set out in Clauses 6.1(a) and 6.2. Only two are relevant to the present dispute and I ignore the rest.

96. *First*, a shareholder is deemed to have given written consent when action on the Reserved Matter is "specifically provided for in the Business Plan": Clause 6.2(d). This is presumably because the Business Plan is itself a Reserved Matter (Schedule 3D, Clause 13), so an action "specifically provided for in the Business Plan" can be seen as already having the requisite shareholder consent. There is some dispute over quite what the words in quotation marks can embrace, and I return to that later. Subject to that, however, the deeming effect of a prior approval of the Business Plan is clear: the Company will have the requisite consent from the shareholders to carry out the actions specifically provided for in the Business Plan, including actions which would otherwise require specific approval as Reserved Matters.

97. *Secondly,* and most central to the current dispute, a shareholder is deemed to have given written consent if that shareholder's nominee director (currently, each shareholder only has one nominee director) was present at any meeting of the Board and "approved such action at such meeting (whether in writing or not)": Clause 6.2(a). Again, the meaning and deeming effect of this clause is plain on its face. If, at a Board meeting, the shareholder's nominee director agrees to taking action on a Reserved Matter, that will count as the written consent of the shareholder to such action, and will do so even if the shareholder might have been minded to reject a request for consent. Again, the Company and its Board can act in relation to the relevant Reserved Matter, relying not on the shareholder's actual written consent, but on the shareholder's deemed written consent under this provision of the SSA. The risk that the shareholder's true views are not reflected by the shareholder's nominee director lies on those two parties, not on the Company and its Board.

98. I add that this provision is apt to cover the parties' present practices, described earlier, whereby decisions taken at Board meetings are taken by the relevant nominee director reporting on the views of the nominating shareholder, and the minutes then recording the matter as agreed as a Reserved Matter with the consent of the shareholders (whatever the form of words used in the minutes to that effect). Plainly the provision is also apt to cover instances where the shareholder's nominee simply agrees to the matter as a director voting on a Board resolution, perhaps without realising the issue was a Reserved Matter. However, no instances of this were put to me. The evidence indicates that H was, and remains, particular about which matters are Reserved Matters for decision by the shareholders. The same might be said of D1's own

precision in these matters, even though in his case the shareholder and nominee director are one and the same person, so the practical problem does not arise.

99. Counsel for the Claimant indicated at the oral hearing that, in relation to Issue 1, answers were only required to Issues 1(f)-(i), but several of the earlier questions are also material so I simply give answers to all the Issue 1 questions initially raised. So far as those answers depend on what has just been set out, I conclude as follows:

> **Issue 1(b):** Whether consent under Clause 6.1(a) must be sought from and, in the first instance, given by the Shareholder itself and not its appointed director (if there is one).
>
> **Answer: No. There is no requirement for any direct request to be made to the shareholders, written or otherwise, and no requirement to ascertain approval or deemed approval according to a particular hierarchy of respondents, and in particular a hierarchy which puts the shareholders themselves first.**
>
> **On the other hand, the question possibly muddles the issues of actual consent and deemed consent. It is the written consent of the *shareholders* that is required to Reserved Matters. The deeming provisions in the SSA do not provide that consent to a Reserved Matter can be obtained from the requisite shareholders *or* alternatively from some other party named in Clause 6.2. The provisions instead confirm that *shareholder* consent is required, but that such consent will be *deemed* to have been given if in fact named persons have acted in the ways described in Clause 6.2.**
>
> **Issue 1(c):** Whether deemed consent under Clause 6.2 operates solely to give effect to Clause 6.1(a), or whether instead Clause 6.2 operates as an alternative or separate approval mechanism to obtain the relevant consent to a Reserved Matter.
>
> **Answer: Clause 6.2 operates as an alternative means of concluding that the Company has, if not the actual written consent of shareholders, then at least their deemed written consent. It provides additional options for deemed approval beyond the one set out in Clause 6.1(a).**
>
> **Issue 1(h):** Whether the directors can be under no duty to vote on a Reserved Matter until the expiry of the period prescribed for the refusal of Shareholder consent under Clause 6.1(a).
>
> **Answer: If, as seemed to be the position at the oral hearing, the question is whether the directors are under *a duty not to vote* on a Reserved Matter until the expiry of the period prescribed for the deemed refusal of Shareholder consent under Clause 6.1(a), then the answer is, no. See Issues 1(b) and (c) immediately above.**
>
> **Issue 1(i):** Whether the proper construction and effect of Clause 6.2(d) is to the effect that a Request for Consent [as defined in the Amended Defence – i.e. a

written request for consent under Clause 6.1(a)] is required, and Shareholder agreement to be obtained, in relation to Reserved Matters that have been included in the Business Plan approved by the Shareholders and whether the answer to this is dependent on whether or not the Business Plan approval for the item at issue is generic rather than specific.

Answer: Clause 6.2(d) expressly provides that the requisite shareholder consent to the Company undertaking any action in relation to a Reserved Matter will be deemed to have been given if (and only if, at least under this proviso) "such action is specifically provided for in the Business Plan". The meaning of "specifically provided for" is considered at paragraphs [239] to [274] below. If the action is not specifically provided for in the Business Plan, then this deeming provision is not activated, and some other means of obtaining the requisite shareholder consent to the action must be found before the Company can properly undertake the action. That alternative mechanism does not require that the shareholders be issued with a written request for consent (a Request for Consent); there are other means of establishing shareholder consent: see Issues 1(b) and (c) immediately above.

100. The next issue in dispute raises the practical matter of whether, once the shareholders have vetoed a Reserved Matter, there could be some subsequent approval by the shareholder or its nominee director which approves the same Reserved Matter. The answer is plainly yes. The shareholders may have vetoed a particular Reserved Matter (e.g., a proposed loan or capital expenditure), but then later been persuaded that the proposal is acceptable. The economic circumstances may have changed, or the Board or its executives may have provided more cogent evidence in support of the proposal, etc. This was what happened in relation to the proposal to create an Irish subsidiary: HMUK initially vetoed the proposal, but, with the advantage for further information, it later consented to the action. This later consent by the requisite majority of shareholders can be delivered by any of the means set out in Clauses 6.1(a) or 6.2. The Company, via its Board or its executives, cannot undertake action on the Reserved Matter before it receives the requisite consent, but once that consent is received, or deemed to have been received, then the Company and its Board are empowered to act.

101. Accordingly, the answers to the next two disputed issues are as follows:

Issue 1(d): Whether, if a Shareholder holding the requisite percentage of shares has denied consent, so as to veto a proposal for a Reserved Matter, a subsequent vote to approve such a proposal by that Shareholder's appointed director is deemed consent under Clause 6.2 such as to override the Shareholder's veto.

Answer: Yes.

Issue 1(e): Whether, if consent has been denied by Shareholders holding the requisite percentage of shares, so as to veto a proposal for Reserved Matters, this can be overridden by a favourable vote by directors, whether or not

those directors voting in favour of the proposal include the appointed director of the Shareholder entitled to veto that has exercised that veto.

Answer: No, not unless the vote by the directors includes a favourable vote by the vetoing Shareholder's nominated director, or by sufficient nominee directors to meet the Reserved Matter shareholder voting thresholds. If that is not the case, a majority vote by directors does not satisfy the terms of the Clause 6.2(a) deeming provision.

Possible constraints on the exercise of the shareholders' veto right imposed by the SSA or by the general law

102. The SSA gives the shareholders a veto right on Reserved Matters. The next issue is whether exercise of that veto right is constrained in any way by the SSA or the general law. The parties' views on this are diametrically opposed.

103. The relevant clauses of the SSA are Clauses 6.1(a) (cited earlier), 6.4 and 15.1(b). For completeness, I add part of Clause 6.5. So far as is material, these all provide that the A Shareholders (or, in certain cases, all shareholders) shall procure compliance with the SSA, or procure the Company's compliance with the SSA, or procure their nominee director's compliance with the SSA and with that director's general duties.

104. I consider first the constraints on *shareholders* (especially HMUK) in exercising their veto rights, before turning to the constraints on *nominee directors* (especially H in his role as HMUK's nominee director).

105. In relation to this first issue, the relevant clauses of the SSA are Clauses 6.1(a) (cited earlier) and 15.1(b). I also add part of Clause 6.5. The latter provisions are as follows:

> "**6.5 Company compliance**
>
> Each A Shareholder shall procure insofar as it is able (recognising that the Investor [HMUK] will not be involved in the day-to-day management of the Business) that each Group Company shall: …
>
> (b) carry on and conduct its business and affairs in a proper and efficient manner in accordance with applicable legal requirements and with the provisions of the Articles, any resolution of the Company and this Agreement; …
>
> **15 IMPLEMENTATION**
>
> **15.1 Further assurances**
>
> … (b) Each Shareholder shall, to the extent that he is able to do so, exercise his voting rights and other powers of control lawfully available as a Shareholder to procure that the provisions of this Agreement are properly and promptly observed and given full force and effect according to the spirit and intention of this Agreement."

106. **The claimant's view** is that a shareholder such as HMUK is free to vote in its own interests on Reserved Matters, and is not constrained by any obligations imposed by either the SSA or the general law to have regard for others; further, a director will not be in breach of his duties as a director if he acts in accordance with a shareholder veto of particular Reserved Matters; and, finally, that a shareholder who is also a director on the Company's Board is not, by virtue of that director role, compelled to vote in some different way and only in good faith in the interests of the Company in determining whether, as a shareholder, to veto or consent to Reserved Matters.

107. Counsel for HMUK place primary reliance on a single case, *Wilkinson v West Coast Capital* [2007] BCC 717, and suggest that it provides the answer to most of the issues in dispute. I therefore consider the case in its full detail. The decision pre-dates the Companies Act 2006, but remains relevant now (see Companies Act 2006 s. 170(4)). In *Wilkinson*, the claim was brought by way of an unfair prejudice petition, but the central dispute, as here, concerned construction of a shareholder agreement containing reserved matters, and the impact of such a provision on the duties owed by shareholder-directors.

108. The facts in *Wilkinson* involved the self-interested purchase by shareholder-directors of a business opportunity that had come to them as directors. That might usually provide for a straightforward claim by the company for an account of profits for breach of fiduciary duty. However, the acquisition of new business opportunities was a reserved matter under the shareholder agreement (Clause 5.1) and the company's acquisition could therefore be prevented by the relevant directors exercising their veto rights as shareholders, since these directors held a blocking majority of the company's shares. The claimant's case in *Wilkinson*, as is the Defendants' here, was that the directors were in breach of fiduciary duty notwithstanding the reservation of such matters to the shareholders. Warren J found for the shareholder-directors.

109. Counsel for HMUK pointed out the strong parallels between *Wilkinson* and the case now before the court:

> (i) Clause 5.1 in *Wilkinson* set out the reserved matters, and provided that, unless shareholders holding in excess of 65% of the shares otherwise agreed in writing, the shareholders were to exercise their power in relation to the company to ensure that the company did not engage in the listed reserved matters. Here, to similar effect, see SSA Clause 6.1(a).
>
> (ii) In *Wilkinson*, as here, the company was a party to the shareholder agreement; the agreement contained an entire agreement clause and provided for the agreement's supremacy over the Articles; it also provided for the appointment of nominee directors. The comparable provisions in the SSA are not in identical terms, but the differences are immaterial.
>
> (iii) However, delivering more of a contrast, Clause 7.1 in *Wilkinson* provided that "Each Shareholder shall use all reasonable and proper means in its power to maintain, improve and develop the business of the Company [and any other companies in the group] and to further the reputation and interests of such

companies." Here, the closest equivalent is Clause 15.1 of the SSA, cited earlier, which requires the shareholders "to procure that the provisions of this Agreement are properly and promptly observed and given full force and effect according to the spirit and intention of this Agreement." Counsel for HMUK noted the stark difference in focus. See too Clause 6.4(b), discussed later, with a similar focus.

110. Two of the principal issues for determination in *Wilkinson* (as set out by Warren J at [222]) are relevant here. The first was whether *shareholders*, in voting to veto reserved matters (as permitted by Clause 5.1), could act in their own interests, or whether their veto powers were limited by the requirement set out in Clause 7.1, which effectively obliged the shareholders to take all reasonable and proper steps to promote the interests of the company. The second was whether it made any difference to that conclusion that the shareholders exercising the power of veto were also directors of the company.

111. As regards the interaction between Clauses 5 and 7, Warren J held, at [225]:

> "225. I reject Mr Crystal's submission concerning the interaction of Clauses 5 and 7. In my judgment, the obligations under Clause 7.1, which are couched in wide general terms, take effect only subject to the specific provisions of Clause 5. The parties have seen fit to make special provision for certain matters which cannot be effected without the requisite 65% support; that provision qualifies the extent to which each shareholder is obliged to use all proper and reasonable means to maintain, improve and develop the business of NGS and other group companies. It can be said that, in the context of the agreement read as a whole, "reasonable" means would not include taking action which Clause 5.1 provides should be subject to the requirement of consent. This does not render Clause 7.1 essentially worthless. The shareholders must continue to promote the interests of NGS but are only obliged to do so in a way which does not conflict with Clause 5.1. I do not consider that it is a purpose of Clause 7.1 to ensure that the powers under Clause 5.1 are exercised in the interests of NGS. Indeed, if that were the case, it would be Clause 5.1 which was rendered essentially worthless."

112. Counsel for HMUK suggested the parallels with the present case are self-evident and compelling. I agree. Nevertheless, that does not fully meet the further claims advanced by the Defendants, which are considered later.

113. Warren J then considered the impact that a director's fiduciary duties might have on the exercise of this veto power where the shareholder is also a director. In the present case, HMUK is not a director, but Warren J's analysis is relevant in this way: it indicates that even where the shareholder is otherwise bound (in its director role) by the strictest of duties in exercising its powers, the veto power held by virtue of the shareholding stands outside those strictures. It is also relevant in the next section, when the position of H as a nominee director is considered.

114. Warren J began with Lord Browne-Wilkinson's familiar assertion in *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145, p.206A–D, to the effect that a contract

between the relevant parties could modify the extent and nature of the general fiduciary duty that would otherwise arise. Warren J then went on to hold:

> "246. Further, whatever duties may generally be cast on a director, those duties, or at least many of them, can be qualified in various ways. For instance, articles of association may define those duties in specified situations and provide for a narrower duty than might ordinarily apply, or exclude a duty altogether. *Similarly, an agreement made between all of the shareholders and the company itself and which is stated to take precedence over the articles of association is capable, I consider, of displacing the duties which would otherwise rest on a director.* I say "those duties, or at least many of them" because there may be certain core duties which cannot be modified, just as there are certain core duties of a trustee … which cannot be abrogated or qualified [but then holding that the particular conflict of duty and interest in issue was not such a duty].
>
> 247. The subject of directors' duties has been the subject of a recent comprehensive review and analysis in the decision of Lewison J. in *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch). No-one, I think, would quarrel with the section at [1292] et seq. headed "Acting in the interest of the company": directors must exercise their powers in what they consider, not what a court may consider, is in the best interests of their company, and not for any collateral purpose. *Thus, if a director does not have a power, as a director, to do a particular act, then he cannot be in breach of duty for failing so to act. …*" (emphasis added)

115. I pause to note this second paragraph. It indicates that a shareholder agreement (or some other source of limitation of the director's power) can limit the scope of operation of a director's duty of good faith, confining it to a duty to act in that good faith manner only in relation to endeavours the company and its directors are empowered to undertake. This approach is consistent with the analysis adopted by Warren J in the preceding paragraph in relation to the director's duty to avoid conflicts of duty and interest. This is not controversial. To take an example far removed from the present dispute, the directors of a company set up to conduct business exclusively in the area of ship-building, for example, do not breach their duties to act in good faith in the interests of the company when they fail to pursue what might be unquestionably lucrative opportunities in nano-technology; nor do those same directors involve themselves in breach of the conflict rules if they pursue these opportunities for their own benefit in their own private time.

116. Accepting all this, Warren J recognised that what made the present case appear more difficult was not the rather straightforward finding that some legal impediment or restriction might limit the scope of the duty owed by a director. After all, the idea that one must "define the scope of the duty before being able to decide whether someone is in breach of it" (*Wilkinson*, at [281]) is of quite general application to legal duties. Rather, the difficulty arose because the director himself, acting in his non-fiduciary capacity, could bring about that crucial legal impediment, and so (on the facts in

Wilkinson) prevent the company of which he was a director obtaining the benefit of what would otherwise be a corporate opportunity.

117. That dilemma prompted a long discussion over many paragraphs (see [297]-[303]) considering the different positions that an ordinary director (with no shareholder veto right) and a shareholder-director (with such a veto) would find themselves in when each encountered a "corporate opportunity". The position of the ordinary director is well-known. So far as the shareholder-director is concerned, Warren J held that:

> "299. Suppose, then, that an opportunity to acquire a company (call it Y) whose business is outside the scope of X's [i.e. the company's] existing business becomes generally known. There would be nothing, I think, to prevent A and B [the shareholder-directors] acquiring Y for themselves even if the board of X considered that it would be a good thing for X to acquire Y. *In these circumstances, there is of course a conflict between the personal interests of A and B on the one hand and their duties, as directors, to X on the other hand. But it is not a conflict to which the "no conflicts" rule has any application because A and B are entitled, as shareholders, to block the acquisition by X. There is, I consider, no duty on them to use their votes as shareholders to approve the acquisition (and this is so, in my judgment, even though it may be in the interests of X to make it and even though they are directors).* There is no risk (such as that which caused concern in *Keech v Sandford*) which needs to be guarded against and no occasion for the intervention of equity. There is no question of the application of the "no profits" rule either since the opportunity is, in the example, generally known." (emphasis added)

118. One clarification is perhaps needed. It is notable that Warren J chose as an illustration a corporate opportunity which was "outside the scope of [the company's] existing business", and thus on its face an opportunity which might raise no issues of conflict of duty and interest for any director. Warren J was, it seems, simply choosing an illustration on all fours with the facts in *Wilkinson*: there the corporate opportunity was outside the scope of the company's existing business, but, crucially, the shareholder agreement made it plain that, subject to the shareholder veto right, the company was open to acquiring or investing in other companies or businesses. Warren J thus concluded, on the facts in *Wilkinson*:

> "304. Applying these principles to the present case, there has, in my judgment, been no breach by [the shareholder-directors] of the "no conflicts" rule. On my findings of fact, there was no agreement [by the necessary majority of shareholders] that [the company] should acquire [the corporate opportunity] so that [the shareholder-directors] were, as shareholders, able to block the acquisition. *There is no question, on my findings, of the board being able to proceed with the acquisition in the face of the provisions of the shareholders agreement to which [the company] itself was a party. In any event, [the shareholder-directors] could not be criticised if, acting as board members, they had voted against [the company] acquiring [the*

> *corporate opportunity] in order to respect the provisions of shareholders agreement* which, as between 100 per cent of the shareholders and [the company] itself, were stated to take precedence over the unamended articles." (emphasis added)

119. This conclusion does not give shareholder-directors completely free rein to act contrary to the company's interests and in breach of their duties in respect of conflicts. Within the scope of the reserved matters limits as set down, these duties continue to apply with full force. This follows automatically from Warren J's analysis and his findings, and is illustrated by his careful consideration of the "no profit" rule as applied to the shareholder-directors in *Wilkinson*. The paragraphs cited earlier make it plain that these shareholder-directors could take the "corporate opportunity" for their own benefit without breaching their duties as directors. However, in pursuing that opportunity, these shareholder-directors had used confidential information provided to one of the companies in the corporate group, and used the company's staff, working at least initially at the company expense, to do much of the initial evaluation of the project. Had the shareholder-directors made a profit from their acquisition, therefore, they would – as directors – likely have been liable to account accordingly, but no profits were made.

120. In short, in a long and careful judgment, Warren J reached three conclusions. *First*, that a shareholder with a veto power over reserved matters could exercise that veto power in his own interests, and could do so notwithstanding a general provision in the shareholder agreement which obliged shareholders to take all reasonable and proper steps to promote the interests of the company. This was because the specific provision on reserved matters reduced the scope of operation of the general provision.

121. *Secondly*, a shareholder with a veto power over reserved matters could exercise that veto power in his own interests notwithstanding that the shareholder was also a director of the company. This was because the reserved matters provision in the shareholder agreement limited the scope of the endeavours which could be pursued by the company, and, where an endeavour was put beyond the scope of the company's endeavours, and thus beyond the power of the directors to undertake on behalf of the company, a director would not be in breach of his duty to act in good faith in failing to pursue the endeavour for the benefit of the company, and nor would such a director be in breach of the conflicts rule by taking for himself the corporate opportunity that had been put beyond the scope of the company's endeavours.

122. *Thirdly*, where the power of the company and its directors *had* been so constrained by a shareholder veto of a reserved matter, the company's board could not act contrary to that veto by pursuing the matter. It follows, by necessary implication, that any directors who act in accordance with the veto will not be in breach of their duties to the company in doing so, and indeed would be in breach if they did otherwise. This is so even where pursuit of the reserved matter might otherwise have been seen by those same directors as being in the company's best interests had the company been unconstrained by the shareholder agreement which made such pursuit subject to a shareholder veto, and made it so with the agreement of the company and 100% of its shareholders.

123. Note that these three conclusions address the constraints on a *shareholder* exercising a power of veto (being constraints imposed by the shareholder agreement, or alternatively by the shareholder's concurrent role as a director), and then the constraints on the operation of the company's board *after* such a veto has been exercised.

124. **Counsel for the Defendants**, by contrast, sought to downplay the significance of this case both in relation to the exercise of shareholder veto powers and in relation to directors' fiduciary duties. The former can be dealt with immediately. The latter requires more elaboration in the next section.

125. In relation to a shareholder's exercise of its veto power, counsel noted that the terms of the SSA are not on all fours with the shareholder agreement in *Wilkinson*: in *Wilkinson* there was no equivalent of the qualifying words in Clause 6.1(a) ("without prejudice to any other provisions of this Agreement"), nor any equivalent of Clause 15.1(b), the "spirit and intention" provision. Accordingly they suggest that the SSA requires shareholders to exercise their powers of veto only in accordance with the "spirit and intent" of the SSA, and thus only in line with the shareholders' clear common ambitions to expand the business of the Company. It follows, they suggest, that a shareholder such as HMUK cannot act self-interestedly in exercising its veto power where that would conflict with delivering the growth ambitions of the Company.

126. I am not persuaded by this argument. In *Wilkinson*, the shareholder agreement provided expressly that each shareholder was to "use all reasonable and proper means in its power to maintain, improve and develop the business of the Company", and yet Warren J still held that this general provision, with its explicit mandate, was subordinate to the specific provision allowing shareholders to exercise their veto rights, and he held that they could do so self-interestedly. Here, by contrast, the SSA merely provides that a shareholder is to "exercise his voting rights and powers of control lawfully available to him as a Shareholder *to procure that the provisions of this Agreement* [i.e. the SSA] are properly and promptly observed and given full force and effect according to the spirit and intention of this Agreement" (emphasis added). There is no explicit priority given to maximising the growth of the Company. That is equally true of Clause 6.5, cited earlier.

127. Moreover, the earlier discussion on the interpretation of the SSA showed it to be a detailed, carefully negotiated and professionally drafted agreement balancing the interests of shareholders in having control over the management of the company and also having control over their disposition or acquisition of shares, and providing for both in the context of a future where it was unclear who would end up with majority control. Given the detail in the SSA, and the careful and comprehensive drafting of its provisions, "the spirit and intention" of the *Agreement* seems to demand that this be sourced in a textual analysis of the agreement itself. That reading suggests a protective balancing of different rights and obligations relating to management control and share ownership, not a singular focus on growth of the Company. In further support of this textual approach, the SSA contains an entire agreement clause. By contrast, the Defendants' proof of the parties' shared aims to "grow the business" comes primarily from email evidence or cross-examination evidence, not from the SSA itself, although undoubtedly all parties hoped for the Company's strong success.

In short, the distinctions between the SSA here and the agreement in *Wilkinson* do not suffice to displace a conclusion that the "spirit and intention" of the SSA is to reserve certain matters to the shareholders, giving them a veto power over the company's scope of operations.

128. That view is supported, not dispelled, by the two Court of Appeal cases relied upon by the Defendants. In both these cases the relevant agreements contained both good faith clauses and a "spirit and intention" provision, yet in neither case did the court regard the latter as delivering more than what would be delivered applying the orthodox canons of construction, including, where necessary, considering the surrounding factual matrix.

129. In *Re Coroin Ltd* [2014] B.C.C. 14, Arden LJ (as she then was) held, at [53]:

> "53. In my judgment, the only way in which the court can give effect to the obligation in [the "spirit and intention" provision] is to treat the reference to the "spirit and intention" of the shareholders' agreement as a reference to the shared aims of the parties in entering into the agreement. Those aims would have to be ascertained in the way in which the court ascertains the background to an agreement as part of the process of interpretation. *On this basis, [the "spirit and intention" provision] has content, but it is merely a mirror image of the process of interpreting an agreement or implying terms into it.*" (emphasis added)

130. Similarly, in *Re Compound Photonics Group Ltd* [2022] EWCA Civ 1371, Snowden LJ analysed aspects of Arden LJ's decision as set out above, before concluding that:

> 212. … the concept of fidelity to the bargain or adherence to the spirit of the agreement could only operate to support the common purpose and aims of the parties as objectively ascertained from the express or implied terms of the contract. … On any footing, however, the shared aims of the parties must be identified by interpretation of the other terms of the agreement, or by implication of terms according to the usual test outlined in *Marks & Spencer plc v BNP Paribas Securities* [2016] AC 742."

131. Moreover, earlier in his judgment, Snowden LJ explicitly considered the general freedom of shareholders to exercise their votes self-interestedly:

> "199. … the long-standing rule is that the votes attaching to shares are proprietary rights that the holder may exercise as they see fit in their own interests: see *North-West Transportation Co. Ltd v Beatty* (1887) 12 App Cas 589 PC and *Burland v Earle* [1902] AC 83 PC.
>
> 200. It is also the case that the votes of shareholders do not ordinarily have the result of depriving other shareholders of the benefit of the statutory contract – i.e. their shares. That is certainly the case where the vote is simply to remove a director from office. But even if a resolution is

> proposed which might be thought to operate to the disadvantage of the minority, e.g. to alter the articles to give the board the power to remove a permanent director, the test applied by the court to determine the validity of the resolution is simply whether those voting in favour honestly believed that it was for the benefit of the company: see *Shuttleworth v Cox Bros & Co. (Maidenhead) Ltd* [1927] 2 KB 9, cited with approval by the Privy Council in *Citco Banking Corporation v Pusser's Ltd* [2007] UKPC 13 at paragraphs 15 to 17. …
>
> 201. That basic position under the articles of association and general company law could, of course, be affected by an agreement between individual shareholders regulating how they should each vote on specific matters. However, *if such well-known principles of company law are intended to be changed, one would ordinarily expect that to be expressed clearly and directly,* and any further consequences (e.g. as to consultation between the parties) to be spelled out – *especially in a professionally drafted agreement.*" (emphasis added)

132. In the context of the present case, two points are significant: first, the general rule permitting self-interested voting; and second, the requirement that any variation to that rule would need to be plain on the face of the relevant agreement. Although cited here for completeness, the limitation noted by Snowden LJ at [200] is not relevant to a shareholder's power of veto. This restriction noted by Snowden LJ is invariably confined to cases where the shareholder's vote is on a resolution intended to alter the legal *rights* of all the shareholders, including the rights held by the dissenting minority, as happens when a majority votes to alter the articles or to vary class rights. It does not apply, as Snowden LJ notes, to other cases, such as when the majority votes to remove a director (Companies Act 2006 s. 168) or, by way of further example, when the majority votes to approve substantial property transactions (Companies Act 2006 s. 190). Equally, it does not apply in the context of a shareholder's right to veto Reserved Matters. This is because in none of these cases is the shareholder's vote altering the *legal rights* of all shareholders, including the dissenting shareholders. It is irrelevant that, in these latter examples, the vote may alter the *value* of the rights shareholders. That is an incident of almost every corporate activity.

133. This conclusion, that shareholders can exercise their veto powers in a self-interested manner, accords with the Defendants' opening submissions. At that stage, counsel for the Defendants conceded that a shareholder *is* entitled to act in its own interests in vetoing Reserved Matters, noting (by reference to legal advice given to HMUK prior to these proceedings) Lord Sumption's assertion to that effect in *Eclairs Group Ltd & Anor v JKX Oil and Gas Group plc* [2015] UKSC 71 at [40].

134. Although counsel for the Defendants may have rowed back from this initial position, even then they consistently maintained their stance on its unacceptable consequences, with counsel suggesting throughout this hearing that it is "a remarkably commercially counter-intuitive stance to adopt" in construing the SSA to that effect: it suggests that HMUK can freely engage in a "Strategy of Disruption", favouring its own interests in

ways that deliberately harm the Company; and with HMUK then risking being subjected to the same treatment, with D1 and D2 adopting the same strategy should HMUK acquire a majority shareholding and they become the minority. (As will become apparent later, they therefore sought to avoid these consequences by relying on the SSA provisions dealing with shareholders and their relationship with their nominee directors, seeing these as providing an alternative and overriding approach to dealing with Reserved Matters.)

135. I accept this observation that the law thus permits a shareholder such as HMUK to exercise its veto on Reserved Matters in ways that freely favour its own interests and may harm the Company, and that the shareholder may act deliberately, or consciously, to that end. However, that is the nature of many tightly drafted protective provisions. While all is well between the parties, the allocated rights provide no impediment to the effective functioning of the endeavour. That has been the case with these parties for three years. But once there is a stand-off over a particular issue, and more so if relations sour, those same rights may be used – and were often designed to be used – self-protectively. Like a knife, any tool can be used for desired or feared ends. The same might be said of each side's time-limited Put-Options, now unavailable, which could have been used to force the other side into a buy-out at fair market value regardless of the financial hardship that caused to the buyers. At this stage I make no findings on any alleged "Strategy of Disruption".

136. This analysis has been set out at such length because it is central to the resolution of a number of issues beyond this immediate one. On the immediate issue, however, and for all the foregoing reasons, I prefer the Claimant's analysis, and find that here, as in *Wilkinson*, the shareholders can exercise their right of veto self-interestedly. Accordingly, the answer to the relevant disputed issues are as follows:

> **Issue 1(f):** Whether a Shareholder is entitled to exercise a power of veto in relation to Reserved Matters, where that exercise would be contrary to the good faith view of its nominated director on the Reserved Matter at issue.
>
> **Answer: Yes. A shareholder is entitled to act in its own interests in vetoing a Reserved Matter.**
>
> **Issue 3(a):** Whether a Shareholder is entitled to act in its own interests in exercising its right to refuse consent to Reserved Matters.
>
> **Answer: Yes. See Issue 1(f).**

Constraints on the exercise of the veto power arising from the interaction of the shareholder and its nominee director

137. The next issue is whether there are any constraints on the exercise of the veto power in relation to Reserved Matters because of the interaction that the SSA mandates between a shareholder and its nominee director.

138. On the Defendants' case, none of the foregoing analysis of a shareholder's right to exercise the veto power self-interestedly has any practical impact. This is because, in

any event, the nominee director can and must act in the interests of the Company, and must ignore the SSA and its Reserved Matters provisions where to do so would be in the interests of the Company. Further, the Defendant suggests that on all the matters where HMUK exercised a veto on Reserved Matters it would have been in the interests of the Company to proceed with the activity in question, and so HMUK is in breach of the SSA Clause 6.4 in not ensuring that its nominee director, H, acted in accordance with his duties as a director to approve activities in the arena of Reserved Matters, notwithstanding that HMUK had already exercised its veto over these matters.

139. This is plainly an approach to the interpretation of the SSA which requires some elaboration to be persuasive.

140. The analysis advanced by the Defendants concerns the impact of Clauses 6.2(a) and 6.4. Clause 6.2(a) provides for the deemed written consent of a shareholder to a Reserved Matter if that shareholder's nominee director is "present at any meeting of the Board, [and has] approved such action at such meeting (whether in writing or not)". Clause 6.1(a) is also potentially relevant. That clause, and Clause 6.4 are as follows:

> **"6.1 Board and Shareholder approval**
>
> (a) The overall management of the Business shall be carried out by the Board and, to the extent permitted by law and without prejudice to any other provisions of this Agreement, the Shareholders shall procure that no Group Company shall take or agree to take any action referred to in Schedule 3 (*Reserved Matters*) except with the prior written consent of …"
>
> "**6.4 Board compliance**
>
> Each A Shareholder who is, or is entitled to appoint, a Director shall procure insofar as it is able that each of such Directors shall, so far as he or she is able to do so, ensure that:
>
> (a) the Board performs its functions on a timely basis;
>
> (b) a quorum is present at each meeting of the Board in accordance with the Articles;
>
> (c) the Board shall at all times act in accordance with any resolution of the Company;
>
> (d) such Directors shall at all times act in good faith in the interests of the Company, and in accordance with the terms of this Agreement; and
>
> (e) the Board shall take all steps necessary and within its power to ensure that the provisions of this Agreement are fully and faithfully complied with (save only to the extent that such steps conflict with the Directors' statutory and common law duties)."

141. The Company's Articles, especially Article 17, is also potentially relevant:

> **"17 Conflicts of interest arising out of nomination by shareholder**
>
> (1) Where a director is appointed pursuant to a nomination as such by one or more shareholders (a "**Nomination**"), any actual or possible conflict with the interests of the company which that director has or may have as a consequence of such Nomination (or which derives from such nomination or his relationship with the nominating shareholder or any other entity in the same group as such shareholder or with which such shareholder is otherwise associated (together, the "**Nominating Group**")) and which would otherwise involve that director breaching his duty under the Companies Acts to avoid conflicts of interest, shall hereby be authorised by the company in accordance with section 180(4)(a) of the Companies Act 2006. …"

142. I pause there. Clause 6.1 gives a veto on Reserved Matter to the shareholders, "to the extent permitted by law *and without prejudice to any other provisions of this Agreement*" (emphasis added). It is this emphasised phrase that the Defendants claim curtails the shareholders' veto powers where their decision would not be in accordance with the decision that their nominee director would have made if deciding the same matter in a Board meeting. This end is reached, according to the Defendants, because the "*other provisions of this Agreement*" include Clauses 6.4(d) and (e), requiring the A Shareholders to procure that their nominee directors shall "*at all times act in good faith in the interests of the Company*, and in accordance with the terms of this Agreement" and that "the Board [presumably though its directors] shall take all steps necessary and within its power to ensure that the provisions of this Agreement are fully and faithfully complied with (*save only to the extent that such steps conflict with the Directors' statutory and common law duties*)" (emphasis added).

143. This, the Defendants argue, requires the A Shareholders to procure that their nominee directors override any shareholder veto of a Reserved Matter where that veto is not in accordance with the decision a director would make if deciding the matter in the interests of the Company and in accordance with the director's statutory and common law duties. It is thus irrelevant that a written veto by the Shareholders may have been delivered according to the terms of Clause 6.1. If that veto is not what a nominee director would have decided, acting in accordance with the duties of a director and unconstrained by the Clause 6.1 veto, then the nominee must (and the shareholder must procure that the nominee does) ensure that the veto is overridden by a later vote by the director at a Board meeting as described in Clause 6.2(a).

144. I find this such a strained construction of the written terms of the SSA as to be unlikely to have been the one intended by the parties. Typically the specific clause (Clause 6.1) prevails over the general clause (Clause 6.4). Further, there seems to be a natural purpose to Clause 6.4 without straining the textual construction. The issue is the nominee director role. The Articles expressly provide for consent to any "duty and duty" conflict inherent in the nominee director position. However, as Millett LJ explained at length in *Bristol and West Building Society v Mothew* [1996] EWCA Civ 533, that "double employment" permission does not carry with it a permission for the director to breach his duties to the company. Those duties continue with their full force, and if the director cannot meet his fiduciary obligations to the Company and to his nominee, HMUK, as it would be here, then the director will have to resign. Of course, that rule only operates in respect of conflicts not specifically agreed by the

Company (such as the agreement in relation to the conflicts noted earlier in respect of DFL). This orthodox "duty and duty" position at common law is, it seems, simply affirmed by repetition in the SSA at Clause 6.4.

145. In any event, even without that rationale, the interaction of Clauses 6.1(a) and Clause 6.4 is perfectly orthodox. Clause 6.1(a) provides a limiting factor to the *scope* of the Company's permitted operations, with any future expansion of that scope into Reserved Matter areas given to the shareholders to decide. But within the permitted scope of the Company's operations (whether as expanded into Reserved Matter areas or not), the directors must manage the Company in full compliance with their common law and statutory duties. Clause 6.4 thus does not negate the express allocation of decision-making power as to the scope of the Company's operations: that lies with the shareholders, not the directors, so far as Company activities in relation to Reserved Matters are concerned. All it does is affirm the directors' obligations in the permitted arena of the Company's operations, and the shareholders' obligation to procure that same compliance by the directors.

146. Further, I am not persuaded by the Defendants' assertion that the parties could not possibly have intended that shareholders holding the requisite number of shares could veto Reserved Matters where an unconstrained Board may have wished to venture into that territory. To the contrary, it seems to me this is precisely what the SSA has done, in its express terms, as professionally advised by lawyers for all of the parties. If the parties had intended to achieve the ends set out by the Defendants, then it would have been simplicity itself to give the Reserved Matter veto power to the relevant nominee directors, and not to the shareholders. This would have achieved the outcome suggested by the Defendants, and is a familiar alternative approach to Reserved Matters adopted in other shareholder agreements.

147. My initial assessment based on the Defendants' arguments is thus to favour the Claimant's interpretation, not the Defendants'. But I set out the legal authorities relied on by each side in order to test that initial assessment.

148. **The Claimant again relies on *Wilkinson*** to the effect that a director acting in good faith and in compliance with his fiduciary duties to avoid conflicts must comply with any shareholder veto which removes certain endeavours from the scope of the Company's operations, and thus from the scope of the directors' proper conduct of the affairs of the Company.

149. Counsel for the Claimant point out that this conclusion applies to every director faced with a situation where the shareholders have exercised their veto powers to limit the Company's operations; there is not some different rule for shareholder-directors (like D1 and D2) and non-shareholder-directors (like H). They point to Warren J's conclusions to that effect at [247] in *Wilkinson*, dealing with the director's duty to act in good faith: "if a director does not have a power, as a director, to do a particular act, then he cannot be in breach of duty for failing so to act". And again at [304], noting that there "is no question … of the board being able to proceed with the acquisition" which had been vetoed by the shareholders, and, further, that the directors of the company "could not be criticised if, acting as board members, they had voted [against the company acting to make the acquisition] in order to respect the provisions of [the]

shareholders agreement". These paragraphs were cited in full earlier, at paragraphs [114] and [118].

150. Counsel suggest that this means, as a matter of general fiduciary law, that H, as HMUK's nominee director, will act in full compliance with his fiduciary duties as a director of the Company if he acts in compliance with any veto of a Reserved Matter, including Reserved Matters vetoed by HMUK. They thus conclude that full compliance with Clauses 6.4(d) and (e) of the SSA (set out above) does not require an A Shareholder such as HMUK to procure that its nominee director, H, do anything which is contrary to a veto exercised by HMUK.

151. If further support for this approach is needed, they also suggest that, as a matter of proper construction of the SSA, the same result is delivered because the general provision in Clause 6.4 is subject to the specific provision in Clause 6.1(a) which allows for a veto by shareholders of specified Reserved Matters, meaning these are not permissible areas of activity for the Company unless the required percentage of shareholders consent to that activity. They note that this rule of construction was seen in operation in *Wilkinson* (see as cited above at para [114]), and is a general rule of construction (see *Towergate Financial (Group) Ltd v Hopkinson* [2020] EWHC 984 (Comm), and also *The Interpretation of Contracts* 7th Ed. 7.46-7.52). This approach is further reinforced because Clauses 6.4(d) and (e) oblige the shareholders to procure that directors not only act in accordance with directors' duties, but also that they act in accordance with the terms of the SSA itself.

152. **The Defendants advance their contrary stance** by first rebuffing the relevance of *Wilkinson* and then relying instead on several other authorities. I deal with the *Wilkinson* points first.

153. *First*, the Defendants note that *Wilkinson* involved a director's conflict of duty and interest, not, as here, a breach of the duty to act in good faith in the interests of the company. Further, they cite Warren J at [246] (cited earlier) to the effect that "there may be certain core duties which cannot be modified … abrogated or qualified". They contend that a director's duty of good faith falls into this category.

154. I accept that the good faith and conflicts duties cannot be abrogated entirely: they form part of the irreducible core of a fiduciary's duties to his principal. However, the scope of their operation can be limited, sometimes dramatically so. Consider the trustee management of a fund that can only be invested in FTSE 100 companies, or a corporate or partnership endeavour that is limited to pursuit of a particular venture. In such cases, the fiduciaries' duties to act in good faith in the interests of their principals are limited to pursuing actions falling within the scope of the relevant endeavour. It would, moreover, be a breach of duty for the fiduciary to act outside that scope, even in good faith. This is not controversial. For directors, where the source of the limitation may lie in the company's constitution, this general principle finds expression in the Companies Act 2006 s. 171. But the general principle will apply where the limitation comes from some other source, be it elsewhere in the Companies Act 2006, or in the general law, or in some agreement such as the SSA. On this, I accept the reasoning of Warren J in *Wilkinson* (see para [247] on the good faith duty) but also find his approach to be entirely orthodox.

155. *Secondly*, counsel for the Defendants note that *Wilkinson* predates the enactment of section 232 of the Companies Act 2006. Subject to certain exceptions, this section renders void any agreement which purports to "exempt a director of a company (to any extent) from any liability that would otherwise attach to him". However, this provision largely replicates the provision in the Companies Act 1985 s. 309A, and in neither case have these sections been used to strike down agreements which limit the scope of a company's legitimate operations by any means, including by reference to reserved matters which must be agreed by shareholders.

156. *Thirdly*, counsel note that the relevant directors in *Wilkinson* were also the shareholders able to exercise the veto powers in issue. Here, by contrast, H is not. Warren J's analysis underlined this as an important distinction (see *Wilkinson* at [299]-[303]). Counsel also note that the agreement in *Wilkinson* contained no equivalent to the SSA Clauses 6.4(d) or 6.4(e) (cited earlier). I deal with these final *Wilkinson*-related matters when considering the more substantive argument advanced by the Defendants.

157. As far as that substantive argument is concerned, the Defendants' analysis can be summarised as follows:

> (i) Clause 6.1(a), giving the shareholders a veto right over Reserved Matters, is expressly qualified by the words "to the extent permitted by law *and without prejudice to any other provisions of this Agreement*" (emphasis added). That qualification indicates the rights in Clause 6.1(a) are subject to, and limited by, other provisions in the SSA.
>
> (ii) Those other clauses, in particular Clauses 6.4(d) and (e), require the A Shareholders to ensure that their nominated directors shall "*at all times*" act "*in good faith in the interests of the Company*" and shall ensure full and faithful compliance with the SSA "*save only to the extent that such steps conflict with the Directors' statutory and common law duties*" (emphasis added).
>
> (iii) The combined effect of (i) and (ii) (i.e. of Clauses 6.1(a) and 6.4(d) and (e)) is that there is no carve out for Reserved Matters: in all circumstances the A Shareholders are to ensure their nominated directors comply with their good faith and fiduciary duties, *even where to do so will involve non-compliance with the terms of the SSA.*
>
> (iv) Further, as counsel for the Defendants put it in their written opening submissions, it therefore follows that "if *implementing* a measure mandated by an A Shareholder runs contrary to the Company's interests and so contrary to the directors' duties, then the Board need not implement it, irrespective of whether the Board conducts a formal vote or not" (emphasis in the original). In short, putting that general assertion into its particular context, if HMUK vetoes a Reserved Matter, but the Board considers it would be in the interests of the Company to pursue that vetoed endeavour, then the Board may pursue the venture even though that would not be in compliance with the SSA, because the SSA is subject to the directors' duties to act in good faith in the interests of the Company.

(v) Taking that point still further, counsel noted that (a) H cannot abstain from voting at Board meetings on Reserved Matters in order to require the Company to approach HMUK directly under Clause 6.1(a), since that would involve H abstaining from a vote for reasons running contrary to the best interests of the Company and contrary to his directors' duties; and (b) even if HMUK had previously vetoed a Reserved Matter, a subsequent Board meeting could be called to consider the same matter, which H would be obliged to attend and at which he would not be permitted to abstain from voting and he would be obliged to vote in accordance with his good faith view as to the best interests of the Company, even if that entailed a departure from HMUK's dissent.

(vi) Accordingly, for all practical purposes, the SSA does not permit HMUK to vote its shares in a way which is contrary to H's good faith view of what is in the Company's best interests, so HMUK has no "right of veto" in relation to Reserved Matters which it can exercise, when doing so runs contrary to the best interests of the Company.

158. In the course of the oral hearing, counsel for the Defendants explained this did not leave the Reserved Matters provision denuded of all effect, simply subsumed within the general rule that directors must comply with their statutory and common law duties. H still held important veto powers: *if* H, acting in accordance with his fiduciary and other duties, genuinely considered that the Reserved Matter endeavour should not be pursued, but the other three directors on the Board, acting similarly, thought that it should, then H would have his way; Clause 6.2(a) would not be met, and so there would be no deemed consent of the shareholders to the Reserved Matter.

159. When asked why, if that was the intention of the parties to the SSA, the parties had not simply provided for HMUK's nominee director to have a veto power on the Board in respect of Reserved Matters, counsel conceded that would have had the same impact, but that the parties had determined to reach this same position by a different route.

160. I am not persuaded by this analysis. It takes as its starting point the practical reality that a veto vote on Reserved Matters taken by a shareholder acting in its own interests may differ in outcome from the same decision if taken solely by that shareholder's nominee director acting in the interests of the Company. It then proffers an analysis which suggests that the SSA denies the possibility of this practical outcome: instead, the only decision which is permitted on a Reserved Matter is one which is, in the nominee director's view, in the interests of the Company. Hypothetically, for example, HMUK, acting in its own interests, may be inclined to veto a particular item of capital expenditure under Reserved Matters, whereas H, unconstrained by that veto and acting solely in the interests of the Company, might agree to the expenditure as being in the interests of the Company. It is then suggested that, in those circumstances, and even where HMUK has already exercised its veto in writing under Clause 6.1(a), the Board could convene to ensure that this shareholder veto was overridden by a Board vote, with directors acting in compliance with their duties, so as to deliver a decision that enabled the Company to pursue action on the Reserved Matter. I consider this flawed on a number of fronts.

161. *First*, it misconceives the law on directors' duties. This law is not controversial. Directors must act within the scope of their powers, and – within that scope – must act in good faith, for proper purposes, with due care and skill, avoiding disloyal conflicts and secret profits (Companies Act 2006 ss 171-176). But the directors' duty to act within the scope of their powers is a limiting feature. The limits on scope can be set out in the articles (s. 171(a)), or in the Act (e.g. limits on issuing shares, declaring dividends, entering into substantial property transactions, etc), or elsewhere, as in shareholder agreements (e.g. *Wilkinson*, but also see the many cases cited by Warren J). The Companies Act 2006 protects third parties dealing with directors who act outside the scope of their authority, but as between the company, its directors and the shareholders, the limitations operate with full force. This same scope limitation is true of all fiduciaries: trustees, partners, solicitors and agents are all very typically subject to constraints on the scope of their fiduciary endeavour. Any activities outside that scope, deploying the principal's assets to such unauthorised ends, will be activities in breach of duty. This is regardless of whether the fiduciary considered, in good faith, that the out-of-scope engagement was one that was in the principal's best interests. This is all familiar territory: consider trustees with limited powers of investment, or partnerships with limited areas of operation, or companies devoted to limited areas of business, as noted earlier.

162. By contrast, the analysis advanced by the Defendants ignores these scope limitations and posits the contrast between decisions taken by a shareholder acting in its own interests and decision taken by directors acting in the interests of the Company *and unconstrained by any notion of Reserved Matters*. But this is not the position of the directors of the Company here. Here, the directors' scope of engagement is constrained by the prohibitions set out in Schedule 3 and Clause 6.1(a), as considered earlier. The impact of these prohibitions on the operation of directors' duties is as set out in *Wilkinson*.

163. *Secondly*, it adopts a strained construction of the clauses in the SSA so as to give priority to the decisions taken by directors notwithstanding the clear wording of Clause 6.1(a), and both parts of Schedule 3, which clearly reserve these matters to veto by the shareholders. By contrast, Clause 6.2(b) is merely a provision for *deeming* that the *shareholders* have given the necessary written consent to Reserved Matters. It is not a self-standing alternative method of adjudicating on Reserved Matters, with the substantive power of veto given to the directors. Much less is it a method which is to be prioritised as the dominant decision-making process on Reserved Matters.

164. *Thirdly*, the analysis seems to misconceive the effect of both shareholder consent to a Reserved Matter and shareholder veto of a Reserved Matter. Shareholder consent to a Reserved Matter is not the equivalent of a special resolution of the shareholders *directing* the directors to take certain action (as is permitted by the Company's Articles, art 4(1)). It is merely a *permission* given to the Company by the shareholders enabling the Company to operate in that expanded area of endeavour, whether by way of acquiring capital equipment, employing staff, entering into loans, implementing the Budget Plan, and so forth. But *within* that permitted and enlarged scope of endeavour, it is still a matter for the Board (or for its authorised delegates) to decide what should be done. That decision must be made by the directors acting in accordance with their common law and fiduciary duties. As an illustration, an agreement by the shareholders to consent to the Budget Plan is not the same as a direction from the

shareholders requiring the directors to engage in all the planned development and expenditure. The directors must decide what is in the interests of the Company, acting in accordance with their statutory and common law duties. For example, a Budget Plan agreed in 2019/20 might have looked economically rash later in 2020 in full view of the uncertainty of Covid. The Board has operated in precisely this way since its creation. For example, it has not acquired every item of machinery permitted by way of Budget Plans when the timing seemed unwise.

165. Similarly a shareholder veto of a Reserved Matter is not a direction to directors; it is merely an absence of permission. It leaves the Company in the position that certain activities, as listed in Schedule 3, remain beyond the permitted scope of the Company's activities. The decision to expand the scope of the Company's activities into Reserved Matter territory is a decision given to the shareholders, not the directors. It is therefore not for the directors to decide that such an expansion would, in their view, be in the Company's best interests. To do so would be in *breach* of their duties, not in compliance with them. *Wilkinson* makes that plain. But the conclusion in *Wilkinson* is perfectly in line with the consistent approach taken by the general law and statutory provisions: see section 171 of the Companies Act, applying when the constraints are expressed in a company's articles; see too the "scope of activity" cases concerning trustees, partners and other fiduciaries, many cited in *Wilkinson*.

166. *Fourthly*, this analysis misconceives the varieties of operation and impact of Clause 6.2(a). This provision indicates that a shareholder will be deemed to have given written consent to a Reserved Matter if that shareholder's nominee director is present at a Board meeting and approves such Reserved Matter action (whether in writing or not).

167. As already noted, the practice of agreeing to Reserved Matters adopted by the Company was that this happened at Board meetings, but was invariably noted in some way as *being* consent in respect of a Reserved Matter, and – on H's uncontested evidence – this always happened after he had been able to communicate with HMUK and was thus able to pass on their views. Clause 6.2(a) covers this approach, because it permits an informality not permitted by Clauses 6.1(a) or 6.2(b) or (c). Since what the directors are doing – as noted in their minutes – is communicating the views of their shareholders and thus agreeing that the matter in issue has received the necessary consent for the Board to proceed with the proposed actions, this is a process which respects the shareholders unconstrained veto right.

168. But the potential operation of Clause 6.2(a) is broader. It is also apt to apply when the Board, acting as such, and not making any specific reference to Reserved Matters, and perhaps not even appreciating that the matter is reserved, agrees to act. Then the deeming provision of Clause 6.2(a) has real teeth: *the shareholder is deemed to have consented* even if it might have been minded to dissent.

169. No illustration of a Reserved Matter decision being taken in this way was presented to me. Nevertheless, a director acting in this context would necessarily be acting in his director role, not in the role of messenger for his shareholder. His director's duties would thus apply with their full force. Of course, that means the director should not in fact be procuring the Company to venture into the Reserved Matter arena, because there has been no requisite written approval by the shareholders, but Clause 6.2(a)

solves that problem by deeming such written approval to be given (with all shareholders having agreed to this outcome when they signed the SSA). But equally, this means a director cannot be *forced* to vote on a Reserved Matter in this way. He can simply and quite properly note that the matter is a Reserved Matter and requires shareholder consent to bring the activity within the permitted scope of the Company's activities before the Company or the Board has liberty to act in relation to the matter.

170. Plainly this does not get the Defendants to the point they wish to arrive at, which is to undermine the Claimant's reliance on Warren J's analysis in *Wilkinson v West Coast Capital* [2007] BCC 717. In closing, counsel for the Defendants took me to Warren J's subsequent decision in *Re Southern Counties Fresh Foods Ltd* [2008] EWHC 2810 (Ch).

171. That case concerned nominee directors with veto powers (i.e. not the position here, but the position the Defendants would like to see imposed: see my earlier question to counsel for the Defendants), and considered the extent to which the nominee directors could act in the interests of their nominators and not in the interests of the company to which they been appointed as directors. The answer was that the nominee directors were subject to all the normal duties owed by all directors, unless specifically qualified or relaxed in certain contexts. In *Southern Counties* that had not been done. See paragraphs [64], [65], [67] and [148].

172. I accept that. It is in my view not controversial, nor disputed. It follows that *if* H *were* deliberating on a Reserved Matter *as a director of the Company* – and not, as was the practice in this Company, merely reporting on the views of its nominating shareholder – then his conduct as a director in resolving what course of action to take *would* require him to act in the interests of the Company, and not in the interests of HMUK (unless those two interests were aligned).

173. But Warren J in *Southern Counties* also looked at the situation where, on a particular issue, the *shareholders* had the relevant veto powers. The shareholder agreement in *Southern Counties* defined "the Business" being carried on by the company in a particular way, and required that the parties to the agreement "shall promote and enhance the Business" but "shall ensure that the Company shall carry on the Business *and no other business unless the Parties from time to time otherwise agree*…" (Clause 3.1.3, emphasis added). The Agreement also provided that any obligation on a shareholder to procure certain ends was to include both an obligation to do so whether as shareholder or as director, and an obligation to procure that any nominee director would procure such ends (see para [94]).

174. Notwithstanding this, with all its parallels with the present case, Warren J still held, without the need for argument or authority, at para [105], that:

> "Clause 3.1.3 makes it clear that the *shareholders are not required to procure that the business is extended beyond the scope of the Business as defined, even if that might be seen as in the interests of SCFF* [the company]. *On the contrary, there is a positive obligation on the shareholders (subject to any contrary agreement) to ensure that SCFF does not do so. Accordingly, the directors* [and this includes the nominee directors who owe the full panoply of duties discussed earlier] *are not*

required to extend the business of SCFF beyond the scope of the Business without the consent of the shareholders; indeed, they could be prevented by the shareholders from doing so." (emphasis added)

175. The parallels with the present case are clear. Here (as is common in many shareholder agreements) Schedule 3 sets out the Reserved Matters, being areas of operation of the Company's business which are prohibited without the consent of a relevant percentage of shareholders. Even if the shareholders were required to "promote and enhance the business" (which they are not under the present SSA, unlike the agreement in *Southern Counties*), they would not be required to agree to an expansion in the Company's areas of operation, even if that were in the interests of the Company, and – where the shareholders have not agreed to such an expansion – it would be contrary to the directors own duties to act beyond the scope of the Company's permitted range of activities.

176. I am therefore not persuaded by the valiant arguments to the contrary advanced by counsel for the Defendants. Their analysis proposes an approach that is contrary to the orthodox and settled law on shareholder voting and on directors' duties. It also proposes a counter-intuitive and unnecessarily complicated construction of the terms of the SSA and their interaction, and is therefore unlikely to be what the parties intended by their own choice of terms for their SSA.

177. To the contrary, the SSA expressly gives the veto power on Reserved Matters to *shareholders* holding 25% or 30% of the shares; it does not give that power to the nominee directors (with all that would entail in relation to constraints on the decision making); nor does it simply leave matters to the Board, unconstrained by any Reserved Matters provision. That choice was clearly a deliberate one, with professional legal advice given to both sides.

178. This deliberate delegation of decisions on Reserved Matters to the shareholders, not the directors, is not altered by Clause 6.2(a). This provision is merely a deeming provision in relation to shareholder consent: it requires each shareholder to monitor its nominee director, or run the risk that the shareholder's powers of restraint under the SSA will be deemed to have been exercised to permit action on the Reserved Matter even when the shareholder may not have wanted that outcome. It does not give the directors a general alternative authority alongside the shareholders to decide Reserved Matter issues.

179. It follows that my conclusions on the relevant issues are as follows:

Issue 1(g): Whether (having regard to clause 6.4(e)) a director cannot be in breach of his duties to the Company by giving effect to the terms of Clause 6.1(a) or any other part of the SSA as agreed between the shareholders and the Company.

Answer: (i) If shareholders have *vetoed* the Reserved Matter, a director is not in breach of duty in ensuring the Company does not engage in the vetoed activity even if a director unconstrained by the Reserved Matters provisions might have considered the activity in the best interests of the Company. (ii) If the shareholders have given the necessary *consent* to the Company taking action on the Reserved Matter, this does not amount to a

direction from the shareholders to undertake that activity; it follows that the directors must still decide whether the activity can and should be undertaken in the light of the duties the directors owe to the Company, and a failure on this front could amount to a breach by the director of his or her duties to the Company.

Issue 3(a): Whether a Shareholder is entitled to act in its own interests in exercising its right to refuse consent to Reserved Matters.

Answer: Yes. See Issue 1(f).

Issue 3(b): Whether a Shareholder is obliged to procure that its appointed director (if any) approve any Reserved Matter if the Shareholder has not already consented to that Reserved Matter within the meaning of Clause 6.1(a).

Answer: No.

Issue 4(a): Whether Mr Hayashi could breach his duties to the Company by giving effect to the terms of Clause 6.1(a) or any other part of the SSA as agreed between the Shareholders and the Company.

Answer: No, subject to the answer to Issue 1(g), above, in the scenario where the shareholders have consented to the Reserved Matter.

Actions in relations to matters which are agreed to be Reserved Matters: the "Five Matters"

180. Given this analysis of the construction of the SSA in relation to the shareholder veto power, and the constraints (or not) on shareholders in exercising that power, and the position of directors once that veto power has been exercised (and until any change to the veto is agreed), the next matter to consider is the "Five Matters" proposed at a Board meeting in 2020, and all agreed to be Reserved Matters.

181. By an email dated 16 June 2020, Mr Knibbs proposed a list of five matters to be addressed at a forthcoming Board meeting ("the Five Matters"): (i) acquisition of premises in Leeds; (ii) purchase of property at 7, 8 and 9 Rye Close; (iii) procurement of financing from HSBC; (iv) incorporation of an Irish subsidiary; and (v) an increase in capital spending of £1.8 million.

182. This is a perfectly proper step. A majority of the Board, or even one director on the Board (typically the Managing Director, as in this instance) can propose that the Company move into Reserved Matter areas, but if the shareholders veto that proposal, then there is nothing more that the Board must do. The directors may try to persuade the shareholders to change their minds, but they are not obliged to pursue that end; and the directors are not permitted (much less obliged) simply to ignore the shareholder veto and act on the Reserved Matter issues regardless, merely because

they consider them to be in the interests of the Company. All this follows directly from the lengthy analysis set out earlier.

183. At the Board meeting on 22 June 2020, H declined to approve the Five Matters, requesting an opportunity to submit written questions on the issues. Later, by letter dated 29 June 2020, HMUK refused its consent. HMUK did later give consent to the incorporation of an Irish subsidiary on 2 December 2020, after receiving further information.

184. It follows from the earlier analysis that, in relation to these Five Matters, HMUK had a right of veto which it could exercise self-interestedly, and it was not obliged to procure that H override any veto decision, even if H, acting only as a director unconstrained in relation to Reserved Matters, would have decided that to do so was in the interests of the Company. Further, H, as a director, was not obliged to ensure that the decision went the other way by voting accordingly in a Board meeting. To the contrary, H, as a director, was acting fully in accordance his common law and statutory duties in declining to put the Company in a position where it would be engaging in activities which were not permitted, being Reserved Matters which did not have the necessary consent of the shareholders.

185. Further, just as H was not obliged to agree to a Reserved Matter, being a matter that is reserved to the shareholders, H was equally not obliged by his director's duties to procure that the matter be pursued to permit the Company to engage in those activities. He was merely at liberty to do that if he chose – as the other three directors were doing.

186. It follows that, where H was acting perfectly properly in ensuring that the Reserved Matter decisions were taken by the shareholders in accordance with the SSA, he cannot have any *obligation* as a director to continue considering any "further information" on the matters: that should be sent to the shareholders, if the aim is to seek a change of mind. H and the rest of the Board, as directors, have no decision to make on the Company's activities until the shareholders have given the requisite consent to the Company to expand its activities accordingly.

187. Likewise, H has no *obligation* "to engage" in any way (whatever is meant by the term) so as to ensure the Company can pursue the Reserved Matters in issue. Nor does he have any obligation to reconvene Board meetings or participate in Board discussions in relation to issues that the Board could only implement with the consent of the requisite majority of shareholders.

188. All this follows from the earlier legal analysis as now applied to the "Five Matters" facts.

189. Accordingly, for the reasons just set out, and the analysis which preceded it, my answers to the relevant issues raised by the parties are as follows:

Issue 4(b) Whether, as a matter of fact and law, Mr Hayashi acted in breach of his duties to the Company by reason of his conduct in relation to the Five Matters by:

(i) Refusing to agree to the Five Matters;

Answer: No. It is the shareholders who need to agree to the Reserved Matters. Although actual consent by the shareholder's nominee director in a Board meeting would be *deemed* to be the shareholder's consent, there is no obligation on the shareholder's nominee director to participate in a decision to approve or veto a Reserved Matter; he can simply indicate the matter should be referred to the shareholders.

(ii) Refusing to consider further information in relation thereto;

Answer: No. See Issue 4(b)(i). There is no obligation on the shareholder's nominee director to decide in a Board meeting that Reserved Matter is approved; the decision is for the shareholders. It follows that the director is not obliged to participate as a director in a proposal to agree to, or veto, a Reserved Matter (whether or not already vetoed, as was the case here) merely because new arguments or information are put forward. Those advocating the plan can simply pass the relevant information directly to the relevant shareholders and request their consent.

(iii) Refusing to engage with proposed Reserved Matters so as to achieve a successful resolution for the Company;

Answer: No. See the answers to Issues 4(b)(i) and (ii). Further, the suggestion that there is only one "successful" resolution for the Company repeats the assumption that the decision is for the directors, or at least must accord with a decision that would be taken by the directors, and, further, that the Defendants' directors are right in determining what would be the "successful" approach. This is not what the SSA provides. The decision to engage in Reserved Matter activities is one for the shareholders, and can be made by them acting in their own interests.

(iv) Refusing to reconvene and adjourned Board meeting despite previously having agreed to do so; and

Answer: No. The contemporaneous email evidence indicates that H agreed to reconvene the Board meeting once the Reserved Matter issues had been resolved, both by the provision by D1 of further information on the issues to be decided, and – as was made clear by H – a decision by HMUK to approve the Reserved Matter. Alternatively, he would reconvene a Board meeting to discuss other issues that were not Reserved Matters. Until there was the requisite consent on the Reserved Matter issues, or until there were other issues to discuss, there was nothing to have a Board meeting about: it was not for the Board to decide Reserved Matter issues.

(v) Refusing to participate in Board meetings insofar as they addressed Reserved Matters.

Answer: No. See the answers to Issues 4(b)(i)-(iii).

…

Issue 6(a) Whether HMUK acted and continues to act in material breach its obligations under the SSA by:

(i) Procuring that H act in breach of his duties to the Company as set out in paragraph 4(b) above (Clause 6, in particular clauses 6.4(d) and 6.4(e));

Answer: No. Since H was not in breach of any of his duties in acting as he did in relation to these Reserved Matters, HMUK cannot be in breach of its duty to procure that H act properly.

…

(iii) Mr Hayashi refusing to discuss Reserved Matters at Board meetings, being the result of HMUK's failure to procure so far as it is able that Mr Hayashi should act at all times in good faith in the interests of the Company (Clause 6(d)) its failure to procure that Mr Hayashi does all he is able to ensure the Board performs its functions on a timely basis.

Answer: No. See the answer to Issue 6(a)(i). H acted in compliance with his duty to act in good faith and in the interests of the Company, ensuring that the Company did not engage in activities that were Reserved Matters without the appropriate consent. Further, the Board can only perform its *permitted* functions on a "timely basis", and its permitted functions do not include activities which remain vetoed Reserved Matters. It follows that H was not in breach of his duties, so HMUK was not in breach of its duties under the SSA Clause 6.4 to procure compliance by H.

Issue 5(a)(iii): The First Defendant's obligations under the SSA:

(a) Whether the First Defendant acted in material breach of his obligations under Clause 6 of the SSA by [engaging in the following actions without first seeking or obtaining consent from all Shareholders]: …

(iii) putting Reserved Matters (being the Five Matters, the appointment of new Company solicitors, expenditure on capital items exceeding £100,000) to the Board for resolution;

Answer: No, and this is not now disputed: counsel for HMUK conceded in his opening that this issue was not being pursued.

Actions in relation to matters which are not Reserved Matters

190. A further series of issues for decision relate to matters which are not, or not automatically, Reserved Matters, being decisions in relation to dividends and external financing. I consider each in turn.

191. Dividends. SSA Schedule 3 Part C (matters requiring consent of holders of 75% of the shares) includes Clause 3: "Pay or make any dividends or other distributions out of its capital, profits or reserves *otherwise than in accordance with* this Agreement and the Articles or any Scheme" (emphasis added). It is not now disputed that the payments of dividends contemplated at various times by the Company were not Reserved Matters under this clause, since the proposals were not "*otherwise than in accordance with* …". That conclusion is well-founded.

192. Nevertheless, at the time decisions were taken, all the parties had assumed that payment of any dividends was a Reserved Matter. Two proposals to pay dividends were contemplated via this route, one in 2021 and one in 2022, although no dividends have been distributed to date.

193. In 2021, the Board agreed that a request should be sent to all the shareholders via their nominee directors formally requesting Reserved Matter consent to payment of a £200,000 dividend to the B Shareholders in compliance with the SSA, and reminding the shareholders of the relevant terms of the SSA. Those terms, in Clause 9, imposed three requirements: compliance with the Companies Act (SSA Clause 9.3); preferential dividends to be paid to the B Shareholders according to a given formula (SSA Clause 9.1(b)); and each shareholder to "*use reasonable endeavours to procure* … that the Company shall make a distribution by way of dividend *when it is considered financially prudent to do so*" (SSA Clause 9.1(a), emphasis added).

194. In its written response, HMUK declined to approve the payment of this proposed dividend, indicating its reasons (see below), although noting it was not required to give reasons. Since the parties were working on the assumption that this was a Reserved Matter, HMUK's decision to vote against the proposal meant that all parties assumed that no dividends *could* be paid, and none were.

195. In 2022, by contrast, the proposal was to pay £100,000 by way of dividends to the B Shareholders, but subject to the Company meeting certain financial targets before the dividend was paid. All the shareholders agreed to this, including HMUK. However, the financial conditions were not met, and so no dividend was paid.

196. The Issue I am asked to determine (**Issue 6(a)(v)**) is whether HMUK "acted and continues to act in material breach of its obligations under the SSA" Clause 9.1 by not voting in favour of the dividend. For the reasons outlined below, I hold that any breach by HMUK would not have been a material breach, but that in any event no breach by HMUK has been shown.

197. The dividend proposals in issue were not Reserved Matters. Had they been, the earlier discussion indicates that HMUK would have been entitled to exercise its veto rights in its own interests, and would not have been in breach of Clause 9.1 in doing so, since the SSA Clause 9.1 is expressly subject to the Reserved Matters provisions in Schedule 3.

198. However, here, where the proposed dividends are not a Reserved Matter, the Company's Articles (Art 33) indicate that dividends can be paid provided recommended by the directors and approved by ordinary resolution of the shareholders. SSA Clause 9.1(a) then provides that each shareholder shall "use reasonable endeavours to procure … that the Company shall make a distribution by way of dividend *when it is considered financially prudent to do so*" (emphasis added).

199. Two things follow. First, whatever the input of HMUK, or indeed its nominee director, if the Defendants, whether as directors or as shareholders, had been in favour of a dividend distribution, the Company could have made such a distribution: it would have been a distribution recommended by a majority of the directors at a Board meeting, and approved by ordinary resolution of the shareholders. Thus, even if HMUK *had* been in breach of its obligations under the SSA, that breach had no impact on the ability of the Company to make a dividend distribution in any event if the Defendants wished to do so. The fact that the Defendants (and the Claimant) did not appreciate this is not an issue to be laid at the feet of HMUK.

200. It follows that even if HMUK had been in breach of any of its SSA obligations, it was not a *material* breach. This is significant, because a "Buy-Out Event" as defined in the SSA Clause 1.1 includes "any breach by that Shareholder of *any of its material obligations* under this Agreement" (emphasis added). Counsel for the Claimant expressly agreed, and counsel for the Defendants did not demur, that this meant that a Buy-Out Event would only occur if there was a "*material breach*" of a party's obligations under the SSA, since the parties' presumed intentions were not to trigger a buy-out regardless of how trivial or inconsequential a breach of the SSA was. I agree.

201. The Claimant makes the further point that Defendants bear an identical obligation to procure a dividend. On the Defendants' own case, therefore, in failing to procure the payment of a dividend by ordinary resolution, they are as much in breach of the SSA as the Claimant, and they cannot rely upon their own breach to found a cause of action: *Extra MSA Services Cobham Ltd v Accor UK Economy Hotel Ltd* [2011] EWHC 775 (Ch).

202. But secondly, and in any event, I do not find HMUK to be in breach of its obligations under the SSA. Those obligations required HMUK to "use reasonable endeavours to procure … that the Company shall make a distribution by way of dividend *when it is considered financially prudent to do so*" (emphasis added). This formulation permits each shareholder to reach its own subjective judgment on whether the payment of a dividend is financially prudent. HMUK is not obliged to procure a payment of a dividend simply because some other person considers it prudent. The use of the word "considered" excludes the conclusion that payment must be made on some external third-party-validated objective basis: if that were the case, "considered" could have been omitted, and the obligation worded simply as one to "procure … a distribution … when it is financially prudent to do so".

203. HMUK's written response to the 2021 request for (Reserved Matter) approval of the payment of a dividend was that it considered the distribution at that time to be financially imprudent given the Company's significant capital expenditure plans for 2021 and the uncertainty of the direction of travel in consumer demand for the Company's products as Covid lockdowns eased, which made the Company's financial predictions for the year uncertain.

204. The evidence supports that conclusion as reasonably open on the facts. The Company had made a loss in 2019 (on a turnover of £7,790,334, it suffered a loss after tax of £7,610), but improved dramatically in 2020 (with a turnover of £14,831,807 and a post-tax profit of £1,466,108). In 2021 it was not clear whether these buoyant 2020 Covid figures would be maintained, or improved further, or would collapse at least to some extent. Further, in April 2021, the letter requesting consent to a dividend payment indicated that the Company had cash reserves of £586k, of which it was proposing to pay out £200k (i.e. 34%) in dividends, while also planning substantial expansion through increased capital spend. As it turned out, the optimistic projections were realised, not HMUK's more pessimistic ones. Accordingly, in February 2022 all parties were sufficiently confident to agree to a smaller proposed dividend distribution of £100,000, subject to financial hurdles. However, by July 2022 net profits were 32% below budget and the financial criteria were not met. In short, in 2022 all the parties' cautiously optimistic projections proved wrong.

205. The fact that, in 2021, the other shareholders disagreed with HMUK's judgment does not of itself prove that HMUK's reasons for declining to vote in the same way are "spurious" and "no more than the enactment of its sectionally-driven standing policy, which dated as far back as 14 December 2019" (as counsel for the Defendants put it). It is true, but in this context irrelevant, that in 2019, in the lead up to HMUK's offer to purchase the B Shareholders' shares, HMUK indicated it would not agree to the payment of a dividend (when the parties all thought this therefore barred such payment as a Reserved Matter), but at the stage the Company was operating at a loss and so a dividend distribution was not in any event possible.

206. In short, in 2020 and 2021 the likely impact of Covid on the Company's business was uncertain. As H explained in cross-examination, his Japanese background probably made him, and HMUK, more cautious than his co-directors and shareholders, and more inclined to favour slow long-term growth over the possible advantages of possibly high short-term risks.

207. It follows that in relation to **Issue 6(a)(v),** concerning the Claimant's obligations under the SSA, and in particular:

> (a) "Whether the Claimant acted and continues to act in material breach of its obligations under of the SSA by: …
>
> (v) Not voting in favour of a dividend (Clauses 9.1).
>
> **Answer: No. There is no breach, and in any event a breach would not have been material.**

208. External Funding. I consider the issue of external funding next. This can be dealt with relatively swiftly given the previous discussion of dividends.

209. Clause 5 of the SSA sets out the agreed approach to the balance between external and shareholder funding. The clause is set out in full in the Appendix, but, so far as relevant here, provides that:

> **5 WORKING CAPITAL AND FINANCE**
>
> **5.1 External finance**
>
> [Subject to certain exceptions, the Company] shall be financed, so far as possible, from external sources … on such terms as shall be agreed from time to time by the Board …
>
> **5.2 Shareholder contributions** …[not presently relevant]

210. The issue then raised by the Defendants, **Issue 6(a)(ii)**, is this:

> ***Issue 6(a)*** *Whether HMUK acted and continues to act in material breach its obligations under the SSA by: ...*

(ii) Mr Hayashi's conduct in standing in the way of external funding so as to circumvent the effect of clause 5.1 of the SSA, being the result of HMUK's failure to procure so far as it is able that Mr Hayashi shall ensure that he is acting in accordance with the SSA (Clause 6.4(d)) [requiring Directors to act at all times "in good faith in the interests of the Company, and in accordance with the terms of this Agreement"] *and its failure to do its part to ensure that the Board shall take all steps necessary to ensure that the provisions of the SSA are fully and faithfully complied with* [i.e. comply with Clause 6.4(e), which requires the Director to ensure, so far as he is able, that "the Board shall take all steps necessary and within its power to ensure that the provisions of this Agreement are fully and faithfully complied with (save only to the extent that such steps conflict with the Directors' statutory and common law duties)]".

211. The argument is convoluted. It is that H has stood in the way of, or failed to agree to, proposed external funding arrangements in Board meetings, and, in doing so, has failed to act "in good faith in the interests of the Company, and in accordance with the terms of this Agreement" (Clause 6.4(d)) and has failed to ensure that "the Board shall take all steps necessary and within its power to ensure that the provisions of this Agreement are fully and faithfully complied with (save only to the extent that such steps conflict with the D's statutory and common law duties)" (Clause 6.4(e)), and, further, that *this* then means that HMUK, as the nominating shareholder, has failed to "procure insofar as it is able" that its nominee director shall (so far as *he* is able) ensure compliance with Clauses 6.4(d) and (e).

212. The Defendants' Amended Defence and Counterclaim asserts that H's and HMUK's "*continued adherence to the position that the Claimant will not consent to the Company entering into arrangements for external funding as negotiated and recommended by the Board of the Company* (save for Mr Hayashi), whilst simultaneously being prepared to countenance such funding through the issuing of further equity in the Company to the Claimant" (emphasis added) means the Claimant is acting in breach of SSA Clauses 6.4(d) and (e) and Clause 5.1.

213. There is little if any detail provided of the instances of refused funding relied upon by the Defendants in support of this claim. The written and oral argument and the cross-examination of H focused instead largely on the numerous email communications between H and Mr Hirono in the period late 2019/early 2020. This was at the time when HMUK was concerned about whether it would be successful in purchasing the shares from the B Shareholders under SSA Clause 11.15. Those emails showed Mr Hirono advising H, in robust terms, that HMUK would increase its chances of success, and at a low price, if it adopted a policy of starving the Company of funds and denying dividends to the B Shareholders. Moreover, many of the emails specifically relied upon were emails written in forceful language by Mr Hirono, not by H. As H explained at length in cross-examination, Mr Hirono was advising, not acting, and H (and HMUK) more often than not did not implement his advice. If the Defendants are to prove that H's refusals of consent to external funding amount to the breaches alleged, then far greater particularity is needed.

214. Without specific detail to the contrary, the broad facts would seem to go against the Defendants' equally broad assertions. The Company has grown rapidly over its short life. Its substantial capital expenditure has frequently been externally funded, as was

inevitably necessary where retained cash was insufficient. It is difficult to square these facts with the Defendants' assertion that, to the contrary, H and HMUK have maintained a "*continued adherence to the position that the Claimant will not consent to the Company entering into arrangements for external funding*". Such a claim is not made out merely by showing particular examples where H or HMUK has voted against further external funding: such divergences of viewpoint are to be expected in a properly functioning Company. Nor is it shown by the mere fact that HMUK has offered to inject further equity funds. Any shareholder is at liberty to make such an offer. Clause 5.2 supports that. However, its offers have all been rejected. As emerged in cross-examination, both sides could see the advantages of equity finance of the Company, especially if the economic climate is uncertain, but both sides could equally see the relative personal advantages and disadvantages in shareholdings being inflated or diluted. In short, the Defendants have not provided the evidence to persuade me that the facts support their claim of the Claimant's continued adherence to a particular position.

215. But in any event, even if a string of refusals of external funding had been specifically identified, there is a more substantial impediment to the Defendants' claim. If the external funding that was envisaged is a Reserved Matter, then HMUK is at liberty to veto the request without being in breach of any of its duties under the SSA. H is not then required to endeavour to procure a different outcome on the Reserved Matter, with HMUK then in turn required to procure that end. See the earlier analysis.

216. Alternatively, if the proposal for external funding is not a Reserved Matter, then the other directors can simply vote by majority to act according to their wishes; the fact that H disagrees, for whatever reason, is immaterial to the outcome: he cannot prevent the transaction. Any breach by H cannot therefore be material. See the same issue raised in the context of dividend distributions.

217. But there has been no proof of any breach by H of the duties he owes as a director in any event. Clause 5.1 demands Board approval for external funding decisions: the implication is that those decisions are subject the directors' common law and duties as directors. Clauses 6.4(d) and (e) require the relevant director to act in accordance with the Agreement (here, SSA Clause 5.1) in good faith, within the Board's power, and in accordance with the director's general duties. It follows that H should not procure that the Company embarks on Reserved Matter actions without the necessary approval to do so, and – with that approval where necessary – should give due consideration, in good faith, as to whether the external funding proposal is in the interests of the Company, bringing to bear his skill and care, and exercising independent judgment. Especially during the Covid years of 2020 and 2021, H gave sound reasons, sustained under cross-examination, for his caution in over-extending the Company's debt. The fact that H's conclusions were not always the same as the other directors' conclusions on these issues is not of itself proof of a breach by H of his duties as a director. The Defendants did not point to other evidence which proved a breach.

218. If H is not in breach, then HMUK cannot be in breach of its duties under Clause 6.4 to ensure H's compliance with those duties.

219. Accordingly, in relation to **Issue 6(a)(ii)**:

Issue 6(a)(ii): Whether HMUK acted and continues to act in material breach its obligations under the SSA by: …

(ii) Mr Hayashi's conduct in standing in the way of external funding so as to circumvent the effect of clause 5.1 of the SSA, being the result of HMUK's failure to procure so far as it is able that Mr Hayashi shall ensure that he is acting in accordance with the SSA (Clause 6.4(d)) and its failure to do its part to ensure that the Board shall take all steps necessary to ensure that the provisions of the SSA are fully and faithfully complied with.

Answer: No.

Disputes over the definition of Reserved Matters

220. The next set of issues concerns the interpretation of Schedule 3 and its definition of Reserved Matters. The matters in dispute relate to the engagement and instruction of lawyers, decisions on capital expenditure, agreeing to employment contracts, and entering into hire purchase contracts. I consider each in turn.

221. Engaging and instructing lawyers. Questions in relation to this matter are raised by **Issues 2(b) and (c)**, and concern the interpretation of Reserved Matter clauses in the SSA. The SSA Schedule 3 Part D specifies the following Reserved Matters:

> "Paragraph 11: Enter into any transaction or contract otherwise than on an arm's-length basis and in the ordinary course of its [i.e. the Company's] business.
>
> Paragraph 12: Approve any transaction or dealing of an unusual or long-term nature other than in the ordinary course of business."

222. The Claimant had initially suggested (**Issue 2(c)**) that the appointment of new solicitors after the withdrawal of Eversheds was a Reserved Matter within Paragraphs 11 and 12 because it fell outside the ordinary course of the Company's business. This submission has now been withdrawn. I agree with that concession. Such an appointment is the normal and usual thing for a company to do in the ordinary course of its business.

223. What remains disputed is whether the earlier instruction of Eversheds in relation to the SSA and/or the conduct of H and/or HMUK was a Reserved Matter. The Claimant is of the view that instructing Eversheds to advise in relation to the Central Issue – i.e. in relation to whether the Reserved Matters provisions of the SSA confer a right of veto on HMUK in respect of those matters, and in particular to advise on the meaning and impact of Clause 6, especially Clauses 6.1, 6.2 and 6.4 – is a Reserved Matter because it is not in the ordinary course of the Company's business. It then follows, the Claimant argues, that D1 was in breach of his obligations under Clause 6 to ensure that the Company did not act in relation to Reserved Matters without the appropriate shareholder consents when he purported to act on behalf of the Company in instructing Eversheds.

224. Questions concerning the "ordinary course of business" involve mixed questions of fact and law, and determinations are particularly context-specific. Nevertheless, should authority be needed on how to address the question, the Defendants referred

me to the Court of Appeal decision in *Koza Ltd v Akcil* [2019] EWCA Civ 891, where, at [27], after a review of the authorities, the Court's conclusion was that the question is not whether the transaction in issue is itself ordinary, or usual, for the particular company, but whether, objectively, the transaction is carried out in the ordinary course of the company's business.

225. The Claimant's argument is that these instructions fell outside the ordinary course of the Company's business because "resolving issues between shareholders and the interpretation of the SSA" is not within the ordinary course of business of the Company.

226. I accept counsels' submission that a company should not expend money on disputes between shareholders, and that where the Company should not do something, that act cannot be within the Company's ordinary course of business. But that leaves the issue of whether the Company can properly seek advice on the interpretation of the SSA: the Company is a party to it, and its interpretation has a profound impact on how the Company's business must be run.

227. Having examined the relevant documentation relating to the obtaining of legal advice (emails and phone messages between directors, shareholders and lawyers, and the terms of the instructions to the lawyers) and listened to the witnesses in cross-examination, I am satisfied that the intention in seeking advice was to ensure that the Company and its executive team, especially its Managing Director, were properly informed about the necessary procedures which needed to be followed in order to conduct the Company's business properly and in accordance with the restrictions in the SSA, and the requirements imposed on the Company's directors to achieve that. The instructions to Eversheds were specifically tailored to that end, and expressly did not address matters that exclusively related to inter-shareholder disputes, on which D1 eventually sought separate legal advice. The outcome of Eversheds' advice, and the subsequent advice from the Queen's Counsel, was accordingly specifically limited to that end.

228. I also consider D1's and D2's evidence in cross-examination to be compelling. As D1 put it, even if he had *not* been a shareholder, he would, as Managing Director, still need to work out how to transact the Company's business. For that, he would need to take exactly the legal advice which he took in the practical circumstances which confronted him, where practices which had developed over three and half years were suddenly changed by H and HMUK. Further, as D2 put it, "Who does the managing director ask in a situation like that? … we thought the company solicitor." That looks to be a logical conclusion.

229. As against this, counsel for the Claimant found support for the claim that D1 had acted in breach of the SSA in the fact that H, as a director, had not been copied into the correspondence with Eversheds as early as the other directors had been. The chronology was as follows: D1 first wrote to Eversheds, not copying any other directors, seeking some rapid advice immediately after the Board meeting at which H has arrived with his prepared statement, which he read out, on the way in which he proposed to conduct matters in the future; a week later D1 sent a detailed briefing note to Eversheds, and copied that to D2; the same day he also sent a brief "heads up" email to Ian York, indicating that he had sought legal advice and that this advice

would be concentrating on Clause 6 and directors' duties (an obvious addition in resolving the operation of the SSA, and clearly of interest to the Company as the person to whom such duties are owed); the next day D1 sent a further note to Eversheds, not copying any other directors, seeking advice on a draft email to be sent to H on H's interpretations of how H and HMUK would now engage in Company decisions; three days later D1 sent a note to all the Company's directors, including H, setting out the state of play, indicating that Eversheds' advice was to seek a Queen's Counsel's opinion, that Eversheds would advise on who to engage, and then seeking thoughts and input from the directors.

230. In short, H was notified that the Company had sought legal advice, and planned to seek further advice, 11 days after D1 first made contact with Eversheds. This was still in good time to engage with or prevent the need for the Company to seek Queen's Counsel's advice. Given that the reason legal advice was needed was H's own prepared actions in the Company's most recent Board meeting, this chronology seems entirely appropriate. As D1 noted in cross-examination, he had not waited to see if the advice from Eversheds supported him: whatever the outcome, the situation needed to be addressed. In any event, the full advice to the Company was dependant on the Queen's Counsel's opinion.

231. I thus conclude that instructing Eversheds in the circumstances described, and in the manner described, was an action in the ordinary course of the Company's business. It follows that my decisions on the specific issues related to this matter are as follows:

Issues 2(b) and (c): Whether, on a proper construction, of Schedule 3 to the SSA:
…

> (b) the instruction of Eversheds in relation to the SSA and/or the conduct of Mr Hayashi and/or HMUK was a Reserved Matter within paragraphs 11 and 12 of Part D of Schedule 3 because it fell outside the ordinary course of the Company's business;
>
> **Answer: No.**
>
> (c) the appointment of new solicitors after the withdrawal of Eversheds was a Reserved Matter within paragraphs 11 and 12 of Part D of Schedule 3 because it fell outside the ordinary course of the Company's business.
> **Answer: No, and this is not now disputed.**

Issue 5(a)(ii): The First Defendant's obligations under the SSA:

> (a) Whether the First Defendant acted in material breach of his obligations under Clause 6 of the SSA by [engaging in the following actions without first seeking or obtaining consent from all Shareholders]: …
>
> > (ii) the instruction of Eversheds in relation to the SSA and/or the conduct of Mr Hayashi and/or HMUK (without the requisite Shareholder consent, without putting the matter to the Board, or copying in other Board members on relevant correspondence and documentation and/or so as to pursue the First Defendant's personal interests);

Answer: No, since no consent from shareholders was required, as this was not a Reserved Matter.

232. Capital expenditure. The next issue also involves interpreting the scope of Reserved Matters, this time in relation to capital expenditure. Paragraph 10 of the SSA Schedule 3 Part D lists as a Reserved Matter "Incur any liability of a capital nature in excess of £100,000". In respect of this paragraph, the Parties seek a declaration in principle only.

233. The Defendants argue that the proper construction of Paragraph 10 require liabilities of a capital nature to be looked at individually. It then follows that items of expenditure of less than £100,000 each, but included in a list of items of more than £100,000 in aggregate, would not constitute Reserved Matters under the SSA. The Defendants advance this construction on the plain meaning of the words used.

234. The Claimant, by contrast, maintains that Paragraph 10 necessarily requires aggregation to give it commercial effect so as to prevent it becoming meaningless by some purported "dicing" of a liability. As an extreme example, the Claimant notes that it would not be contemplated that a car could be broken down into its constituent parts as individual liabilities, even if the invoice or invoices purported to do so. I accept this. By way of illustration, the Claimant notes that the Defendants aggregated the purchase and installation of the new boiler along with the necessary drains and flooring to accommodate it. Thus it would seem the Defendants too accept this aggregation principle. It suggests that the liability associated with a capital acquisition will include all the acquisition costs of ensuring that the acquired asset is operative in the Company's business.

235. But the Claimant also seeks to go much further than that. It suggests that the proper construction of Paragraph 10 is to consider whether the liability arises out of a series of linked transactions forming one *greater transaction* or *purpose*. In order to give the SSA a commercial construction, the Claimant suggests it is necessary to look at the substance of a transaction, not the form or presentation. By way of illustration, it suggests that the Company's earlier 2020 proposal to buy a new generator, a boiler and pasteurising equipment, and to improve the flooring and drainage in the premises, were all part of a single *purpose* (to increase capacity), or a single *transaction* (to improve the production line). Accordingly, all these items should be aggregated, and, if the total cost is more than £100,000, then their acquisition would be a Reserved Matter.

236. I do not accept this. The Company's production capacity and the efficiency of its production line will grow over time. An effective Board will have a long-term plan for this. That surely cannot mean that the entire expansion endeavour must be aggregated as a Reserved Matter. Schedule 3 already provides for the efficiency of aggregation and forward planning in requiring the Company's annual Business Plans to be agreed as Reserved Matters. Otherwise, outside that annual arrangement, I find that the ordinary meaning of Paragraph 10 is that individual items of capital expenditure (i.e. functioning items, such as a working car) in excess of £100,000 will require approval as Reserved Matters, but items (again, functioning items) under £100,000 will not.

237. Still less am I persuaded by the Claimant's further suggestion to the effect that if approval for capital expenditure is sought in a single proposal made at one Board meeting and the total liability to be incurred is greater than £100,000, then the basket of items would be swept up together into a single unit requiring Reserved Matter approval. To reach this conclusion requires so many additional words to be read into the 11 short words of Paragraph 10 that I find it impossible to see that this, objectively, is a reasonable construction of the clause.

238. Thus, on the specific issues noted for decision, I conclude as follows:

Issue 2(a): Whether, on a proper construction, of Schedule 3 to the SSA:

(a) capital expenditure in excess of £100,000 in aggregate (as set out in the email dated 24 September 2020) constitutes a Reserved Matter within paragraph 10 of Part D of Schedule 3 because:

(i) although the items are individually worth less than £100,000, they are all part of linked transactions forming part of a single wider transaction; or

(ii) approval for the items at issue was sought at a single proposal made at one Board Meeting (which were commonly held on a quarterly basis).

Answer: No, in both cases.

239. The specificity required in Reserved Matter proposals or in any annual Business Plans. The further issues for decision concern the employment of two individuals with remuneration packages in excess of £35,000pa (Ms Smith and Mr Eastwood) and entering into hire purchase agreements in excess of £30,000 (here, to finance the acquisition of capital equipment). These are plainly Reserved Matters under Paragraphs 9 and 4 of the SSA Schedule 3 Part D (with those paragraphs cited in full in the Appendix to this judgment). They thus require shareholder approval. The issue is whether that approval is deemed to have been given by virtue of the SSA Clause 6.2(d), because "such action is specifically provided for in the Business Plan", where the Business Plan has itself been agreed by the shareholders as a Reserved Matter (Schedule 3 Part D, paragraph 13), or, alternatively, whether an agreement by the shareholders expressed at a Board meeting in response to a Board Pack presentation had been sufficiently specifically agreed to in order to amount to approval of a Reserved Matter.

240. I begin with Clause 6.2(d) and the inclusion of Reserved Matters in annual Business Plans. All clearly hangs on whether action on these different matters was "*specifically provided for*" in the relevant agreed Business Plan.

241. The Claimant suggests the answer turns on whether "an item is referred to specifically or generally", with that being a question of fact. Pursuing this distinction, the Claimant then suggests that general references in the Business Plan to an employee role do not meet the required test; instead, full details of the specific employee proposed to be employed and the package to be offered is necessary for the item to be captured within the rubric "specifically provided for" in the Business Plan. Similarly, general references to types of capital equipment, such as "blast chillers" or "cookers", do not meet the test; what is required, presumably, is specific details of the equipment

proposed to be purchased. Further, the Claimant suggests that references in the Business Plan to the budget allocations and expenditure for acquisitions, and whether the asset acquisition is to be financed through cash reserves or asset financing, is not sufficiently specific, and any subsequent loans or hire purchase agreements entered into in execution of the capital acquisition will need further shareholder approval as Reserved Matters under Paragraph 4 if over £30,000.

242. I disagree with this construction of SSA Clause 6.2(d). I consider the proper question is whether the matter on which action is proposed to be undertaken is "specifically provided for" *or not*; it is not whether the matter is specifically provided for rather than only generally provided for. I reach that conclusion on the basis of the plain words used, supported by the context in which those words are used.

243. So far as presently relevant, the SSA Schedule 3 Part D lists a number of matters which are all concerned with transactions that would increase the Company's financial liabilities. These include credit transactions (Paragraph 4 – loans, hire-purchase, leases, credit sales), guarantees (Paragraph 5), employment contracts (Paragraph 9), capital expenditure (Paragraph 10), annual Business Plans (Paragraph 13) and real estate investments (Paragraph 21). The purpose of this list of Reserved Matters is to give the shareholders holding 30% of the shares a veto power over whether the Company can extend its liabilities to the degree proposed by these engagements.

244. Looked at from the other end of the telescope, if the shareholders holding 70% of the shares *do* agree to such an extension of the Company's liability under any of these Reserved Matter paragraphs, then this expands the envelope of the Company's permitted operations. As noted earlier, this does not mean that the Company is *obliged* to operate in that wider arena: the vote on Reserved Matters is not a shareholder direction under the Articles (art 4(1) which requires a special resolution). The effect of shareholder approval is simply that the management of the Company is now free to operate within this wider permitted envelope of activities, but management decisions remain a matter for the Board. Importantly, these decisions are subject to all the obligations imposed on directors to comply with their various common law and statutory duties in determining whether to proceed with any action which is within the permitted bounds of the Company's operations. This would be the case in any event, but that is reinforced by SSA Clause 6.4. Finally, much less still is the vote on Reserved Matters an intervention by the shareholders which sees them taking over the directors' management role and determining for themselves whether, and on what terms, any of the Company's activities will be pursued in these Reserved Matter contexts.

245. Given this view of the place and purpose of Reserved Matter provisions in the SSA, and then construing the words of the legally negotiated terms of the SSA according to the canons of construction outlined earlier in this judgment, I hold that a matter falling with Schedule D is "specifically provided for in the Business Plan" (as required by Clause 6.2(d)) if – in the specific context of the present disputed issues – it is clear to the shareholders that, in agreeing to the Business Plan, they are also agreeing to extend the liability of the Company to a particular financial level in relation to the particular matter in issue.

246. For example, provided that a specific employee role and its relevant remuneration envelope is noted in the Business Plan, which Plan is then agreed by the shareholders, this will meet the hurdle set out in Clause 6.2(d): i.e. the matter is sufficiently "specifically provided for in the Business Plan" to mean that separate later shareholder approval is not necessary. In particular, the shareholders are neither required nor entitled to exercise a veto vote on the individual appointed to the role, the precise terms of the job description, or the detailed terms of the employment contract (provided these fall within the agreed financial envelope). The only exception to this is in relation to employee share options. These appear as Reserved Matters under Paragraphs 16 and 26 of Schedule D, and are patently differently motivated Reserved Matters, giving the shareholders a veto power over dilution, rather than a veto power over the Company's expanding financial liability. Accordingly, any employee share options will require specific mention in the Business Plan or subsequent separate approval by the shareholders as a self-standing Reserved Matter.

247. Further, I hold that this same approach to specificity applies equally to individual Reserved Matters agreed by the shareholders independently of the Business Plan.

248. Employment Contracts. I turn then to the employment of Ms Smith and Mr Eastwood.

249. The minutes of the Board meeting held on 23 March 2020 record that "it was unanimously agreed under reserved matters that the Management could hire these two new roles", the roles being a Head of Purchasing (with Mr Surry subsequently appointed) and a Business Manager (with Ms Smith subsequently appointed). The minutes also note that H had asked whether these employees would be eligible for shares, to which D1 had responded that they would be considered but not until a six-month probation had passed. H had asked for any proposal on share awards to be brought back to the Board once the time was appropriate. As noted above, this would in any event have been necessary under the specific Reserved Matter provisions on this issue in Schedule 3.

250. That would seem to be the end of the matter, but the Claimant suggests that these hires were not agreed. The email evidence indicates that, 2 days after this Board meeting, and after exchanges of emails between H and Mr Hirono, H wrote to D1 acknowledging that at the Board meeting he had "tentatively approved" the hiring of a new Head of Purchasing (notably, the role of Business Manager – the only one in dispute here – is not mentioned, which would seem to suggest it remains agreed as per the Board minutes) but reminding that he had "also made it clear that my agreement is subject to the final confirmation to be made based on the written proposal from you about the terms to offer including an offer of the stock option." He then continued that "I gave another thought on this matter … Given the drastic changes taking place in business environment, and increasing uncertainty, I must inform you that I disagree with the proposal you made. I disagree with the new hiring." He then added a further paragraph about the uncertain global market and the fact that other companies had paused their hiring and were more inclined to be laying off employees.

251. When the minutes of the Board meeting were finally circulated on 8 April 2020, with the relevant hiring minute in the terms noted in paragraph [249], H replied the next day saying "Hiring was NOT unanimously agreed. I made myself clear that I

disagreed to hire. Also, it should mention that the stock option is subject to further approval."

252. There then followed a round of emails where the other directors confirmed, contrary to this, that the minutes as circulated accurately reflected the discussion that had taken place on the 23rd of March 2020.

253. In the circumstances I accept the evidence of the other directors that hiring to the two roles was agreed unanimously, as a Reserved Matter, subject only to further decision on employee share options. The minutes are, in other respects, quite specific in their qualifications as to what was agreed, so I do not accept it as likely that H's agreement was qualified other than in relation to the share options. If that is true, the decision on this Reserved Matter was made on 23 March 2020, and is deemed under Clause 6.2(a) to have been made by the shareholders in writing (see the earlier analysis). The date on which minutes are subsequently circulated is immaterial. The chronology, and the precise words of the emails noted above, suggest that H had a change of mind after being prompted in that direction by Mr Hirono. This is too late. The Reserved Matter has already been approved. Indeed, the engagement of Mr Surry was communicated to him the day after the Board meeting, and the Claimant is not now disputing that engagement as proper.

254. I therefore hold that the ability of the Company to appoint to the role of Business Manager was properly agreed by the shareholders as a Reserved Matter.

255. The Claimant suggests that this was not enough to enable the appointment of *Ms Smith* to that role, as that too needed to be properly agreed by the shareholders as a Reserved Matter. As the Claimant puts it, "The purported approval of Ms Simone Smith appears to be limited solely to the *general* approval of the role" (emphasis added) with the implication that the necessary specificity was not present. I disagree. The general role was agreed, and that is all that is necessary (with its salary envelope, which was given here). The Claimant appears to be of the view that the shareholders must also consent to the appointment of the particular individual intended to fill the role. This is not so: this is not a matter for the shareholders; it is a matter for management.

256. The position in relation to Mr Eastwood is a little more complicated. Mr Eastwood was offered employment on 31 December 2019 at a salary of £60,000, which he accepted. The Claimant says that this employment was not approved by the Board or by the shareholders, and nor was it "specifically provided for in the Business Plan". The 2020 Business Plan, presented to the Board on 23 December 2019, notes that the Company's operations structure presents a "major achilles heel for the business" because their existing Manufacturing Manager was clearly underperforming and the Company had lost both its new Shift Manager and new HSE Manager within four weeks.

257. What then happened, it seems, is that the underperforming Manufacturing Manager was effectively demoted to the vacant Shift Manager position (successfully it appears), and Mr Eastwood was appointed to a role of Operations Manager which combined both the previously agreed but now vacant roles of Manufacturing Manager

and HSE Manager. The net financial effect was a saving for the Company, and by all accounts Mr Eastwood seems to have performed well covering both roles.

258. The dispute between the parties is thus laid bare. The Claimant contends that *any* person employed by the Company on a salary in excess of £35,000 must be approved by the shareholders as a Reserved Matter, with that approval necessarily including approval of both the individual and their contract terms. As already noted, I disagree with this. In my view approval is only needed for a new role with its additive financial envelope. Within that envelope, recruitment is for the Company's management.

259. It follows, in my view, that once a role is properly agreed, any replacements of the incumbent of that role do not need renewed shareholder approval as a new Reserved Matter: the role and financial commitment have already been agreed. This accords with the purpose and intent of the relevant Reserved Matter provision.

260. The problem in the present circumstances is clear: Mr Eastwood is not a pure replacement for a role, he is a replacement for two roles; and his additive 'new' role has not been agreed as a Reserved Matter. His recruitment to the double role was reported to the Board in February 2020, and he commenced employment in March.

261. D1 noted this difficult tension in cross-examination. He suggested that this appointment was a new person appointed to an *existing* role, to replace the underperforming Manufacturing Manager who had been paid c.£50,000pa. This replacement to an existing role did not require Reserved Matter approval because the "role" had already been signed off as an approved Reserved Matter. So far, I agree. In addition, Mr Eastwood had agreed to take on additional responsibilities for HSE, a separate role for which the existing salary was less than £35,000pa. Instead of filling this HSE role (indicated on the organisation chart but not needing Reserved Matter approval), Mr Eastwood was paid £60,000 for both roles.

262. It is impossible to see what harm resulted from this action. To the contrary, the Company has been saved a substantial sum, and the coverage being delivered by Mr Eastwood has not been questioned. Moreover, the Board (and the shareholders' nominee directors) were all on notice of the need to fill the roles in issue; the salaries to fill those roles were all included in the base Business Plan; and yet when coverage of those roles was delivered by management at a lower net cost, the complaint is that they have committed a breach of the SSA. It is not an attractive position for the Claimant to take. Nevertheless, I accept that there has been a technical breach of the Reserved Matter provisions, since it cannot be proper that the management is left to take an approved "role" and then embellish the financial commitments attached to it by adding further responsibilities to the role, arguing that the aggregations are within the financial windows that do not require Reserved Matter approval. The "car components" illustration used in the context of the acquisition of capital assets is again apt.

263. However, where a technical breach of the SSA appears to have saved the Company money, and thus benefited all parties and harmed none, I am not prepared to find the breach to be material.

264. Accordingly, my decision on the issues relating to these employment matters is as follows:

Issue 5(a)(i): The First Defendant's obligations under the SSA:

(a) Whether the First Defendant acted in material breach of his obligations under Clause 6 of the SSA by [engaging in the following actions without first seeking or obtaining consent from all Shareholders]:

(i) procuring the employment of Mr Surry, Ms Smith and Mr Eastwood;…

Answer: The employment of Mr Surry is no longer in dispute. The employment of Ms Smith is not a breach. The employment of Mr Eastwood may constitute a technical breach, but it is not a material breach. To the contrary, it has advantaged the interested parties.

265. Hire Purchase Contracts. I turn next to the hire purchase contracts. Schedule 3 Part D Paragraph 4 provides that is a Reserved Matter in respect of arrangements in excess of £30,000.

266. The Claimant notes that on 20 October 2020, at Mr Knibbs' instigation, the Company entered into a hire purchase agreement for soya bean conveying, ventilation and chilling equipment in the sum of £229,298 without specific shareholder consent for any hire purchase arrangement.

267. On the Claimant's analysis, not only must any capital acquisitions over £100,000 be agreed by the shareholders as Reserved Matters (either individually or as items specifically provided for in an approved Business Plan), but the shareholders must also provide further Reserved Matter approval for any hire purchase arrangement subsequently entered into to effect the agreed capital acquisitions.

268. In this instance the Claimant asserts that the capital expenditure in issue has not been *specifically* provided for an approved Business Plan, since the Board pack detailing the Business Plan simply contains a page listing "Capital Priorities", including no more than generalised references to "2nd Cooker", "Packing Hall Conveyoring", "Blast Chill", with a round sum acquisition figures to the nearest £10,000. The Claimant suggests these references are hopelessly inadequate to amount to deemed consent to action "specifically provided for in the Business Plan".

269. I disagree. As with Reserved Matter agreement on employee roles, and for the same reasons, I consider that the shareholders need to be put on clear notice that there are major capital acquisitions of a particular type being proposed, and that those acquisitions will entail a substantial liability for the Company. With that information, the shareholders are on sufficient notice to request further information, if they need it, before they consent to the Business Plan (or consent to requests in relation to individual items). But when they do consent to the Business Plan with those listed capital acquisitions, they are then taken to have agreed to the Company and its management being empowered to take action on the relevant capital expenditure to acquire those specific listed assets. It is up to management to ensure that the particular choice of "2nd Cooker" or "Blast Chiller" is made in the interests of the Company and

in accordance with all the directors' duties of care and skill and proper judgment. This level of decision-making is not a matter for the shareholders.

270. Further, the Claimant suggests that even if the Business Plan is approved, and the proposed major capital expenditure plans are incorporated into the agreed budget, it is still necessary to obtain shareholder approval under Reserved Matter provisions to each hire purchase arrangement negotiated to support the agreed capital acquisition. Presumably the same would be true of any other financing arrangement adopted to enable the acquisition.

271. Again, I disagree. Where the shareholders have agreed to specific major capital acquisitions, they have necessarily agreed that the Company may incur the associated financial liability in respect of those acquisitions. The budget in the Business Plan will indicate whether the planned liability is manageable, and that will be a material consideration in the shareholders' decision to approve plans or not. Even where the planned acquisition is from cash reserves, that drain on the Company's resources is a material consideration in whether to approve the acquisition.

272. When D1 was cross-examined on this issue, he expressed the view that, in agreeing to major capital expenditure, the shareholders must have appreciated that some financing facility would be used, and were implicitly approving that use. That was how it had been done for the three years prior to this 2020 issue arising. Further, approvals in relation to Reserved Matters were designed to ensure the Company did not venture into these reserved activities without the shareholders being aware of and consenting to the activity. A second round of approvals in relation to the same acquisitions was therefore surplus to the purposes of the SSA.

273. I agree. Further, the consequences for Company management are impossible to deal with. If a Business Plan is approved, the Company's management knows what envelope of permitted activity lies ahead. If that envelope is immediately rendered liable to a later shareholder veto of the funding for the very acquisitions already agreed by the shareholders, then no Company plans could be made with confidence. I suggest that Schedule 3 of the SSA is not, on its natural construction, liable to deliver that end, and should not be forced into that shape.

274. In short, I consider that the evidence shows that the capital acquisitions in issue were specifically provided for in the Business Plan, that Plan was agreed by the shareholders, and that agreement to undertake the capital acquisitions necessarily includes an agreement to enter into the necessary funding arrangements to do so.

275. Finally, in a related aside, I note that the minutes of the 2021 meeting approving the Budget Plan for the year include approvals for capital acquisitions (some to be paid for from cash reserves, others by asset financing), but also record that, despite this Reserved Matter approval of the Budget Plans, the Company is on notice that the shareholders must still provide Reserved Matter approval of "the proposed final draft of each such [funding] contract" for the capital acquisitions. Given the analysis here, I suggest that neither the Articles nor the SSA give the shareholders the power to demand this while also agreeing to the Budget Plan, unless they do so by special resolution under Article 4(1).

276. Accordingly, my conclusion on this hire purchase issue is as follows:

> **Issue 5(a)(iv):** The First Defendant's obligations under the SSA:
>
> (a) Whether the First Defendant acted in material breach of his obligations under Clause 6 of the SSA by [engaging in the following actions without first seeking or obtaining consent from all Shareholders]: …
>
> (iv) procuring that the Company entered into hire purchase agreements in excess of £30,000.
>
> **Answer: No, at least not in relation to the particular instances advanced by the Claimant.**

277. Further, it follows automatically that my answer to the two additional related issues are as follows:

> **Issues 5(b) and (c):** The First Defendant's obligations under the SSA: …
>
> (b) Whether the said breaches are capable of remedy and, if remediable, unremedied.
>
> **Answer: These "said breaches" are not breaches.**
>
> (c) Whether a Buy-Out Event within the meaning of the SSA has occurred as a result of the alleged breaches.
>
> **Answer: No.**

A "Strategy of Disruption" and "untenable" pursuit of certain Reserved Matter issues

278. I have left until last my comments on the Defendants' arguments in relation to the "Strategy of Disruption" allegedly pursued by the Claimant and by H. It is difficult to pin down the precise scope and intent of these allegations. The Defendants' Amended Defence and Counterclaim affords little assistance, indicating merely that resolution of these issues (along with the various issues already considered in this judgment) is necessary so that the Company can get on with its successful growth plans "*free of the disruption perpetrated upon it by reason of the strategy being adopted by the Claimant and Mr Hayashi as summarised at paragraph 21.3 above*".

279. I pause to note that if the "disruption" being perpetrated is a disruption expressly provided for in the SSA, by virtue of the Claimant using its power to veto Reserved Matters in its own interests, and if H, as its nominee director, is then complying with his director's duties in operating within the Company's mandated scope of operations, there would seem to be no reason for the Defendants to be "free" of the resulting disruption. They were well advised before they signed the SSA. D1 expressly acknowledged in cross-examination that he had appreciated at the time that the Reserved Matter provisions were tough. I consider later whether somehow labelling this as a "strategy", if such it is, alters matters.

280. Returning to the Defendants' Amended Defence and Counterclaim, the summary of the alleged "strategy" at paragraph 21.3 indicates that, after H's and HMUK's failed attempts to become majority owners of the Company, the two of them have "*pursued*

a disruptive strategy involving reliance on provisions relating to Reserved Matters within the SSA *in order to stymie* the Company's ability to expand its production capacity so as to meet market demand for its products, *and to stymie* the taking of decisions generally necessary for the good administration and best interests of the Company." The focus is plainly not simply on the act of vetoing Reserved Matter issues, but the motivation underpinning that act. The Defendants did not, however, explain what that added to the case being made. Nevertheless, they ask me to resolve the questions they raise on this front, and I endeavour do that.

281. Paragraph 21.3 further records that both H and HMUK are concerned that H's pursuit of this strategy by objecting to Reserved Matters in his capacity as a director on the Company's Board will involve him in a breach of his duty to act in good faith in the interests of the Company (also see SSA Clause 6.4(d)). I dealt with the relevant law earlier, and the obligations imposed on H in this regard by the SSA and by the general law, and note, again, that there does not appear to be a single example of H objecting to Reserved Matters in his capacity as a director on the Company's Board. I therefore say no more on this aspect.

282. The Joint Statement of Issues makes it clear that what is being asked is, first, whether, *as a matter of fact and law*, H and HMUK are in breach of their legal duties, and then, separately, whether *as a matter of fact*, in engaging in these activities, the two of them are acting in pursuit of a "Strategy of Disruption". Here again the Defendants do not indicate what follows, legally, from any factual finding of such a strategy.

283. I consider first the remaining duty questions, and then turn to the factual matter of the existence of a "Strategy of Disruption". **Issues 6(a)(iv) and (vi)** deal with the Claimant's obligations under the SSA. Taking them in order:

> (a) Whether the Claimant acted and continues to act in material breach of its obligations under of the SSA by: …
>
> > (iv) The Claimant's and Mr Hayashi's *deployment of the concept of Reserved Matters on an untenable basis*, including in relation to the appointment of Company solicitors, expenditure on individual capital items totalling less than £100,000 each and by insisting that a Request for Consent must be issued and shareholder agreement obtained in relation to all actions which constitute a Reserved Matter, even if such actions have already been approved by reason of the shareholders' approval of the Business Plan, *so as to stymie decision-making in relation to those matters* (clauses 6.4(a), 6.4(c) and 6.4(d)). (emphasis added)

284. The implicit logic in this question is that the Claimant and H have in fact deployed the concept of Reserved Matters on an untenable basis, that they have done this so as to stymie decision-making in relation to those matters, and that this behaviour is a material breach of their obligations under the SSA. If these listed matters had indeed been proper Reserved Matters, the earlier analysis of the law indicates the short answer to the question: i.e. the basis is not untenable (it being accurate); the veto can be exercised in the shareholder's own interests (rendering the "*so as to stymie*"

rationale immaterial); and the act is therefore not in breach of the SSA: it is in accordance with it.

285. At the other extreme, if the deployment of Reserved Matters *is* pursued on an untenable basis, then – necessarily, it seems – the matters are not in fact Reserved Matters. It follows that, even if such untenable deployment were in breach of the SSA (and the Defendants have not explained why that would be so), this would not be a *material* breach. It would not be material because the decision-making of the Board would then be unconstrained by the Reserved Matter provisions in the SSA, and the Board could vote to pursue the desired act by simple majority. The views of H and HMUK would be immaterial. Here again, the Defendants cannot rely upon their own doubts and uncertainties as to whether the Claimant and H are correct in their assessment of the matters as being Reserved Matters as some sort of unlawful interference with their powers (especially where the premise is that the views of H and the Claimant were "untenable"), nor can their own failure to procure the outcome that they desire be laid at H's or the Claimant's feet (see the earlier analysis to the same effect in relation to dividends).

286. Moreover, the same would still hold true even if it were also proven that the Claimant and H were motivated by a reprehensible desire to stymie decision-making in relation to these Reserved Matters: if the matters were not in fact Reserved Matters, their desire to stymie would come without the necessary veto power to bite.

287. In short, although I have held that none of these listed matters are Reserved Matters, the legal analysis is such that any breach the Defendants might prove (and they have not laid out the logic) would not be a material breach.

288. But in any event, on the facts I also hold that the Claimant and H have not deployed the concept of Reserved Matters "on an *untenable* basis". It is true that I have found against them on their categorisation of each of the listed matters, but in the environment where the parties were increasingly aggressive in their assertion of where the permitted lines in the SSA lay, the faults in holding on to "untenable" – or simply flawed or unsound – positions must be assessed in this context. Neither side is under a duty to pursue only those arguments that turn out to be seen as correct by the court, and the pursuit of arguments that fail does not automatically make them "untenable". That suggests the running of arguments that no reasonable person could think sustainable. To take an example going in the other direction, while the Claimant and H were arguing about the categorisation of Reserved Matters, the Defendants were arguing about the role and powers of nominee directors. Both have turned out to be wrong on the analysis adopted here by the Court; both would have caused some delays and disruption in the management of the Company's affairs; but I would hesitate to describe either view as simply "untenable".

289. Further, if the Defendants' intention, in claiming that there is a "Strategy of Disruption", is to impugn the Claimant's motives, or purposes, then they have not provided adequate characterisation of either the wrong which is in issue and which thus requires resolution of this question by the court, nor sufficient evidence to constitute proof of the implementation of such a strategy.

290. Their evidence of a "strategy" or "scheme" or some impermissible motive or purpose is to assert that this is evident, or self-evident, from the following:

> (i) H and HMUK have vetoed Reserved Matters to promote their own interests rather than acting in the interests of the Company. However, there was no evidence put forward of the advantages resulting to H or HMUK as a result of any Reserved Matter that was vetoed; further, the law permits HMUK to act in its own interests in vetoing Reserved Matters; and H himself has not voted as a Board director to veto any Reserved Matter, and is not obliged to vote on such matters as these are matters for the shareholders to decide.
>
> (ii) H and HMUK have acted as they have so as to enable HMUK's acquisition of 51% or 100% of the Company. The Defendants' evidence in relation to this rested more on the aggressive nature of the emails between Mr Hirono and H than on the actions that were then taken by H or HMUK as a consequence of Mr Hirono's advice. Further, to the extent that any actions so taken involved Reserved Matters, HMUK was entitled to act in its own interests. Finally, whatever was done by H and HMUK, HMUK's shareholding has not changed;
>
> (iii) H and HMUK have endeavoured to reduce the Company's share price by blocking access to external finance. This assertion is made despite the evidence of significant instances of approval of external financing and rare instances of its blocking. It is also made in the face of the Company's evident growth and presumed share price increase. Finally, and in any event, any material decision on external financing would have been for financing at a level that rendered it a Reserved Matter which HMUK could veto in its own interests.
>
> (iv) H and HMUK favoured liberal capital investment in DFL while taking quite a different stance in relation to the Company. This assertion is contrary to the evidence, including the evidence in Mr Wickham's witness statement.
>
> (v) H and HMUK refused to agree to the Business Plan at a Board meeting of directors. This is not a matter for complaint, since the proper process is to recognise this as a Reserved Matter requiring the approval of the requisite percentage of shareholders. See the earlier analysis.

I need not repeat the evidence which emerged in cross examination or from witness statements – see especially paragraphs [33]-[40] and [62]-[66] above – but, setting the Defendants' arguments against the evidence as I have found it, I do not consider that a "Strategy of Disruption" has been shown to exist. See too the further discussion below at paragraphs [294]-[312].

291. I turn next to the second duty question, which is this:

> **Issue 6(a):** Whether the Claimant acted and continues to act in material breach of its obligations under of the SSA by: …
>
> (vi) Failing and continuing to fail to exercise its voting rights and other powers of control lawfully available to it as a Shareholder to procure that the provisions of the SSA are properly and promptly observed and given

full force and effect according to the spirit and intention of the SSA, by its conduct set out at paragraphs 6(a)(i) to 6(a)(v) above (Clause 15.1(b)).

292. My conclusions on Issues 6(a)(i)-(v) make my conclusion on Issue 6(a)(vi) inevitable. If no wrongs have been committed in relation to the issues listed in 6(a)(i)-(v), then there can be no further wrong in breach of Clause 15.1(b): see the earlier analysis on the construction of Clause 15.1(b).

293. It follows that my conclusions in relation to **Issues 6(a)(iv) and (vi)** are as follows:

> **Issues 6(a)(iv) and (vi)**: The Claimant's obligations under the SSA:
>
> (a) Whether the Claimant acted and continues to act in material breach of its obligations under of the SSA by: …
>
> (iv) The Claimant's and Mr Hayashi's deployment of the concept of Reserved Matters on an untenable basis, including in relation to the appointment of Company solicitors, expenditure on individual capital items totalling less than £100,000 each and by insisting that a Request for Consent must be issued and shareholder agreement obtained in relation to all actions which constitute a Reserved Matter, even if such actions have already been approved by reason of the shareholders' approval of the Business Plan, so as to stymie decision-making in relation to those matters (clauses 6.4(a), 6.4(c) and 6.4(d)).
>
> **Answer: No.**
>
> (vi) Failing and continuing to fail to exercise its voting rights and other powers of control lawfully available to it as a Shareholder to procure that the provisions of the SSA are properly and promptly observed and given full force and effect according to the spirit and intention of the SSA, by its conduct set out at paragraphs 6(a)(i) to 6(a)(v) above (Clause 15.1(b)).
>
> **Answer: No.**

294. I turn finally to the questions of fact on the "Strategy of Disruption". The issues in dispute are these:

> **Issue 4(c)**: "Whether, as a matter of fact, Mr Hayashi has acted in the ways set out at paragraph 4(b) above in pursuit of a disruptive strategy involving reliance on provisions relating to Reserved Matters within the SSA in order to stymie the Company's ability to expand its production capacity so as to meet market demand for its products, and to stymie the taking of decisions generally necessary for the good administration and best interests of the Company ("Strategy of Disruption")."
>
> **Issue 6(b)**: "Whether, as a matter of fact, the Claimant has acted in the ways set out at paragraph 6(a) above in pursuit of the Strategy of Disruption."

295. I made some brief comments on the evidence at paragraphs [289]-[290].

296. I add to that with some repeated but relevant legal background. With the present split of shareholding in the Company, all the cards are in HMUK's hands in respect of Reserved Matters. It has the shareholding to carry an effective veto of Reserved Matters, and the law permits it to do so in its own interests. No complaint can be made of the power this obviously gives to HMUK to strangle the growth of the Company: the SSA was designed on precisely this model. While all the parties' decisions were aligned, no one felt threatened by the possibility of a growth-limiting veto on Reserved Matters; but as soon as differences emerged, it was perhaps a shock to see where the real power lay in respect of this range of issues.

297. Then there is the question of H's position in his role as a director. In relation to all the matters in 4(b), H acted perfectly properly as a director of the Company, complying with his common law and statutory duties and with the SSA. H was not obliged to solicit agreement to Reserved Matters from any shareholders, including from HMUK, nor was he obliged to vote on those matters himself. The five relevant Reserved Matters had already been vetoed by HMUK. H was not obliged to seek a change to that view, but, until that view changed, the Board was not able to engage in the relevant activities. H's actions in declining to do so were in accord with those legal and factual realities. Behaving in this way does not constitute a "Strategy of Disruption", merely compliance with H's duties and with the SSA. Nevertheless, below I consider a number of further issues in relation to the alleged "Strategy of Disruption".

298. I concluded earlier that none of the nominated activities of H or HMUK involved breaches, or material breaches (where that was the question), of their legal duties: HMUK was entitled to veto (or not) Reserved Matters in its own interests; H was obliged to exercise his duties as a director only within the Company's permitted scope of endeavours, enhanced (or not) by agreements to act in relation to certain Reserved Matters; he was not required to pursue a different outcome simply because a director unconstrained by Reserved Matter restrictions might have considered an activity to be in the interests of the Company.

299. Notwithstanding this finding that neither H nor HMUK were in breach of their legal duties in relation to these listed matters, what is now in issue is the motivation animating these decisions taken by H and HMUK. The Defendants suggest a deliberate Strategy of Disruption designed to stymie the Company's growth and also stymie the ability to take action in the best interests of the Company. The context is important. H and HMUK are, on my findings, exercising their powers legally, but the Defendants nevertheless suggest that this exercise of legal rights is abusive or wrong because it is motivated by a "Strategy of Disruption".

300. The evidence for this motivation is not specified in detail. I have already laid out some issues at paragraphs [289]-[290]. The greatest detail emerges from counsel's cross-examination of H: see paragraphs [33]-[40] above. For example, it is said to rest in part on the fact that Mr Hirono and H discussed aggressive plans (frequently not, or not fully, acted on); that HMUK vetoed a series of Reserved Matter decisions (but by no means all the Reserved Matter decisions put to it) and did so in ways that constrained the Company's growth ambitions (or at least the growth ambitions held by the majority of directors and shareholders). These growth ambitions covered financing, capital expenditure and additional employees. The Defendants further

allege that the Strategy of Disruption is shown by H and HMUK deliberately favouring DFL over the Company, providing it with far more generous financial support while putting tight financial constraints on the Company, all in order to reduce the Company's competitiveness and reduce its share price. I have already indicated, in discussing Mr Wickham's witness statement, that the facts put in evidence do not support this last claim.

301. I do not accept this evidence as proof of an abusive or somehow vindictive strategy. The question of motivation was put to H in endless different ways in cross-examination, and he stuck vigorously and convincingly to his claim that Company growth had been supported until 2020/2021, but when Covid hit (with that risk added to the existing Brexit concerns) he assessed the opportunities against the risks and arrived at a different answer from his co-directors, whom he thought were too focused on the opportunity side alone. Nevertheless, despite this caution, earlier parts of this judgment indicate just how much growth financing was approved over the difficult Covid 2020/2021 years and later.

302. In addition, having listened to the witnesses give oral evidence, and despite Mr Hirono's rather vindictive emails, I am not persuaded that H or HMUK acted with that same one-eyed motivation that Mr Hirono could express in emails. I consider there was a genuine difference of opinion between the parties, sincerely held on both sides, although, perhaps like all quarrelling partners, the litigious nature of the exchanges increased as time passed.

303. Mr Hirono is not a party to these proceedings. He was not cross-examined, and that makes it risky to read too much into the selected emails in evidence, especially given H's description of the general context and practice in their communications. I ignore his email communications except to the extent that H and HMUK adopted the same stance, but in any event *his* email do not prove that *H and HMUK* were perpetrating some disruptive strategy.

304. I found H's own evidence persuasive. Further, his careful description of his own motivations fits the facts: his cautious view in 2020 and 2021 is hardly one that no reasonable person could have adopted, thus leaving some vindictive motivation as the only option left on the table. In short, I am not persuaded that H or HMUK (as H spoke for both) was motivated by a desire to stymie the Company's growth.

305. Equally, I can see no evidence of a deliberate strategy to prevent good governance. Indeed, quite the opposite. H appeared focused on ensuring that it was the shareholders who took Reserved Matter decisions, leaving the directors to act appropriately within their own sphere.

306. In short, on the facts presented I am not persuaded that there is evidence of a Strategy of Disruption, taking that to be an approach motivated by some sort of vindictive or deliberate desire to harm and to stymie the Company's operations.

307. Rather, to the contrary, even when HMUK was entitled to exercise a veto in its own interests, I found the reasons advanced by H in explaining the motivation for HMUK's actions were ones which looked carefully to the good of the Company, not to some immediate 'win' for HMUK. If HMUK and H had truly wanted to ensure a

low share price that would be inclined to persuade the B Shareholders to sell, then they would surely have adopted their strategy of starving the Company of funds well before the 3-year Option date arose, so that they could combine their strategy with the opportunities provided in the SSA.

308. I close this section by adding one further comment on the law. The tone and terminology of the Defendants' case indicated, by strong inference but perhaps no more, an abuse of rights argument in play. That is evident in what I have already said; there seems to be no better way to describe the issue being advanced for decision. In addition, the context suggests as much: even where H and HMUK are not in breach of the SSA or their respective legal duties in exercising their powers, the argument seems to be that their mis-motivation may be held against them. An argument of improper purposes might plausibly be advanced by a company against its director, but – in relation to H and his actions – such an argument cannot be mounted in the scenario being addressed here where H did not act and was not obliged to act in the way the Defendants have argued he must.

309. In the present context an abuse of rights argument can be sustained only if the right-holder uses his rights or powers for purposes or ends other than those for which they were given. But here the powers held by the parties, especially the Reserved Matter powers, arose out of a carefully negotiated SSA designed to deliver just that power to the relevant shareholders with sufficient shareholding. The exercise of this power by HMUK, in its own interests, was both part of and fully aligned with the spirit and intent of the SSA, or – putting it another way – that exercise was consistent with delivering the legitimate, professionally negotiated expectations of the parties. All this is reinforced abundantly in the detailed consideration of the issues in *Wilkinson*, and further amplified in this judgment in the present context. *Wilkinson* clearly indicates that the shareholders holding veto powers under Reserved Matters clauses can exercise those powers in their own interests, unconstrained by what might be the best interests of the company.

310. It therefore does not serve the Defendants' case to suggest that HMUK must have a Strategy of Disruption because the decisions it takes are in its own interests and not in the interests of the Company. It is not required to take these Reserved Matter decisions in the interests of the Company. By contrast, H, when acting as a director of the Company, would be bound by his duties to the Company, but he is not in the sightlines here: he has not taken any decisions on Reserved Matters in that capacity.

311. Further, the fact that shareholders *use* their Reserved Matters powers on several different occasions does not of itself indicate a "strategy" which then draws in another legal rule to constrain exercise of the power by a different mechanism, and nor did the Defendants identify or suggest such a legal rule.

312. It follows that where an SSA has tightly limited the scope of the Company's operations, and has given the power to relax those strictures to the shareholders, and done so in a professionally negotiated contract that all the shareholders and the Company have signed up to, it can hardly be suggested that the result is "unfair", and the Defendants did not seek to do that. Instead, they rather left their abuse of rights /"Strategy of Disruption" claim hanging in the air. I am not persuaded that there is the evidence, backed by legal principle, to keep it floating.

313. Accordingly, my conclusions on these final matters in relation the Claimant are as follows:

> **Issue 4(c)** Whether, as a matter of fact, Mr Hayashi has acted in the ways set out at paragraph 4(b) above in pursuit of a disruptive strategy involving reliance on provisions relating to Reserved Matters within the SSA in order to stymie the Company's ability to expand its production capacity so as to meet market demand for its products, and to stymie the taking of decisions generally necessary for the good administration and best interests of the Company ("Strategy of Disruption").
>
> **Answer: No.**
>
> **Issue 6(b)**: Whether, as a matter of fact, the Claimant has acted in the ways set out at paragraph 6(a) above in pursuit of the Strategy of Disruption.
>
> **Answer: No.**
>
> **Issue 6(c):** Whether a Buy-Out Event within the meaning of the SSA has occurred as a result of the alleged breaches.
>
> **Answer: No. There is no proof of an underpinning material breach.**

Summary of conclusions

314. I therefore find, for the detailed reasons given earlier, that the answers in respect of each of the issues raised in the parties' Joint Statement of Issues are as follows:

1. The proper construction and effect of Clause 6 of the Subscription and Shareholders' Agreement between the Claimant, the Defendants and R&R Tofu Limited (the "Company") dated 10 October 2016 (the "SSA"), namely:

    a. Whether the Shareholders of more than 25% or 30% of the shares (as applicable) have the right to veto any activity that falls within the definition of Reserved Matters.

    Answer: Yes.

    b. Whether consent under Clause 6.1(a) must be sought from and, in the first instance, given by the Shareholder itself and not its appointed director (if there is one).

    Answer: No.

    c. Whether deemed consent under Clause 6.2 operates solely to give effect to Clause 6.1(a), or whether instead Clause 6.2 operates as an alternative or separate approval mechanism to obtain the relevant consent to a Reserved Matter.

    Answer: Clause 6.2 operates as an alternative deemed approval mechanism.

d. Whether, if a Shareholder holding the requisite percentage of shares has denied consent, so as to veto a proposal for a Reserved Matter, a subsequent vote to approve such a proposal by that Shareholder's appointed director is deemed consent under Clause 6.2 such as to override the Shareholder's veto.

Answer: Yes.

e. Whether, if consent has been denied by Shareholders holding the requisite percentage of shares, so as to veto a proposal for Reserved Matters, this can be overridden by a favourable vote by directors, whether or not those directors voting in favour of the proposal include the appointed director of the Shareholder entitled to veto that has exercised that veto.

Answer: No, not unless the vote by the directors does include a favourable vote by the vetoing shareholder's nominated director so as to meet the conditions set out in Clause 6.2(a).

f. Whether a Shareholder is entitled to exercise a power of veto in relation to Reserved Matters, where that exercise would be contrary to the good faith view of its nominated director on the Reserved Matter at issue.

Answer: Yes. A shareholder is entitled to exercise its rights of veto in a self-interested way.

g. Whether (having regard to clause 6.4(e)) a director cannot be in breach of his duties to the Company by giving effect to the terms of Clause 6.1(a) or any other part of the SSA as agreed between the shareholders and the Company.

Answer: (i) If shareholders have *vetoed* the Reserved Matter, a director is not in breach of duty in ensuring the Company does not engage in the vetoed activity even if a director unconstrained by the Reserved Matters provisions might have considered the activity in the best interests of the Company. (ii) If the shareholders have given the necessary *consent* to the Company taking action on the Reserved Matter, this does not amount to a direction from the shareholders to undertake that activity; it follows that the directors must still decide whether the activity can and should be undertaken in the light of the duties the directors owe to the Company, and a failure on this front could amount to a breach by the director of his or her duties to the Company.

h. Whether the directors can be under no duty to vote on a Reserved Matter until the expiry of the period prescribed for the refusal of Shareholder consent under Clause 6.1(a).

Answer: If, as seemed to be the position at the oral hearing, the question is whether the directors are under *a duty not to vote* on a Reserved Matter until the expiry of the period prescribed for the deemed refusal of Shareholder consent under Clause 6.1(a), then the answer is, No. See Issues 1(b) and (c) above.

i. Whether the proper construction and effect of Clause 6.2(d) is to the effect that a Request for Consent [as defined in the Amended Defence] is required, and Shareholder agreement to be obtained, in relation to Reserved Matters that have been included in the Business Plan approved by the Shareholders and whether the answer to this is dependent on whether or not the Business Plan approval for the item at issue is generic rather than specific.

Answer: Clause 6.2(d) provides that the requisite shareholder consent to the Company undertaking any action is relation to a Reserved Matter will be deemed to have been given if, and only if (at least under this proviso), "such action is specifically provided for in the Business Plan". The meaning of "specifically provided for" is considered at paragraphs [239] to [274] above. If the action is not specifically provided for in the Business Plan, then this deeming provision is not activated, and some other means of obtaining the requisite shareholder consent to the action must be found before the Company can properly undertake the action. That alternative mechanism does not require that the shareholders be issued with a written request for consent (a Request for Consent); there are other means of establishing shareholder consent: see Issues 1(b) and (c).

2. Whether, on a proper construction of Schedule 3 to the SSA:

a. capital expenditure in excess of £100,000 in aggregate (as set out in the email dated 24 September 2020) constitutes a Reserved Matter within paragraph 10 of Part D of Schedule 3 because:

i. although the items are individually worth less than £100,000, they are all part of linked transactions forming part of a single wider transaction; or

ii. approval for the items at issue was sought at a single proposal made at one Board Meeting (which were commonly held on a quarterly basis).

Answer: No, in both cases.

b. the instruction of Eversheds in relation to the SSA and/or the conduct of Mr Hayashi and/or HMUK was a Reserved Matter within paragraphs 11 and 12 of Part D of Schedule 3 because it fell outside the ordinary course of the Company's business;

Answer: No.

c. the appointment of new solicitors after the withdrawal of Eversheds was a Reserved Matter within paragraphs 11 and 12 of Part D of Schedule 3 because it fell outside the ordinary course of the Company's business.

Answer: No, and this is not now disputed.

3. Duties owed by the Shareholders under the SSA:

a. Whether a Shareholder is entitled to act in its own interests in exercising its right to refuse consent to Reserved Matters.

Answer: Yes. See Issue 1(f).

b. Whether a Shareholder is obliged to procure that its appointed director (if any) approve any Reserved Matter if the Shareholder has not already consented to that Reserved Matter within the meaning of Clause 6.1(a).

Answer: No.

4. Directors' duties:

a. Whether Mr Hayashi could breach his duties to the Company by giving effect to the terms of Clause 6.1(a) or any other part of the SSA as agreed between the Shareholders and the Company;

Answer: No, subject to the answer to Issue 1(g), above, in the scenario where the shareholders have consented to the Reserved Matter.

b. Whether, as a matter of fact and law, My Hayashi acted in breach of his duties to the Company by reason of his conduct in relation to the Five Matters by:

i. Refusing to agree to the Five Matters;

ii. Refusing to consider further information in relation thereto;

iii. Refusing to engage with proposed Reserved Matters so as to achieve a successful resolution for the Company;

iv. Refusing to reconvene an adjourned Board meeting despite previously having agreed to do so; and

v. Refusing to participate in Board meetings insofar as they

addressed Reserved Matters.

Answer: No, in relation to all of the matters (i)-(v).

c. Whether, as a matter of fact, Mr Hayashi has acted in the ways set out at paragraph 4(b) above in pursuit of a disruptive strategy involving reliance on provisions relating to Reserved Matters within the SSA in order to stymie the Company's ability to expand its production capacity so as to meet market demand for its products, and to stymie the taking of decisions generally necessary for the good administration and best interests of the Company ("Strategy of Disruption").

Answer: No.

5. The First Defendant's obligations under the SSA:

a. Whether the First Defendant acted in material breach of his obligations under Clause 6 of the SSA by [engaging in the following actions without first seeking or obtaining consent from all Shareholders]:

i. procuring the employment of Mr Surry, Ms Smith and Mr Eastwood;

Answer: The employment of Mr Surry is no longer in dispute. The employment of Ms Smith is not a breach. The employment of Mr Eastwood may constitute a technical breach, but it is not a material breach. To the contrary, it has advantaged the interested parties.

ii. the instruction of Eversheds in relation to the SSA and/or the conduct of Mr Hayashi and/or HMUK (without the requisite Shareholder consent, without putting the matter to the Board, or copying in other Board members on relevant correspondence and documentation and/or so as to pursue the First Defendant's personal interests);

Answer: No, since no consent from shareholders was required, as this is not a Reserved Matter.

iii. putting Reserved Matters (being the Five Matters, the appointment of new Company solicitors, expenditure on capital items exceeding £100,000) to the Board for resolution;

Answer: No, and this is not now disputed.

or

iv. procuring that the Company entered into hire purchase agreements in excess of £30,000.

Answer: No.

b. Whether the said breaches are capable of remedy and, if remediable, unremedied.

Answer: These "said breaches" are not breaches.

c. Whether a Buy-Out Event within the meaning of the SSA has occurred as a result of the alleged breaches.

Answer: No.

6. The Claimant's obligations under the SSA:

a. Whether the Claimant acted and continues to act in material breach of its obligations under the SSA by:

i. Procuring that Mr Hayashi act in breach of his duties to the Company as set out in paragraph 4(b) above (Clause 6, in particular Clauses 6.4(d) and 6.4(e));

Answer: No.

ii. Mr Hayashi's conduct in standing in the way of external funding so as to circumvent the effect of Clause 5.1 of the SSA, being the result of the Claimant's failure to procure so far as it is able that Mr Hayashi shall ensure that he is acting in accordance with the SSA (Clause 6.4(d)) and its failure to do its part to ensure that the Board shall take all steps necessary to ensure that the provisions of the SSA are fully and faithfully complied with (Clause 6.4(e));

Answer: No.

iii. Mr Hayashi refusing to discuss Reserved Matters at Board meetings, being the result of the Claimant's failure to procure so far as it is able that Mr Hayashi should act at all times in good faith in the interests of the Company (Clause 6.4(d)) and its failure to procure that Mr Hayashi does all he is able to ensure that the Board performs its functions on a timely basis (Clause 6.4(a));

Answer: No.

iv. The Claimant's and Mr Hayashi's deployment of the concept of Reserved Matters on an untenable basis, including in relation to the appointment of Company solicitors, expenditure on individual capital items totalling less than £100,000 each and

by insisting that a Request for Consent must be issued and shareholder agreement obtained in relation to all actions which constitute a Reserved Matter, even if such actions have already been approved by reason of the shareholders' approval of the Business Plan, so as to stymie decision-making in relation to those matters (Clauses 6.4(a), 6.4(c) and 6.4(d)).

Answer: No.

v. Not voting in favour of a dividend (Clauses 9.1).

Answer: No.

vi. Failing and continuing to fail to exercise its voting rights and other powers of control lawfully available to it as a Shareholder to procure that the provisions of the SSA are properly and promptly observed and given full force and effect according to the spirit and intention of the SSA, by its conduct set out at paragraphs 6(a)(i) to 6(a)(v) above (Clause 15.1(b)).

Answer: No.

b. Whether, as a matter of fact, the Claimant has acted in the ways set out at paragraph 6(a) above in pursuit of the Strategy of Disruption.

Answer: No.

c. Whether a Buy-Out Event within the meaning of the SSA has occurred as a result of the alleged breaches.

Answer: No.

315. I will hear the parties on any draft order to be made, and also on any consequential matters to the extent they cannot be agreed between the parties in light of this judgment.

APPENDIX

RELEVANT PROVISIONS OF THE SSA

5 WORKING CAPITAL AND FINANCE

5.1 External finance

Save in relation to [earlier inputs to Company finances from D1 and the 2016 share acquisition by HMUK], each Group Company shall be financed, so far as possible, from external sources on a non-recourse basis as far as the Shareholders are concerned on such terms as shall be agreed from time to time by the Board and so that any Security Interest required in respect of such finance shall, if possible, be provided by any Group Company which shall, if necessary and if so determined by resolution of the Board, be empowered to create Security Interests for such finance.

5.2 Shareholder contributions

Subject to Clause 6.1 (Board and shareholder approval) and Clause 10 (Issue of Shares), all working capital requirements of the Company shall be determined by the Board in accordance with the Business Plan and to the extent they exceed the Company's resources and cannot be financed from external sources in accordance with Clause 5.1 (External finance), may (if so agreed in writing by the relevant shareholders and the Investor [ie HMUK]) be contributed to the Company by the relevant Shareholders in such proportions as they may agree (whether by way of subscriptions for new Shares or as loans) on the terms agreed by the relevant Shareholders and the Company.

6 MANAGEMENT

6.1 Board and Shareholder approval

(a) The overall management of the Business shall be carried out by the Board and, to the extent permitted by law and without prejudice to any other provisions of this Agreement, the Shareholders shall procure that no Group Company shall take or agree to take any action referred to in Schedule 3 (*Reserved Matters*) except with the prior written consent of (a) the holders of 75% of the Shares at any one time in respect of the matters listed in Part C of Schedule 3 (*Reserved Matters*) and (b) the holders of 70% of the Shares at any one time in respect of the matters listed in Part D of Schedule 3 (*Reserved Matters*). The Shareholders agree that they shall communicate their decision in respect of any request for consent to any of the matters referred to in Schedule 3 (*Reserved Matters*) not later than 14 days after receipt of a written request specifying the matter in respect of which consent is requested, failing which they shall be deemed to have consented to the relevant matter.

(b) [concerning the involvement of D1 and D2 in decisions on their employment contracts, not here relevant]

6.2 Deemed Shareholder approval

For the purpose of Clause 6.1 (*Board and Shareholder approval*) a Shareholder shall be deemed to have consented in writing to any action referred to in Schedule 3 (*Reserved Matters*) if:

(a) all of the Directors appointed by it under Clause 8 (*Appointment of Directors*) present at any meeting of the Board, have approved such action at such meeting (whether in writing or not); or

(b) the consent in writing is signed by that Shareholder or on behalf of that Shareholder by any of the Directors appointed by it under Clause 8 (*Appointment of Directors*) or any other person notified in writing by the Shareholder to the other parties for the purposes of this Clause; or

(c) the consent in writing is signed, in the case of a B Shareholder, by the Existing B Shareholders' Representative; or

(d) such action is specifically provided for in the Business Plan.

…

6.4 Board compliance

Each A Shareholder who is, or is entitled to appoint, a Director shall procure insofar as it is able that each of such Directors shall, so far as he or she is able to do so, ensure that:

(a) the Board performs its functions on a timely basis;

(b) a quorum is present at each meeting of the Board in accordance with the Articles;

(c) the Board shall at all times act in accordance with any resolution of the Company;

(d) such Directors shall at all times act in good faith in the interests of the Company, and in accordance with the terms of this Agreement; and

(e) the Board shall take all steps necessary and within its power to ensure that the provisions of this Agreement are fully and faithfully complied with (save only to the extent that such steps conflict with the Directors' statutory and common law duties).

…

6.5 Company compliance

Each A Shareholder shall procure insofar as it is able (recognising that the Investor [HMUK] will not be involved in the day-to-day management of the Business) that each Group Company shall: …

(b) carry on and conduct its business and affairs in a proper and efficient manner in accordance with applicable legal requirements and with the provisions of the Articles, any resolution of the Company and this Agreement; …

…

6.7 Reasonable endeavours

Where, under this Agreement, any Shareholder undertakes to procure any action on the part of the Company, that Shareholder shall be deemed to have complied with that undertaking if it has used its reasonable endeavours to procure such action including, without limitation, proposing and voting in favour of all relevant and necessary resolutions.

9 DIVIDEND POLICY

9.1 Dividend Policy

Subject to Clause 9.2 (*Compliance with Companies Act*) and Schedule 3 (*Reserved Matters*), the Company shall, and each Shareholder shall use reasonable endeavours to procure:

(a) so far as is lawfully possible in the exercise of its rights and powers as a Shareholder, that the Company shall make a distribution by way of dividend when it is considered financially prudent to do so; and

(b) that the Company shall not make any distribution by way of dividend [unless in compliance with the agreed policy to prefer the B Shareholders to the extent of the nominal value of their shares] …

15 IMPLEMENTATION

15.1 Further assurances

… (b) Each Shareholder shall, to the extent that he is able to do so, exercise his voting rights and other powers of control lawfully available as a Shareholder to procure that the provisions of this Agreement are properly and promptly observed and given full force and effect according to the spirit and intention of this Agreement."

SCHEDULE 3

Part C

Part D

MATTERS WHICH NO GROUP COMPANY CAN UNDERTAKE WITHOUT THE CONSENT OF THE HOLDERS OF 70% OF THE SHARES

…

4. Make any borrowings (other than pursuant to the Overdraft), incur any capital liability, enter into any hire purchase, lease, credit sale or similar agreement in excess of £30,000 or grant or permit the creation of or suffer to subsist any Security Interest over the whole or part of its undertaking property or assets (except for any billion arising by operation of law) or increasing or otherwise changing the terms of the Overdraft.

…

10. Incur any liability of a capital nature in excess of £100,000.

11: Enter into any transaction or contract otherwise than on an arm's-length basis and in the ordinary course of its [ie the Company's] business.

12: Approve any transaction or dealing of an unusual or long-term nature other than in the ordinary course of business

ARTICLES

4 Shareholders' reserve power and effect of altering the articles

(1) The shareholders may, by special resolution, direct the directors to take, or refrain from taking, specified action.

(2) No such special resolution invalidates anything which the directors have done before the passing of the resolution. …

17 Conflicts of interest arising out of nomination by shareholder

(1) Where a director is appointed pursuant to a nomination as such by one or more shareholders (a "**Nomination**"), any actual or possible conflict with the

interests of the company which that director has or may have as a consequence of such Nomination (or which derives from such nomination or his relationship with the nominating shareholder or any other entity in the same group as such shareholder or with which such shareholder is otherwise associated (together, the "**Nominating Group**")) and which would otherwise involve that director breaching his duty under the Companies Acts to avoid conflicts of interest, shall hereby be authorised by the company in accordance with section 180(4)(a) of the Companies Act 2006. …

33 Procedure for declaring dividends

(1) The company may by ordinary resolution declare dividends, and the directors may decide to pay interim dividends

(2) A dividend must not be declared unless the directors have made a recommendation as to its amount. Such a dividend must not exceed the amount recommended by the directors.

(3) No dividend may be declared or paid unless it is in accordance with: (i) shareholders' respective rights; and (ii) any agreement in place between the shareholders from time to time and of which the company has been notified. …