Company – Articles of Association – Whether conversion of preferred shares into ordinary shares a variation or abrogation of special rights attaching to such shares – Whether such conversion permitted by company's articles – Whether such conversion would unfairly prejudice the preferred shareholders – Whether such conversion should be set aside – Companies Act 2006, ss. 630, 633

Neutral Citation Number: [2023] EWHC 437 (Ch)

Case No: CR-2022-001952

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

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

Date: Wednesday, 8 March 2023

Before :

HIS HONOUR JUDGE HODGE KC
(sitting as a Judge of the High Court)

- -

IN THE MATTER OF DnaNudge Limited

AND IN THE MATTER OF THE COMPANIES ACT 2006

Between:

(1) Ventura Capital GP Limited
(Acting for and on behalf of Ventura Capital LP Fund IV)
(2) Ventura Capital GP Limited
(Acting for and on behalf of Ventura capital MG1 LP Fund) **Claimants**
- and -
DnaNudge Limited

Defendant

- -
- -

Mr Timothy Collingwood KC (instructed by **Fladgate LLP**) for the **Claimants**
Mr Andrew Thornton KC (instructed by **Dorsey & Whitney (Europe) LLP**) for the **Defendant**

Hearing dates: 18 and 19 January 2023
Draft judgment released: 28 February 2023
Postscript added: 7 March 2023
Judgment handed down: 8 March 2023

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

HIS HONOUR JUDGE HODGE KC

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Remote hand-down: This judgment was handed down remotely at 10.30 am on Wednesday 8 March 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

The following cases are referred to in the judgment:

Allen v Gold Reefs of West Africa Ltd [1900] 1 Ch 656
Britvic Plc v Britvic Pensions Ltd [2021] EWCA Civ 867, [2022] 2 All ER 457
Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101
Re Coroin Ltd, McKillen v Misland (Cyprus) Investments Ltd [2011] EWHC 3466 (Ch)
Cosmetic Warriors v Gerrie [2017] EWCA Civ 324
Re Euro Accessories Ltd [2021] EWHC 47 (Ch)
Holmes v Keyes [1959] Ch 199
Re John Smith's Tadcaster Brewery Co Ltd [1953] Ch 308
Thompson v Goblin Hill Hotels Ltd [2011] UKPC 8
White v Bristol Aeroplane Co Ltd [1953] Ch 65

The following additional authorities were provided in response to the draft judgment and are referred to in the postscript:

House of Fraser Plc v ACGE Investments Ltd [1987] AC 387, HL (Sc)
Re Hunting Plc [2004] EWHC 2591 (Ch)
Re Saltdean Estate Co Ltd [1968] 1 WLR 1844

His Honour Judge Hodge KC:

I: Introduction

1. This is my reserved judgment following the trial of a Part 8 claim issued on 28 June 2022. The short, but novel, question raised by this claim is whether the special rights attached to a class of preferred shares can be extinguished by the simple procedure of converting those shares into ordinary shares without the consent of the preferred shareholders, who had invested some £44 million in the company in reliance on those special rights. From the perspective of common sense and simple fairness, the answer to that question should be fairly straightforward; but the resolution of contested legal issues is seldom an easy process.

2. The hearing took place on Wednesday 18 and Thursday 19 January 2023, concluding shortly before 12 noon on the second day. The claimants are represented by Mr Timothy Collingwood KC and the defendant by Mr Andrew Thornton KC. In addition to their helpful and detailed written skeleton arguments, there is a written transcript of leading counsel's oral submissions (although I am informed by Mr Thornton that this was commissioned by the claimants and has not been made available to the defendant). The advocacy, both written and oral, was of an extremely high order; and I am indebted to both counsel for the clarity of their submissions, and also for their willingness to respond to, and engage with, questions from the Bench which, I fear, added to the length of the hearing (although, despite my interventions, this concluded well within its original time estimate).

II: Background

3. The evidence in support of the claim is contained within the witness statement, dated 28 June 2022, of Mr John Mark Buckley, a solicitor and partner in the dispute resolution department of Fladgate LLP, which represents the claimants. Evidence in answer is contained in the witness statement, dated 12 July 2022, of Mr David Lyons, a barrister then acting as the defendant's general counsel. Evidence in reply was provided by Mr Buckley in his second witness statement dated 28 July 2022. At the beginning of the hearing, and without any objection from the defendant, I gave permission (pursuant to CPR 8.6 (1) (b)) for the claimants to rely upon a third witness statement from Mr Buckley, dated 22 December 2022. This merely brought the evidence up-to-date following the expiry of the timetable for evidence prescribed by the Civil Procedure Rules and the case management order of ICCJ Burton. It concerns discussions about a possible sale of the company and is said to be relevant to the extent, and potential imminence, of the unfair prejudice that the claimants will suffer if the conversion of their shares is allowed to stand, highlighting the significance of the relief claimed in these proceedings. It was clearly just, and in accordance with the overriding objective, to permit the claimants to update their evidence in this way; and the defendant did not seek to put in any evidence by way of rejoinder. There has been no cross-examination of either witness on their written evidence. Since the evidence stands unchallenged, I need do no more than briefly summarise the background facts.

4. The defendant company, DnaNudge Limited, is a medical and health technology company which was incorporated in July 2015. Towards the end of 2021 and early

2022, the company sought to raise significant funding from investors in reliance on a substantial contract for the supply of clinical products to the NHS. The claimant, Ventura Capital GP Limited ('**Ventura**'), acting as the general partner for and on behalf of two Cayman Islands exempted limited partnerships, invested £42m in acquiring a total of 24,026 Series A Preferred Shares in the company (the **'preferred shares'**). Shortly thereafter, Sumitomo Mitsui Trust Bank ('**SMTB**'), Japan's largest trust company, and part of Japan's second largest banking group, invested some £2m in acquiring a further 851 preferred shares. Together, Ventura and SMTB held all of the preferred shares in the company, and they constituted the entirety of that class of shareholder. Since the interests of all the preferred shareholders coincide, SMTB does not oppose the declaratory relief sought by the claimants as to the true meaning and effect of the articles; and SMTB has appointed the claimants to make this application pursuant to s. 633 of the Companies Act 2006 (**'the 2006 Act'**) on its behalf. Thus, all the holders of preferred shares in the company are united in objecting to the extinguishment of their special class rights.

5. As Mr Buckley explains (at paragraph 20 of his first witness statement), as at about 20 May 2021 (and following the issue of the preferred shares to Ventura and to SMTB, consequent upon their respective investments in the company), the issued share capital of the defendant company was approximately £76,400,000 (including the nominal value of the shares and share premium), divided into 24,877 preferred shares and 162,561 ordinary shares each of £0.001, all of which shares were (and are) fully paid up. As can be seen, the number of ordinary shares in issue greatly exceeds the number of preferred shares.

6. Before investing in the company, Ventura (and later SMTB) had negotiated and acquired a number of valuable preferential rights attached to the shares they were purchasing which were additional to the rights enjoyed by the holders of ordinary shares in the company. These additional rights were ultimately recorded in amended articles of association (adopted on 21 January 2021) and an amended shareholders' agreement. Articles 5 and 6 of the amended articles provide for a preferred payment of arrears of dividends and return of capital plus a cumulative 8% preferred return (compounding annually), in priority to ordinary shareholders, in any distribution on liquidation or return of capital or sale of shares amounting to a controlling interest in the company. Clause 3.3 of the shareholders' agreement provides that if a **'Qualifying IPO'** (a defined term but effectively a listing on an identified or recognised exchange with an offer price of at least £900m) does not occur prior to 19 November 2023, then (subject to sufficient distributable reserves) Ventura (and SMTB) have a put option to require the company to purchase all or any portion of their preferred shares for an aggregate purchase price equal to the preferred payment for each preferred share. Under clauses 10.1 and 10.4 of the shareholders' agreement, Ventura (but not SMTB because it does not hold the required threshold number of preferred shares) also has the rights to appoint a director and a representative to attend directors' meetings. Clause 12 of the shareholders' agreement provides (in fairly standard form) that:

(1) Each shareholder shall (to the extent he is able to do so) exercise his voting rights and other powers of control as a shareholder to procure that the provisions of the agreement are properly and promptly observed and given full force and effect according to the spirit and intention of the agreement;

(2) If there is any inconsistency between any of the provisions of the shareholders' agreement and the articles, then the provisions of the former shall prevail between the parties; and

(3) Each shareholder shall, when necessary, exercise his powers of voting and any other rights and powers available to him as a shareholder to amend, waive or suspend a conflicting provision in the articles to the extent necessary to permit the company and its business to be administered as provided in the agreement.

7. On 23 May 2022 the company sent a circular to all its shareholders setting out a proposal *"to raise additional working capital"*. The circular summarised (in Schedule 1) *"... some of the risk factors facing the Company and relating to an investment in the Company"*. One of these was the put option held by the preferred shareholders: *"In the event that the Company was obliged to repurchase Series A Shares pursuant to an exercise of the Put Option, its business, financial condition, results of operations and prospects may be materially adversely affected."* The company noted that *"... an Investor Majority might seek to nullify the Put Option by converting the Series A Shares into Ordinary Shares (pursuant to Article 9.2), ahead of any exercise of the Put Option"*. The circular also warned that: *"The former holders of the Series A Shares might seek to challenge (or otherwise bring legal proceedings in respect of) any conversion of the Series A Shares (and Ventura have indicated that such a challenge and/or legal proceedings would be likely)."* The majority of the directors expressed the *"hope that Shareholders will support the issue of the Convertible Loan Notes and recommend that Shareholders approve the Written Resolutions, the Shareholder Consents and the Investor Majority Consent"*.

8. On 26 May 2022 various ordinary shareholders, constituting an *'Investor Majority'*, signed a letter to the company purporting (pursuant to article 9(2)(a)) to give notice in writing requiring the preferred shares to be converted into ordinary shares (with the same nominal value) at the date of the notice ('**the Conversion Notice**'). On 10 June 2022 the company's solicitors, Dorsey & Whitney (Europe) LLP ('**Dorsey**') wrote to Ventura and SMTB informing them that the company was in receipt of the conversion notice, that their shares had been *"converted into Ordinary Shares"*, and that the register of members had been amended accordingly. From that letter, it would appear that the relevant threshold required to constitute the requisite investor majority shareholder consent had only been achieved on 7 June 2022. On 28 June 2022, SMTB appointed the claimants to make this application under s. 633 of the 2006 Act on its behalf, and it also confirmed (by separate email) that it did not oppose the declaratory relief sought by the claim. The Part 8 claim form was issued later that day.

III: The articles of association

9. It is common ground that until 7 June 2022, the claimants and SMTB together held all of the preferred shares in the company. It is the defendant's case that on that day, those shares were converted into ordinary shares with the same nominal value. That conversion was purportedly effected in accordance with the mandatory provisions of article 9.2 (a) of the company's articles following the receipt of a notice from shareholders in the company constituting an *'Investor Majority'*. That expression is defined in article 2 as meaning *'the holders of a majority of the Series A Shares and Ordinary Shares in aggregate as if such Shares constituted one class of share'*.

10. Article 9 is headed *'Conversion of Series A Shares'*. Article 9.1 permits any holder of preferred shares, by notice in writing to the company, to require the conversion into ordinary shares of all of the preferred shares held by such holder at any time; and those preferred shares then convert automatically on the date of such notice. Article 9.2 is in the following terms:

> All Series A Shares shall automatically convert into Ordinary Shares:
>
> (a) upon notice in writing from an Investor Majority at the date of such notice (the 'Conversion Date'); or
>
> (b) immediately upon the occurrence of a Qualifying IPO.

11. Article 9.3 mandates a holder of preferred shares to deliver the relevant share certificate (or an indemnity for any lost certificate in a form acceptable to the company's board of directors) to the company's registered office not more than 10 business days after the conversion date. Article 9.5 provides that the conversion shall take place on a one-for-one basis (both the preferred and the ordinary shares having the same nominal value). Article 9.6 provides as follows:

> The Company shall on the Conversion Date enter the holder of the converted Series A Shares on the register of members of the Company as the holder of the appropriate number of Ordinary Shares and, subject to the relevant holder delivering its certificate(s) (or an indemnity for lost certificate in a form acceptable to the Board) in respect of the Series A Shares in accordance with this Article, the Company shall, within ten Business Days of the Conversion Date, forward to such holder of Series A Shares by post to his address shown in the register of members, free of charge, a definitive certificate for the appropriate number of fully paid Ordinary Shares.

Article 9.7 provides for the conversion ratio to be adjusted in certain circumstances. Article 9.8 provides for fractional entitlements arising on a conversion to be paid out in cash.

12. The claimants contend that the conversion of the preferred shares into ordinary shares amounted to a *'variation or abrogation'* of the special rights held by them and was therefore ineffective because the company had neither sought nor obtained the approval of the holders of the preferred shares in accordance with article 10.1. Article 10 is headed *'Variation of Rights'*. Article 10.1 is in the following terms:

> Whenever the share capital of the Company is divided into different classes of shares, the special rights attached to any such class may only be varied or abrogated (either whilst the Company is a going concern or during or in contemplation of a winding-up) with the consent in writing of the holders of more than 75 per cent in nominal value of the issued shares of that class.

Article 10.2 provides that:

> The creation of a new class of shares with preferential rights to one or more existing classes of shares shall not constitute a variation of the rights of those existing classes of shares.

13. It is the claimants' case that article 9 must be read as subject to article 10. Alternatively, the claimants contend that the conversion unfairly prejudiced them and ought to be set aside under s. 633 of the 2006 Act.

IV: Section 633 of the Companies Act 2006

14. Section 630 of the 2006 Act provides as follows:

> (1) This section is concerned with the variation of the rights attached to a class of shares in a company having a share capital.
>
> (2) Rights attached to a class of a company's shares may only be varied —
>
> (a) in accordance with provision in the company's articles for the variation of those rights, or
>
> (b) where the company's articles contain no such provision, if the holders of shares of that class consent to the variation in accordance with this section.
>
> (3) This is without prejudice to any other restrictions on the variation of the rights.
>
> (4) The consent required for the purposes of this section on the part of the holders of a class of a company's shares is —
>
> (a) consent in writing from the holders of at least three-quarters in nominal value of the issued shares of that class (excluding any shares held as treasury shares), or
>
> (b) a special resolution passed at a separate general meeting of the holders of that class sanctioning the variation.
>
> (5) Any amendment of a provision contained in a company's articles for the variation of the rights attached to a class of shares, or the insertion of any such provision into the articles, is itself to be treated as a variation of those rights.
>
> (6) In this section, and (except where the context otherwise requires) in any provision in a company's articles for the variation of the rights attached to a class of shares, references to the variation of those rights include references to their abrogation.

15. Section 633 of the 2006 Act confers a power on the court to set aside a variation of class rights. It is drafted in the following terms:

> (1) This section applies where the rights attached to any class of shares in a company are varied under section 630 (variation of class rights: companies having a share capital).
>
> (2) The holders of not less in the aggregate than 15% of the issued shares of the class in question (being persons who did not consent to or vote in favour of the resolution for the variation) may apply to the court to have the variation cancelled.
>
> For this purpose any of the company's share capital held as treasury shares is disregarded.
>
> (3) If such an application is made, the variation has no effect unless and until it is confirmed by the court.
>
> (4) Application to the court—
>
> (a) must be made within 21 days after the date on which the consent was given or the resolution was passed (as the case may be), and
>
> (b) may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.
>
> (5) The court, after hearing the applicant and any other persons who apply to the court to be heard and appear to the court to be interested in the application, may, if satisfied having regard to all the circumstances of the case that the variation would unfairly prejudice the shareholders of the class represented by the applicant, disallow the variation, and shall if not so satisfied confirm it.
>
> The decision of the court on any such application is final.
>
> (6) References in this section to the variation of the rights of holders of a class of shares include references to their abrogation.

V: The parties' cases in summary

(i) The claimants

16. The claim to defeat the extinction of the claimant's class rights as preferred shareholders in the company is made on two alternative grounds:

> (1) On the proper construction of the company's articles of association, the purported conversion of the preferred shares was invalid, void and of no effect for failure to comply with article 10.1 (which provides comprehensive protection for the preferred rights held by the preferred shareholders).
>
> (2) The variation and/or abrogation of the rights effected by the conversion (if valid) unfairly prejudices the preferred shareholders and ought to be cancelled and/or disallowed pursuant to s. 633 of the 2006 Act.

17. In a nutshell, the claimants' case is that the majority ordinary shareholders of the company have sought to benefit personally by reneging on the bargain which they had struck with Ventura (and with SMTB) at the point of issue of the preferred shares. They have knowingly sought to extinguish the preferred rights specifically bargained for by Ventura (and SMTB) through an impermissible side-wind, and in the face of objections from all the holders of the preferred shares.

18. On the proper construction of the articles, the additional rights attached to the preferred shares cannot be extinguished without compliance with article 10.1. This takes precedence over article 9.2 (a), and it would be commercially absurd if that sub-article could be used to entirely invalidate the protection expressly provided in the articles.

19. Even if the claimants are wrong about that, the conversion (if effective) would abrogate the rights attached to the preferred shares, causing the claimants (and SMTB) to suffer significant unfair prejudice such that the court ought to disallow it.

(ii) The defendant

20. In summary, the defendant's position is as follows:

21. First, article 9.2 does not provide for a variation of the rights attached to the preferred shares but rather for an exchange of those shares for ordinary shares, which are a different class of share altogether. This is clear from, at least, the following factors:

(1) The obligation of the holders of converted preference shares to surrender their share certificates in respect of those shares within ten days of a conversion taking effect.

(2) The removal of the holders of converted preference shares from the company's register of members as holding such shares and their entry into the register as the holders of ordinary shares.

(3) The grant of new share certificates representing ordinary shares (conditional upon the surrender of the *'old'* certificates).

(4) The inclusion of a provision dealing with the cashing out of fractional entitlements arising on the exchange.

(5) The absence of any changes to the rights attached to the preferred shares on conversion. The rights of the preferred shares (in contrast to the former preferred shareholders) remain identical before and afterwards. No changes to the company's articles are made; the only change is that the former holders of the preferred shares cease to hold those shares, and there are no preferred shares currently in issue pending the company issuing further shares of that class.

In short, article 9.2 provides for a swap, or exchange, of an *'old'* share for a *'new'* share, and not a variation of the rights of any existing share. Accordingly, neither article 10 nor s. 633 of the 2006 Act are engaged. This is said to be a complete answer to the claimants' entire case. Mr Thornton advances the following arguments in the alternative:

22. Second, the conversion amounts to the performance of the rights attached to the preferred shares, and not to any variation of those rights. The company's shareholders adopted rights which would change, or evolve, upon the occurrence of certain specified events, including the consent of an *'Investor Majority'*. The risk of the convertible preference shares being redesignated as ordinary shares was a risk *'baked into'* those shares when they were issued, and it formed part of the package of rights acquired by the preferred shareholders when they invested in the company. The evolution of those rights may affect the **enjoyment** of the rights of the preferred shareholders; but it does not constitute a variation of those rights. Again, as a result, neither article 10 nor s. 633 of the 2006 Act are engaged.

23. Third, in construing the rights attached to the convertible preference shares, the court's role is more limited than that which it adopts when construing a general commercial contract. When construing a set of articles of association, the court must not take into account any matters which might, or might not, be known to the parties by way of commercial context. It can only consider those matters which would be available to a third party looking at the company's constitutional documents available from public sources; here, the records available from the Registrar of Companies at Companies House.

24. Fourth, applying that approach to construction, the outcome is straightforward. The natural meaning of the words used in article 9 leaves only one construction, namely, that the preferred shares converted into ordinary shares **automatically** upon an '*Investor Majority*' notice being served. The claimants' approach (that an article 10 approval is also required) is incapable of reconciliation with the wording of article 9, particularly bearing in mind that the service of an investor majority notice required the immediate alteration of the company's register of members (article 9.6) and the delivery up of the preferred share certificates (article 9.3).

25. Fifth, it does not assist the claimants to allege that the company's construction of the articles amounted to the claimants having agreed a bad deal. Even if the rights that the claimants obtained at the time of their investment in the company were of negligible value (which they were not), they are the rights that they acquired on investing in the company, and the claimants cannot now, armed with the benefit of hindsight, invite the court to confer on them rights which they did not acquire simply because that would give them a more valuable stake in the company than the one they did, in the event, acquire.

26. Sixth, this claim does not fall within the statutory ambit of s. 633 of the 2006 Act. Properly construed, the ability of a member of a company to allege that it is unfairly prejudiced by a variation of class rights only arises if that variation is undertaken pursuant to the default variation provision under s. 630 (2) (b) of the 2006 Act, and not when undertaken pursuant to a bespoke provision specifically adopted by the members themselves.

27. Seventh, if, contrary to the previous submission, s. 633 is engaged, the claimants have not made out any ground of unfair prejudice. The alleged prejudice relied on by the claimants amounts to no more than a statement of the consequences of the conversion, which would occur on any conversion of the convertible preference shares into ordinary shares. If the claimants fail on their construction point, the unfair prejudice allegation adds nothing.

VI: The construction of articles of association

28. There was little difference between counsel concerning the legal principles governing the construction of articles of association, as distinct from the application of those principles in the circumstances of the present case.

29. Mr Collingwood submits that articles of association are commercial documents and should be construed so as to give them reasonable business efficacy, where a construction tending to that result is admissible on the language of the articles, in preference to a result which would, or might, prove unworkable, or produce a wholly unreasonable result; although he accepts that the plain and ordinary meaning of words can be displaced only if it produces a *"commercial absurdity"*. He points out that the court may also imply a term into articles of association in order to give them business efficacy; although he acknowledges that the implication of any term into the articles should be on the basis of a consideration of the language used in them, as opposed to extrinsic circumstances. Indeed, Mr Collingwood acknowledges that there are limits to the extrinsic evidence that can be used when construing articles of association, and that this is confined to what is apparent from the articles themselves, together with any information available in any publicly accessible register.

30. Mr Thornton identifies the following general principles of contractual interpretation:

(1) The court must ascertain the intention of the parties by reference to the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the audience to whom the document is addressed.

(2) Where it is clear that something has gone wrong with the language or syntax, and it is clear what a reasonable person would have understood the parties to have meant, the court may construe a contract so as to correct that error. In the course of his oral submissions, Mr Collingwood took me to the well-known statement of this principle in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 at paragraph 25, where Lord Hoffmann also observed that:

> … there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant.

(3) Where there are two possible constructions, the court is entitled to prefer the construction which is the most consistent with business common sense.

(4) The court is not entitled to depart from the natural meaning of the words where a contractual arrangement has proved commercially disastrous for one of the parties but falls short of being a commercial absurdity.

(5) In cases of ambiguity, it is necessary to undertake a more detailed analysis of the factual background and the implications of rival constructions (contextual factors) and a close examination of the relevant language in the contract (textual factors). It does not matter which of these factors is considered first so long as the court balances the

indications given by each. The weight to be given to each will vary according to the circumstances of the particular agreement.

31. The test for the implication of a term *'in fact'* is whether such a term is so obvious that it goes without saying, or is necessary to give business efficacy to the relevant contract.

32. However, given the special nature of the contract constituted by a company's articles of association, there are limits to the matters the court will take into account when applying these principles. In particular, the court's concern is to construe what the articles mean, rather than inquiring into what the subscribers, or the members at the time of their adoption, actually intended to agree. As David Richards J noted, in *Re Coroin Ltd*, *McKillen v Misland (Cyprus) Investments Ltd* [2011] EWHC 3466 (Ch), when explaining (at paragraph 63) why extrinsic evidence is not admissible in the *construction* of articles of association:

> The articles govern relations between the company and its members and between the members. The members are a fluctuating body of persons. Persons will become members on the basis of the registered articles and without, in most cases, any knowledge of the circumstances existing when the articles were adopted or were subsequently amended, perhaps on many occasions.

33. For this reason, there are clear limits to the recourse that may be made to extrinsic evidence as an aid to construction which are much narrower than might apply to an ordinary commercial contract. Admissible extrinsic evidence for the purposes of construing articles is generally limited to what any reader of the articles would reasonably be supposed to know from the articles themselves, and the information on the public register maintained by Companies House. It cannot include extrinsic facts which were known only to some of the people involved in the formation of the company. The established approach was usefully summed up by Snowden J, sitting as Vice-Chancellor of the County Palatine of Lancaster, in *Re Euro Accessories Ltd* [2021] EWHC 47 (Ch) (at paragraph 34):

> The result is that the process of interpretation to arrive at the true meaning of a provision in a company's articles of association must concentrate on the natural and ordinary meaning of the words used, when viewed in light of the scheme and purpose of the articles in general, any extrinsic facts about the company or its membership that would reasonably be ascertainable by any reader of the company's constitution and public filings at Companies House, and commercial common sense.

34. Mr Thornton referred me to a number of decisions which illustrate this approach, namely:

(1) *Holmes v Keyes* [1959] Ch 199, where the Court of Appeal held that the articles should be regarded as a business document and construed so as to give them reasonable business efficacy, where a construction tending to that result is admissible on the language of the articles, in preference to a result which would, or might, prove unworkable: see per Jenkins LJ at page 215.

(2) *Thompson v Goblin Hill Hotels Ltd* [2011] UKPC 8, where the Privy Council held that articles had to be given their plain and ordinary meaning where there was no evidence that such construction would produce a commercially absurd result.

(3) *Cosmetic Warriors v Gerrie* [2017] EWCA Civ 324, where the Court of Appeal agreed with the parties that, in construing the articles of the claimant companies, reliance could only be placed on matters which were public knowledge derived from the companies' annual returns: see per Henderson LJ at paragraph 23 (with the agreement of Beatson and Lindblom LJJ).

(4) *Re Euro Accessories* (cited above) where, applying the approach endorsed by the Court of Appeal in *Cosmetic Warriors*, Snowden J held that it would be apparent to any third party that the compulsory transfer provisions had been introduced into the articles by the majority shareholder in respect of the minority shareholder's shares. The most that an astute and assiduous reader might deduce was that, because the minority shareholder's signature did not appear on the copies of the special resolutions filed at Companies House, he might not have agreed to the insertion of those provisions and the redesignation of his shares. Beyond that, neither the background to the parties' relationship, nor the circumstances surrounding its breakdown leading to the adoption of the new provisions, would be apparent to any reasonable reader of the relevant materials on the public register, and so those considerations were not relevant to the interpretation of the articles: see paragraphs 35 and 36.

35. Against that background, I turn to the parties' submissions in more detail. Since the submissions on construction feed into the submissions on the application of s. 633 of the 2006 Act, I shall deal with both construction and s. 633 together.

VII: The claimants' detailed submissions

36. Mr Collingwood submits that the proper construction of articles 10.1 and 9.2, and their interrelation, involves a relatively unique point of construction. He says that the clear purpose and intent of article 10.1 is to afford a comprehensive, iron-clad protection to the special rights granted to the holders of any class of shares to which such rights attach. It is common ground that the preferred shares had special rights attached to them. Mr Collingwood therefore submits that (on the proper construction of article 10.1) those special rights can only be varied (i.e. changed or altered) or abrogated (i.e. done away with, abolished, or put an end to by formal action) with the requisite consent provided in article 10.1. Among other matters, this is demonstrated by the language used, and in particular the words *"**may only be** varied or abrogated"*; but it is also apparent from the nature of the rights themselves, which are (as articles 5 and 6, in particular, make clear) of significant value to the preferred shareholders.

37. In answer to a question from the bench, Mr Collingwood acknowledges that article 10.2 (which provides that the creation of a new class of shares with preferential rights to one or more existing classes of shares does not constitute a variation of the rights of those existing classes of shares) might affect the **enjoyment** of the rights attaching to the preferred shares, but it would not amount to a variation or abrogation of the rights themselves. It was effectively a carve-out from the comprehensive protection otherwise afforded by article 10.1 to facilitate future investment in the company.

38. In the present case, the preferred shares enjoyed special rights, and the company (through the majority ordinary shareholders) has purported to wholly extinguish and nullify those rights, through the service of the conversion notice, such that they are no longer held at all. This is not a case where the creation of rights for other shareholders merely impacts upon the **enjoyment** of protected rights. In the line of cases exemplified by *White v Bristol Aeroplane Co Ltd* [1953] Ch 65 (relied on by Mr Thornton, and cited below), the rights attached to the relevant shares remained exactly the same, but the fact that further rights had been given to other shareholders, or that new shares had been issued, meant that those rights were no longer as attractive as they had once been. Nevertheless the original rights remained in identical terms, attached to the shares held by the same shareholders as before. Ventura and SMTB are not in that situation at all. They no longer have any of the special rights attached to their shares. The company says that they are now no different from the other ordinary shareholders, so this is not simply a case where the *enjoyment* of the special rights has been affected; rather, those special rights have been entirely extinguished and completely lost. One just has to look at the reality of the situation. The conversion of the shares is in the nature of a variation or abrogation of the rights attached to them, so the consent of the relevant majority of the class whose shares were to be converted had to be obtained first.

39. The company relies only upon article 9.2 to effect this extinction of the preferred shareholders' rights. Article 9.2 provides that all the preferred shares will automatically convert into ordinary shares upon notice in writing from an *'Investor Majority'* at the date of that notice or immediately upon the occurrence of a *'Qualifying IPO'* (both defined terms). Mr Collingwood points out that there is no specific provision in the 2006 Act permitting the conversion of shares as such, and that *'conversion'* has no specific statutory basis or meaning under the 2006 Act, so it is a further matter for construction of the articles as to what *'conversion'* means. Mr Collingwood also points out that by article 9.2, the preferred shares shall *'automatically convert'* into ordinary shares as at the conversion date, a feature reinforced by the words in article 9.5 *'stand converted'*. This is achieved irrespective of the delivery up of the share certificates or any entry in the company's share register. The shares are automatically redesignated as they stand; and the redesignation takes effect in advance of, and without any need for, the return of the existing share certificates, or the issue of new share certificates. It is automatic and instant, without the need for anything apart from the conversion notice. One moment the preferred shares have the special rights attached to them, and the next moment they no longer enjoy those rights, and are automatically redesignated as ordinary shares. There is no share exchange or swap, as suggested by Mr Thornton. The issue of the new share certificates simply reflects the automatic redesignation of the shares effected by the conversion notice, which operates to abrogate the special rights formerly attached to the preferred shares.

40. Mr Collingwood submits that article 9.2 has to be construed alongside article 10.1. If article 9.2 were capable of operating as contended by the company (so that the additional rights enjoyed by the preferred shares are simply extinguished without the requisite consent of the holders of those shares) then it would be inconsistent – indeed incompatible – with article 10.1. He argues that the proper construction of article 9.2 (required to give reasonable business efficacy and commercial reasonableness to the articles) is that it cannot operate to effect any removal or abrogation of special rights

from any shares to be converted without the consent required by article 10.1. Mr Collingwood submits that clear words would have been required to deprive the preferred shareholders entirely of the special rights attached to their shares (in particular in the light of article 10.1). The purpose of article 9.2 is primarily to operate as an administrative provision, in order to facilitate an IPO or some other form of exit transaction or other fundamental corporate reorganisation, where all separate classes of shares would necessarily have to convert into ordinary shares as part thereof (as explained by Mr Buckley at paragraph 35 of his first witness statement); its purpose is as a fall-back, catch-all in the circumstances of an IPO, exit or corporate reorganisation not picked up by article 9.1 or 9.2 (b). The purpose of article 9.2 is not to enable a qualifying majority of ordinary shareholders to abrogate the special rights enjoyed by Ventura and SMTB; and that is clearly not what a reasonable person reading the articles would regard article 9.2 as being designed to achieve.

41. As Mr Collingwood put it in his oral submissions: On the defendant's case, at one moment, Ventura and SMTB have the special class rights attached to the preferred shares under articles 5 and 6, and then, at the next moment, when the conversion notice is served, instantaneously those shareholders have no special rights at all. Those rights have been completely lost to Ventura and SMTB, and thus they have been abrogated and extinguished. So, in order to give the articles business efficacy and commercial reasonableness, one has to construe article 9.2 (a) as an administrative provision, simply in order to effect the redistribution of the preference shares following compliance with article 10.1, but not as purporting to effect any removal or abrogation of, or changes to, the special rights from the shares to be converted. Thus article 9.2 (a) is to be construed as subject to the requirement to comply with the provisions regarding class rights, including article 10.1. Mr Collingwood submits that this is the only way to give business efficacy to the articles as a whole. If there is no requisite consent under article 10.1, then any purported conversion notice is invalid. That is the only means of giving business efficacy to the two provisions, and the way they interrelate, because the scheme of the articles does not work if the company's contentions are correct. On the defendant's case, there is no effective protection for the special rights of the preferred shareholders. They could be lost, abrogated, and taken away, at the whim of the ordinary shareholders. Effectively, instead of having some copper-bottomed pot for the preferred shareholders, you would have a permanent trapdoor fitted to the pot, and operable by the ordinary shareholders at will. Whenever they might fancy, the ordinary shareholders could just convert the preference shares, and then all the special rights attaching to those shares are automatically extinguished.

42. Indeed, Mr Collingwood submits that it would be commercially nonsensical, and absurd, for the express protection conferred by article 10.1 to be completely overridden and eradicated by the provision in article 9.2 (a). If the company is correct, any special rights acquired by an investor, at a significant premium, can simply be taken away, at any time, against the wishes of all the members of that class, by a vote of those with naturally opposed interests (the ordinary shareholders). On the very day that Ventura and SMTB had been allotted preferred shares in the company, with special rights attached, a qualifying majority of the ordinary shareholders could have served a conversion notice, whereupon the preferred shares would instantly have stood converted, thereby depriving Ventura and SMTB of the rights they had specifically bargained, and paid a substantial premium, for. That would be

commercially absurd since it would render the preferred shareholders vulnerable to the whim, and entirely at the mercy, of the ordinary shareholders. On that construction, article 10.1 would be largely redundant, at least so far as the abrogation of the special rights is concerned, because the consent of the holders of the preferred shares would never actually be needed.

43. Should Mr Thornton argue that the preferred shareholders bargained for the potential conversion of their shares when they signed up to article 9.2 (a), then Mr Collingwood would submit that there was a clear error which, applying the *Chartbrook* principle, the court can correct. This is the real nub of Mr Collingwood's various submissions: That it is a complete nonsense to bargain for special rights, which can only be varied or abrogated with the consent of 75% of the class members, yet to agree a trapdoor to this protective pot that can be pulled open at any stage by the ordinary shareholders. Even if, in theory, the preferred shares still remain as a potential class of shares, who in their right mind is going to want to have such shares allotted to them when the very preferred rights they are paying a substantial premium to secure are liable to be lost in an instant? Had an officious bystander been asked whether the preferred shareholders could lose the rights attached to their shares without their consent, by the simple device of the ordinary shareholders converting their shares to ordinary shares, the answer must be an unqualified and resounding: *No*. It simply cannot be right that a qualifying majority of ordinary shareholders can compel an exchange of preference for ordinary shares under article 9.2 (a), thereby running the M25 motorway through the special protection conferred by article 10.1. This is Mr Collingwood's response to any suggestion that Ventura and SMTB merely made a bad bargain: What they bargained for was the protection afforded by article 10.1, in the sense for which Mr Collingwood contends, rather than the absurd construction advanced by the defendant, which produces a result so absurd and uncommercial that no rational reader could ever have contemplated or understood it as forming part of the parties' bargain.

44. Mr Collingwood points out that amongst the public filings, and thus part of the admissible extrinsic evidence, are the returns of allotment of shares in Form SH01. The example for SMTB (at page 395 of the hearing bundle) clearly shows that the price paid for each of SMTB's 851 preferred shares (with a nominal value of only £ 0.001) was £ 2,350. It is also clear from the statement of share capital that 162,561 ordinary shares, and a total of 24,877 preference shares, had been allotted, all with the same nominal value. It would also have been apparent to any person inspecting the publicly filed documents at Companies House that the articles had been amended at about the time that preference shares were first allotted, and that valuable rights attached to the preference shares for which a substantial premium had been paid. Therefore, an astute and assiduous reader would deduce that the holders of the preference shares in the company had paid a substantial premium for the special rights attached to their shares, in preference to the inferior rights enjoyed by the numerically far greater number of ordinary shareholders in the company.

45. Accordingly, Mr Collingwood submits that the proper construction of article 9.2 is that it is subject to the comprehensive protection of special rights in article 10.1, which must also be complied with in order to effect the abrogation of any rights attached to the preferred shares. That is the manner in which reasonable business efficacy is to be given to the interrelation between the two provisions. Such an approach also accords with practitioner notes on the appropriate practice on the

conversion of shares, such as *Practical Law UK Practice Note* 3-522-2424, which describes the process of converting issued shares from one class into another, as anticipated by s. 636 of the 2006 Act, where the issued share capital and the nominal value of the shares remain the same (a process sometimes referred to as *'re-designating shares'*). Addressing the procedure for converting shares by re-designation, the notes include, under the heading *'Variation of class rights'*, the following:

> If the conversion involves a variation to any of the class rights attached to the shares that are to be converted (or any other shares in the company), then the necessary steps must be taken. This will involve complying with any relevant provisions in the articles with regard to a variation in class rights and, in the absence of any such provisions, will require the obtaining of written consent from the holders of at least three quarters in nominal value of the issued shares of that class or a special resolution passed at a separate general meeting of that class sanctioning the variation. For further information in relation to varying class rights see *Practice note, Share capital: class rights.*

46. Further and in any event, Mr Collingwood submits that it would be commercially nonsensical and absurd for the express protection in article 10.1 to be completely overridden (and eradicated) by the provision in article 9.2. In particular:

(1) As in the present case, that would mean that (having paid a premium and bargained for those rights) the special rights attached to preferred shares acquired by an investor could simply be extinguished at any point against the wishes of all of the holders of such shares by a vote of those whose interests are naturally opposed to the preferred shareholders (namely the ordinary shareholders), and at their whim. That is a commercially absurd result which cannot have been intended.

(2) Article 10.1 would be left largely redundant (at least as regards the extinction of special rights) if (as contended by the company) the consent of the preferred shareholders would never actually be needed for the abrogation of their special rights so long as the ordinary shareholders (whose interests are opposed to the preferred shareholders) were minded to exercise the power to convert the shares under article 9.2 (a).

47. Mr Collingwood submits that the claimants' approach to construction also accords with the provisions, and the scheme, of s. 630 of the 2006 Act, which provides that rights attached to a class of shares may only be varied (or abrogated) in accordance with a provision in the company's articles for the variation of those rights or (in the absence of such a provision) with the consent of 75% in nominal value of the relevant class.

48. Further, the claimants' construction accords with the provisions of the shareholders' agreement (as amended) with respect to Ventura's rights thereunder regarding the put option and the appointments of a director and a board representative. It makes no commercial sense for those rights simply to be subject to nullification at the whim of the ordinary shareholders through a conversion of the preferred shares. Such would be contrary to the spirit of the shareholders' agreement.

49. Further or alternatively, in order to give the articles business efficacy (for the reasons given above), the court ought to imply a term that the power under article 9.2 (a) may not be exercised without first complying with the consent provision in article 10.1.

50. In the course of his oral submissions, immediately before the short adjournment, I invited Mr Collingwood to articulate the correction, or term, he would invite the court to make, or imply, into article 9.2 (a). Mr Collingwood's response was to invite the court to insert, at the end of the article, the words *"... subject always to having first obtained any requisite consent under article 10.1"*.

51. In the circumstances, none of the holders of the preferred shares consented to the abrogation of the additional rights attached to those shares. There has been a failure to comply with article 10.1. Accordingly, the claimants seek a declaration that the purported conversion of the preferred shares is invalid, void and of no effect.

52. In the alternative to its claim for relief as to the invalidity of the extinction of its special rights on the basis of the proper construction of the articles, Ventura (on its own behalf, and on behalf of SMTB) seeks relief pursuant to s. 633 of the 2006 Act, disallowing any abrogation of the rights formerly attached to the preferred shares. Mr Collingwood submits that if the conversion notice were effective to extinguish the rights formerly attached to the preferred shares, then such constitutes an abrogation of rights for the purposes of s. 633.

53. It is common ground that the s. 633 application was made within the relevant time period, and by a qualified shareholder (Ventura), which also acts on behalf of the only other affected shareholder (SMTB). Mr Collingwood submits that a principal difference between himself and Mr Thornton relates to the true ambit of s. 633. Mr Collingwood points out that the leading company law practitioner texts treat it as settled law that s. 633 applies to a variation of class rights effected under a provision in the company's articles, as well as to a statutory variation effected outside the articles under s. 630 (2) (b): see *Gore-Browne on Companies* at paragraph 21 [14] and *Palmer's Company Law* at paragraphs 6.032 and 6.034. This follows from the wording of s. 633 (1), which expressly states that s. 633 applies *"where the rights attached to any class of shares in a company are varied under section 630"*: the scope of s. 633 is not expressly limited to variations under s. 630 (2) (b), where the company's articles contain no provision for the variation of class rights, but extend to variations effected in accordance with a provision in the company's articles under s. 633 (2) (a). The clear statutory purpose of s. 633 is to create a comprehensive statutory scheme to protect the variation of class rights howsoever effected. What s. 633 is saying is that where you have a variation under s. 630, whether by way of a provision in the articles or the specific statutory fall-back, then the protection afforded by the remedy under s. 633 is available. Should Mr Thornton seek to contend that there is no need for the protection afforded by s. 633, where class rights are varied under a provision in the articles, because affected shareholders will have the unfair prejudice remedy available under s. 994 of the 2006 Act, Mr Collingwood points out that that remedy is available whether the variation is effected under an express power in the articles or under the statutory fall-back in s. 630 (2) (b), so that contention affords no proper basis for seeking to differentiate between the two means of varying class rights.

54. Mr Collingwood submits that Ventura (and SMTB) would be unfairly prejudiced as a result of the variation of their special rights because they would suffer the following prejudice:

(1) The loss of the preferential interest and priority on distribution or exit (under articles 5.1 and 6).

(2) The financial loss (or exposure to financial loss) in the event of an exit (due to the lost preferential financial rights).

(3) The loss of the put option conferred by the shareholders' agreement.

(4) The financial loss occasioned by the loss of the put option.

(5) In the case of Ventura (but not SMTB) the loss of the rights to appoint a director and a representative to attend board meetings.

55. Mr Collingwood submits that that prejudice would be particularly unfair for the following reasons:

(1) Ventura (and SMTB) specifically negotiated for the preferential rights, including on exit or distribution (and for representation and presence at board meetings based upon a particular number of shares held, as opposed to the percentage of shares in issue). It is unfair for the shareholder majority to extinguish those rights without their consent or any compensatory consideration.

(2) The ordinary shareholders in the company (who implemented the purported conversion in order to extinguish the preferred rights) had agreed to Ventura (and SMTB) having the preferred rights granted to them (as demonstrated by the adoption of the new articles and the execution of the deed varying the original shareholders' agreement).

(3) The conversion constituted a breach of the shareholders' agreement by the ordinary shareholders since it sought to deprive Ventura (and SMTB) of the benefit of the put option in order to raise and induce additional investment into the company, as described in the circular to shareholders. Such is contrary to the spirit and intent of the shareholders' agreement (and thus is in beach of clause 12.1 thereof).

(4) The extraordinary circumstances of the present case are all the more unfair since none of the holders of preferred shares voted in favour of the extinction of their special rights. The entire class opposed the loss of such rights.

(5) The ordinary shareholders have sought to improve their own financial position at the expense of Ventura (and SMTB).

56. In all the circumstances, Mr Collingwood submits that Ventura (and SMTB) would suffer unfair prejudice, and that the court should grant an order disallowing the conversion of the preferred shares and the abrogation of the rights attached to them. He invites the court to grant the relief sought in the claim form, including an order for rectification of the company's register of members.

57. At the end of his submissions, I raised with Mr Collingwood Mr Thornton's point that for the court to disallow a variation of class rights, it must be satisfied that it is not only prejudicial but also **unfairly** prejudicial; and if the abrogation of such rights is permitted in accordance with the articles, then how could it be said to be unfairly prejudicial? Mr Collingwood's response was that it could be unfairly prejudicial because it constituted a breach of the spirit and intent of the shareholders' agreement (contrary to clause 12.1 thereof). Although that was not a document available at Companies House, it was a document that governed the relations between the shareholders; and, in the ordinary course, a breach of the shareholders' agreement could amount to unfairly prejudicial conduct under s. 994 of the 2006 Act. The put option, in particular, was no part of the articles, but it was part of the shareholders' agreement; and it was never contemplated that the valuable rights which it conferred on the preferred shareholders should be lost by the simple device of converting the preference shares into ordinary shares. As far as matters between shareholders are concerned, one could extend the purview of the matters to be taken into account under s. 633 and look to all the matters that they had bargained for and agreed, and also look to the general unfairness of the situation, which was that the preferred shareholders had paid a substantial premium for the rights attached to their shares and that these had now been taken away from them. That was unfair. Even if the ordinary shareholders were entitled do this under the articles, it was a breach of the shareholders' agreement; and it did away with a whole raft of rights which it could never have been contemplated that the preferred shareholders would give up so easily.

VIII: The defendant's detailed submissions

58. Mr Thornton began his oral submissions with a simple example, drawn from the retail world, designed to illustrate what the claimants were seeking to do and why that was flawed:

> Suppose a greengrocer and a fruit wholesaler entered into a contract pursuant to which the wholesaler agreed to supply, for a fixed price, a hundred apples to the greengrocer, deliverable one month in the future. The agreement they entered into provided that the wholesaler could, in his absolute discretion, substitute pears for apples. Between the date of the agreement being entered into and the date of the fruit being supplied, apples became substantially more expensive for the wholesaler to procure than originally appeared. Accordingly, the wholesaler decided to exercise his substitution right and supply to the greengrocer pears and not apples. The greengrocer was unhappy because he could have charged a significant premium for an apple compared to a pear; and by supplying pears, the wholesaler improved his financial position by exercising his right under the contract and prejudiced the greengrocer's financial position.
>
> The first question arising is: Did the wholesaler commit a breach of contract? Answer: No, because he supplied fruits in accordance with the terms of the agreement. Second question: Was the agreement varied, modified or abrogated? Again the answer is: No. The wholesaler performed the contract in accordance with its terms. Would the court imply a term into the contract that the wholesaler can only supply pears with the greengrocer's consent? Well, that is completely contradictory to

> the clause that says that the wholesaler can do it at his absolute discretion; it completely changes the bargain.
>
> The adverse economic consequences encountered by the greengrocer resulted from the decision of the wholesaler as to how he would perform the contract within its terms, not because of a breach or variation or an abrogation; and that is exactly the same position here. Just as the greengrocer in my example would love to have had apples to sell to his customers, the claimants would love to hold preferred shares to sell to an acquirer of the company because that would give them a better economic outcome. However, no more than the greengrocer was entitled to insist on apples, were the claimants able to insist on preferred shares. They agreed very clear circumstances in which they would swap preference shares for ordinary shares. One of those options allowed them to convert at a time of their choosing; another allowed a larger category of shareholder, including themselves - because under investor majority both the ordinary and the preferred shareholders can vote to make that decision – to trigger the conversion right. The claimants are obviously unhappy with the outcome, and they may be able to show that that has reduced the value of their shareholding; but that is commercial life. It is the outcome of performance of the contract that they entered into. It is not the role of this court to shield them from that reality, nor from the decision they made to invest on those terms at the outset.
>
> Of course, if there is a pot to be divided between the shareholders after the sale, it is to be shared between all of the shareholders; and the effect of essentially rewriting the articles - which in my submission is what you are being invited to do - will take money out of the pockets of shareholders who did not draft the articles and put it into the hands of the shareholders who did draft the articles. And, in my submission, that would be an incredible thing for the court to do.

59. Mr Thornton submits that there was no *'variation'* or *'abrogation'* of the class rights attached to the preferred shares. The conversion notice effected a *'swap'* or *'exchange'* of preferred shares for ordinary shares, and not a variation of the rights attached to the preferred shares. He contends that the claimants' case proceeds on the misapprehension as to what it is that article 9 provides for. Article 9 provides for an exchange (or swap) of one form of security (a preferred share) for another form of security (an ordinary share). An exchange (or swap) is fundamentally different from a variation of rights. In the case of the latter, the shareholder retains the same security both before and after the transaction, but the rights attached to it are modified. In the instant case, that would be the position if, for example, it had been proposed to change the one-to-one ratio by which the preferred shares were to be converted into ordinary shares. A variation does not involve any amendment to the register of members of the issuing company, no need to swap share certificates or, indeed, any question of fractional entitlements arising. However, it will involve an amendment to the articles of association of the company, and thus compliance with any provisions dealing with the variation of class rights (such as here, article 10).

60. Here, it is clear there is an exchange (or swap) of shares and not a variation of class rights because:

(1) Under article 9.3, the holders of the converted preferred shares are required to surrender their share certificate in respect of those shares. A share certificate is evidence of the member's title to such shares.

(2) Under article 9.6, the company is mandated to update its register of members to record the former preferred shareholders as holders of ordinary shares.

(3) Under article 9.6, the company is mandated to issue new certificates to the former preferred shareholders, representing the ordinary shares to which they have become entitled in place of their preferred shares.

(4) Article 9.8 sets out a regime for dealing with fractional entitlements arising on a conversion (with any fractional entitlements being cashed out). Those provisions would not be required in the case of a variation of the rights attached to the preferred shares.

(5) The absence of any changes to the rights attached to the preferred shares. The rights remain identical before and afterwards, and no changes to the articles are made; the only change is that the former holders of the preferred shares cease to hold those shares and there are no longer any preferred shares in issue. The flaw in the claimants' submission is that they have confused two concepts: class of share with class of shareholder or member. They are two separate concepts under the 2006 Act. The question for the court is not whether the rights of the **holders** of the shares have changed, but whether the rights attaching to the **class of share** have changed. The test is: Is there any variation to the rights of the preferred shares?; and not: Is there a variation of the rights held against the company by the holders of the preferred shares? The rights of the existing class of preferred shares have not changed; it is simply that there are no longer any holders of those shares pending any decision by the company, if it wishes to do so, to issue further preferred shares of that class.

61. This fundamental flaw in the claimants' case explains why there is no conflict between articles 9.2 and 10.1: the process for conversion under article 9 does not involve any change to the rights of the preferred shares. It may involve a change to the rights enjoyed by Ventura and SMTB as the holders of equity in the company because their preferred shares are taken away, and they are given ordinary shares; but the preferred shares (and the rights attaching to them) are identical both before and after the conversion, so there cannot be any argument about those rights being varied or abrogated.

62. Mr Thornton submits that, essentially, that is the answer to this entire claim, because if there is no variation of the rights attached to the preference shares, neither article 10.1 nor s. 633 of the 2006 Act are engaged because both are predicated upon the court being satisfied that there has been a variation or abrogation of class rights. Both the claimants' case on construction, and their claim of unfair prejudice under s. 633, depend upon them establishing that the conversion involved a variation or abrogation of class rights. As there was no such variation or abrogation, both claims are bound to fail. Mr Thornton advances his alternative submissions without prejudice to this core argument.

63. Mr Thornton's first alternative submission is that the terms for the conversion of the preferred shares into ordinary shares formed part of the rights built into the preferred

shares at the outset; they were part of the original bargain made between the company and the preferred shareholders. This bargain has simply been performed in accordance with its terms, so the share conversion amounted to a performance of the preferred shareholders' rights and not a variation of them.

64. During the course of his submissions, Mr Thornton took me through the documents, by reference to his written chronology, which clearly demonstrate that it was Mr Daniel Jeon, Ventura's General Counsel, who (by email dated 25 November 2020) first sent new draft articles of association to the company, including a definition of *'Investor Majority'* and article 9 (as eventually adopted with immaterial amendments), describing them as *"based on what I found to be somewhat standard forms of New Articles for UK Private Limited Companies that are at similar capital growth stages as"* the company; and describing the draft articles as including *"customary terms"*, including *"conversion terms"*. So having entered into the drafting exercise with an agreed IPO conversion right, it was Ventura that suggested that the '*Investor Majority'* (constituted by the ordinary shareholders) should have a unilateral right to convert the preference shares into ordinary shares. Mr Thornton points out that a deliberate decision was taken to remove some of the rights (including the valuable put option) from the articles to the shareholders' agreement. Mr Thornton also emphasises that the drafting of the articles, about which the claimants now complain, was actually undertaken, in the first instance, by their own general counsel, and was described as '*customary'* – and not as *'absurd'*. What the claimants are inviting the court to do is to correct what they now say is their own self-induced drafting error. When one looks at questions of fairness, why should the other shareholders, who relied on the claimants' drafting, and adopted it, suffer any financial loss? That should be borne by the party that made the error, if error it was.

65. There was agreement that the rights attached to the preferred shares should change, or evolve, upon the occurrence of certain trigger events in a manner fixed in the amended articles. The rights which the holders of the preferred shares were entitled to enjoy depended on whether or not any such trigger event had taken place. The effect of the conversion was not to **alter** the rights of the preferred shareholders but to impact upon the **enjoyment** of those rights. Mr Thornton contends that an alteration of the **enjoyment** of a class right is not a variation or an abrogation of that class right, citing decisions of the Court of Appeal in *White v Bristol Aeroplane Co Ltd* [1953] Ch 65 and *Re John Smith's Tadcaster Brewery Co Ltd* [1953] Ch 308.

66. The shareholders of the company adopted rights which would change, or evolve, upon the occurrence of specified events, including the consent of an '*Investor Majority*'. The position here is no different from the situation where the coupon on a share is to change over time. Again, as a result, neither article 10 nor s. 633 of the 2006 Act are engaged.

67. Mr Thornton next submits that on a true construction of the company's articles, article 10 is not triggered. Applying the correct approach to the construction of a company's articles of association, the outcome is straightforward. The natural meaning of the words used in article 9 leaves only one construction, namely that the preferred shares converted into ordinary shares automatically upon '*Investor Majority*' consent being obtained. The claimants' approach is incapable of reconciliation with the wording of article 9, bearing in mind that the service of an investor majority conversion notice

required the immediate alteration of the company's register of members (article 9.6) and the delivery up of the preferred share certificates (article 9.3).

68. Mr Thornton submits that when one looks at how article 9.2 works, there is no room for the imposition of any requirement to seek the consent of the preferred shareholders because their shares convert automatically on the day the conversion notice is served: it is immediate. So the claimant has to imply a term to get there; but there is no proper basis upon which to do so because the articles work perfectly well as drafted. Mr Collingwood's submissions essentially involve confusing a bad deal with commercial absurdity. There is no evidence that the conversion provisions were inserted for administrative purposes; and even if there were, that would not be admissible as an aid to the true construction of the articles. The claimants may not like where the conversion provisions have got them, but they work perfectly well. In any event, Mr Thornton submits that Mr Collingwood's implied term does not actually work because it is circular and begs the real question: is any relevant consent required under article 10.1? The same applies to the *Practical Law UK Practice Note*: Does the share conversion require or involve any variation to any of the class rights attached to the preferred shares? If any term falls to be implied, Mr Thornton suggests that it would be much more likely to have been along the lines: *'Any conversion of shares under article 9.2 (a) shall constitute a variation or abrogation of the class rights attached to the preferred shares'*. But that goes back to Mr Thornton's grocer example and completely reverses the contract, which provides that if the investor majority serve a conversion notice, then the preferred shares automatically convert to ordinary shares. But there is no proper basis for the court to imply any term in this situation: there is no need to do so because the contract in the articles is neither unworkable nor absurd.

69. During the course of his submissions, Mr Thornton accepted that the court was entitled to look to the Form SH01 by way of extrinsic evidence. He pointed out that this included the statement that the preference shares *"... are non-redeemable but may be converted into Ordinary Shares in the circumstances set out in the Company's Articles of Association"*. Mr Thornton also accepted that anyone reading the articles would also know the number of different classes of shares that had been issued; but he submitted that this would only lead them to conclude that the preferred shareholders could not block the conversion of their shares into ordinary shares, so he says that the extrinsic evidence only '*digs a deeper hole'* for Mr Collingwood. It makes it absolutely clear that there was a conversion right in the articles; and it tells the shareholders that it is capable of being exercised without the approval of the preferred shareholders.

70. It does not assist the claimants to say that, on the company's construction, the claimant has agreed a *'bad deal'*. Even if the rights that the claimants obtained at the time they invested in the company were of negligible value (which they were not), they were the rights they acquired; and the claimants cannot now, armed with the benefit of hindsight, invite the court to confer on them rights which they did not secure simply because that would give them a more valuable stake in the company than the one they did in fact acquire. The role of the court is not to relieve a contracting party from a disadvantageous transaction.

71. Turning to ss. 630 and 633 of the 2006 Act, Mr Thornton repeats his submission that there was no variation of any class rights attaching to the preferred shares. He also

emphasises what he maintains is the limited ambit of those sections. He submits that s. 630 provides a default power, allowing the holders of a majority of the shares in a particular class to effect a variation of those class rights. The section makes no attempt to restrict a company from adopting different, and more flexible, provisions for varying the rights attached to a particular class of shares.

72. In the present case, there is no suggestion that there has been any variation of class rights in accordance with the default provision in s. 630 (2) (b) of the 2006 Act. Instead, it is alleged that the variation (if there was one at all) was made pursuant to article 9. That is said to be an important distinction. Article 9 does not derive its binding force from s. 630 but from s. 33 (1) of the 2006 Act. This provides that:

> The provisions of a company's constitution bind the company and its members to the same extent as if there were covenants on the part of the company and of each member to observe those provisions.

73. Any alleged variation here was not carried out '*under*' s. 630. Accordingly, Mr Thornton submits that s. 633 is not engaged. That section forms part of the regime imposed by default where a company does not adopt its own variation of class rights regime. As it is imposed on the minority members of a class by statute, it is subject to a regime of policing by the court. No such regime is required where the shareholders have themselves adopted a variation of rights process in the company's articles. The adoption of that regime could be challenged under the principle in *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656; and any illicit exercise of the regime through a claim for unfair prejudice under s. 994 of the 2006 Act. There is no need to impose any additional regime where the company and its shareholders have adopted their own process; and s. 633 does not purport to do so. Mr Thornton submits that it is no answer for Mr Collingwood to submit that the law is settled just because two practitioner texts say so without the benefit of any citation of authority. If one were to ask any shareholder in the company whether the conversion of the preferred shares had been effected *'under'* s. 630, or under the articles, they would answer *'under the articles'*. Mr Thornton also points to the moratorium imposed by s. 633 (3) whereby, in the event of any challenge under s. 633, the variation has no effect unless and until it is confirmed by the court. There is no need for any application for interim injunctive relief, or any cross-undertaking in damages. In those circumstances, faced with two constructions, one of which is a very narrow and targeted construction, and the other is a very broad construction, essentially providing for an automatic moratorium whenever there is any challenge to a variation of class rights, Mr Thornton submits that the court should prefer the narrower construction.

74. In any event, Mr Thornton submits that there is no substance to the unfair prejudice allegation. He points out that this issue will only fall to be decided if: (1) there has been a variation of the class rights attaching to the preferred shares for the purposes of s. 633, and (2) that variation was in accordance with the company's articles, because article 10.1 does not trump article 9. 2 (a). So this assumes that there has been a lawful and valid variation of the class rights under the company's articles. When considering the unfair prejudice claim, Mr Thornton submits that it is important to bear in mind that the impact of any order setting aside the share conversion will have serious repercussions for other shareholders in the company, none of whom have been joined to the proceedings. The court will be depriving them of the bargain they obtained when the articles were adopted. The court will also be changing the basis

upon which any distribution of the proceeds of any sale of the company will be made, taking away moneys to which, on the face of it, the ordinary shareholders are entitled, and giving those moneys to the preferred shareholders. The court should only impose those consequences on the non-claimant shareholders in circumstances where a case for unfair prejudice is made out, and the court considers it appropriate to grant relief in the exercise of its discretion. Mr Thornton says that in circumstances where those affected parties are not before the court, it should only grant relief in extreme circumstances. Mr Thornton also points out that the claimants advance no case of improper motive on the part of either the ordinary shareholders or the company, acting by its board of directors. The most that is said is that the ordinary shareholders were acting in their own financial self-interests. In those circumstance, Mr Thornton submits that the claimants' case ultimately seems to come down to the single proposition that it would be unfair to hold them to their bargain: that they made a bad deal, and the court should relieve them from it. But it is not at all unfair for a party to be held to the bargain it has made.

75. Mr Thornton contends, by way of analogy with s. 994 of the 2006 Act, that if it is to be '*unfairly prejudicial'*, the conduct complained of must be both prejudicial (in the sense of causing prejudice or harm to the relevant interest) and also unfairly so. It is necessary for a claimant to establish both unfairness and prejudice; proving only one element will not suffice. The only allegation of unfair prejudice is that set out at paragraph 40 of Mr Buckley's first witness statement, namely that each of Ventura and SMTB have been deprived of class rights for which they had specifically negotiated, and which were beneficial to them, through the votes of the ordinary shareholders, who thereby stand to benefit at the expense of Ventura and SMTB. Mr Thornton contends that this appears to amount to no more than reliance on the alleged adverse impact of the conversion being carried out in accordance with its terms. But that cannot amount to unfairness; the best test of what is fair is to consider whether it is consistent with the terms agreed between the parties. Here, if the claimants' construction argument fails – as it must for the issue of relief under s. 633 to arise at all – the conversion will have been in accordance with the terms the claimants had agreed (indeed, the terms they themselves had drafted and proposed to the company). The rights that the claimants negotiated were part of a composite package of rights that they, as presumably sophisticated, offshore investors, had negotiated; and they were subject to terms enabling them to be taken away on the occurrence of certain trigger events.

76. Turning to Mr Collingwood's submission that the conversion of the preferred shares was unfairly prejudicial because it involved a breach of the shareholders' agreement, Mr Thornton argues that the problem with that is that the court is being invited to set aside a variation of the rights attached to the preferred shares, but the provisions of the shareholders' agreement are not rights attached to those shares; they are rights that have been conferred contractually upon particular shareholders so they are not within the ambit of s. 633. Further, the other shareholders in the company are not parties to the present proceedings, so the claimants are asking the court to find a breach of contract against people they have not drawn into the proceedings, and that is something that is not open to them. Indeed, it is even worse than that because the claimants are also seeking relief that would affect those ordinary shareholders who did not even sign the conversion notice. So the court is being asked to grant relief in relation to people (1) who are not parties to the proceedings, and (2) against whom the

claimants cannot even allege any breach of the shareholders' agreement. Still further, the claimants have not explained how the exercise of conversion rights which, on this hypothesis, are conferred by the articles, without any restriction on their exercise, can amount to any breach of the spirit or intent of the shareholders' agreement. There is no provision in the shareholders' agreement which seeks to vary the conversion rights conferred by the articles, or to restrict their application.

77. For all these reasons, Mr Thornton invites the court to dismiss the proceedings.

78. At the conclusion of Mr Thornton's oral submissions, towards the end of the first day of the hearing, I drew counsel's attention to a Court of Appeal decision refusing the remedy of corrective construction in the context of documentation governing an occupational pension scheme, in a case where it had been contended that there was both a clear error and a clear solution. The case is *Britvic Plc v Britvic Pensions Ltd* [2021] EWCA Civ 867, [2022] 2 All ER 457; and since it reversed a decision of my own at first instance, I indicated that it was an authority I was likely to have firmly in mind when deciding this case. Sitting at first instance, I had corrected a provision in pension documentation by way of construction, rather than recourse to the equitable rectification; and the Court of Appeal unanimously held that I was wrong to have done so because there was no clear error and, even if there were, the solution was not clear.

79. When the court resumed the following morning I also invited any further submissions from counsel on the relevance of the distinction between the rights conferred by the articles and those conferred by the shareholders' agreement, which was, of course, a private, and not a public, document.

80. Mr Thornton submitted that when considering the variation of class rights, for the purposes of both construction and the engagement of s. 633, one was only looking at rights that were set out in the company's articles. When asking, as a matter of construction, whether there was any variation of class rights, Mr Thornton contended that the court was only looking at rights that attached to a share, and not to legal rights that were given to a particular shareholder under some other contractual arrangement. The same applied to the jurisdictional gateway into s. 633 because that was predicated upon a variation of the rights attached to a particular class of share. Once one had passed through the gateway into s. 633, however, Mr Thornton accepted that, when considering questions of fairness and prejudice, the court should not ignore any variation of the rights conferred by the shareholders' agreement because one must take into account all the consequences of the variation, even though s. 633 (5) directs the court to address the question whether *'the variation'* would unfairly prejudice the relevant class of shareholders. Mr Thornton considered that it would be going too far to submit that if it were to reach the stage of considering the question of fairness, the court should *'put on blinkers'*, and ignore the fact that the conversion of the preferred shares has had a consequential impact elsewhere.

81. Mr Thornton submitted that *Britvic* was consistent with his case; and he made three short points on that authority:

(1) The Court of Appeal held that there was no ambiguity in the words *'any other rate'*, Similarly Mr Thornton says that there is no ambiguity in the phrase *'all Series A shares shall automatically convert into Ordinary Shares upon notice in writing from*

an Investor Majority'. This is not a case where there are alternative constructions for the court to choose between.

(2) At paragraph 33, Sir Geoffrey Vos MR had made it clear that a corrective approach to construction only arises where there is an obvious mistake on the face of the document. Mr Thornton says again that there is no error on the face of the articles here. Mr Collingwood puts his case on the basis that it is absurd, and that no reasonable shareholder would ever have agreed to the defendant's construction. But there is no obvious mistake on the face of the relevant article.

(3) The Court of Appeal recognised that the courts take a slightly narrower approach to construing a pension scheme than a contract; but the approach is even narrower in the case of articles of association. The court reads the words of the articles; and the only extrinsic evidence which it can take into account is the Form SH01, which refers to the special rights attached to the preferred shares, and the fact that they are subject to the right of conversion, and also reveals the number of shares in issue, enabling a calculation to be done as to who could secure an '*Investor Majority'*.

82. At the end of Mr Thornton's closing speech, I suggested that it might be difficult to see that there was an obvious error on the face of the articles; and it might also be difficult, without attempting to rewrite those articles, to say that there was any alternative construction to that which article 9.2 bears on its face. So really, as a matter of commercial common sense, and on analysis, the only case that the claimants might be able to get off the ground was not really an implied term, but an implied limitation: that the court should imply a limitation on the apparently wide scope of article 9.2 so that it does not apply to a case to which article 10.1 applies.

83. Mr Thornton's response was that this would completely reverse the effect of article 9.2. Essentially, the court would be depriving the ordinary shareholders of one half of the bargain they had struck, even though they were not represented in court, had been given no notice, and there was no evidence as to their intentions at the relevant time. The court could only construe the words on the page. This case simply fell into that category of cases where the court may say that it can appreciate how one of the parties now regrets their bargain because, with the benefit of hindsight, it has turned out not to be as good a deal as it had expected; but that is no justification for interfering. What the court would actually be doing would be to deem that something that did not constitute a variation of class rights was such a variation, and reversing the bargain under article 9.2 by implying a term into a set of articles in order to protect a sophisticated, offshore investment fund from a drafting error of its own making.

IX: Submissions in reply and rejoinder

84. As part of his oral closing submissions, Mr Thornton had produced copies of written resolutions passed by the company on 19 August 2022, authorising the creation of convertible loan notes as part of a further capital fundraising, and of the company's new articles of association. In his oral reply, Mr Collingwood points to the fact that the new Series B preferred shareholders have clearly learned the lessons of earlier drafting inadequacies because they have negotiated an amendment to the company's articles, expressly providing that, save upon the occurrence of a Qualifying IPO, no series B shares should be capable of automatic conversion into ordinary shares, and rendering any conversion notice from an Investor Majority of no effect. It now seems

highly likely that no-one would ever consider either issuing, or subscribing for, any new Series A preferred shares so, as a class, these have effectively ceased to exist.

85. Whilst Mr Collingwood accepts that he cannot rely on the shareholders' agreement as an aid to the construction of the articles, because it is not a public document, he submits that he can rely on the rights conferred by the shareholders' agreement for the purposes of ss. 630 and 633 as rights *'attached'* to the preferred shares. The only reason that Ventura and SMTB ever enjoyed the put option, or any of the other rights conferred by the shareholders' agreement, was because they had held the preferred shares.

86. Mr Collingwood invites the court to construe article 9.2 in the context of the immediately following article, 10.1. He asks the court to adopt a unitary process, construing articles 10.1 and 9.2 (a) together. His approach differs from that of Mr Thornton, who looks only at article 9.2 (a), starting instead with article 10.1, and considering the relationship between the two articles, the inconsistency between them, and the absurdity of treating article 9.2 (a) as a stand-alone provision, unaffected by article 10.1. Mr Collingwood submits that something has clearly gone wrong because the two articles do not work together. The results for which Mr Thornton contends cannot be reconciled with the remainder of the articles; and the problem is clear: the conflict with article 10.1, and the absurdity of the situation where the special rights of the preferred shareholders can be lost immediately simply by the service of a conversion notice by those with a financial interest in inflicting that loss. It is plain that that is not what was contemplated by the parties. So the problem is clear; and once the problem has been clearly identified, the solution to it is equally clear: *"All roads lead to Rome."* Article 9.2 (a) is subject to article 10.1, which takes precedence. That is the clear solution, and clearly what a reasonable person at the time would have understood the parties to have meant.

87. Mr Collingwood submits that the conversion of the shares effected a variation to the special rights attached to the preferred shares because those rights are being taken away from those shares. All of Mr Thornton's points about the return of the share certificates, and the like, are not required for the implementation of that conversion: rather, they are consequential upon it. Mr Collingwood points out that *'conversion'* has no independent definition in the 2006 Act; nor is *'conversion'* addressed in the model articles of association.

88. Mr Collingwood seizes upon the observation at paragraph 76 of the concurring judgment of Nugee LJ in *Britvic* that sometimes a drafting mistake *"... does not readily appear when reading the provision, but it becomes apparent on examination that this cannot have been what the drafter meant, as it makes no rational sense"*. Nugee LJ accepted that such cases would be rare; but Mr Collingwood submits that this is one of those rare cases where, because of the nature of the ambiguity, the mistake in the articles is clear, as is borne out by the commercial absurdity of the present case if Mr Thornton's construction were to be upheld. It was clearly never in anyone's contemplation that the ordinary shareholders might remove the special rights of the preferred shareholders as soon as these were granted, or whenever might suit the financial interests of the ordinary shareholders. The whole purpose of the preferred shares had been to give their holders preferential rights, protecting them from any downside, and enabling them to enjoy any upside, in the value of the company. Mr Thornton had sought to take article 9.2 (a) in isolation; and that was

why his greengrocer example was of no assistance to the court, since it ignores the existence of article 10.1. By purporting to convert the preferred shares, the ordinary shareholders had sought to extinguish (or abrogate) the rights attached to those shares. The fact that redundant rights might persist in the articles, attached to the preferred shares, but bereft of any shareholder, was neither here nor there.

89. Mr Collingwood explains that in proceedings such as the present, the company represents the interests of the shareholders, unlike the position on a s. 994 petition. The other shareholders have all been notified of this claim, and of their right to apply to attend and to make submissions, but none of them has elected to do so. The court was referred to a notice sent by the defendant's solicitors on 3 September 2022 to all of the company's shareholders, alerting them to the fact that these proceedings had been set down to be heard in the Rolls Building in a five-day window from the 16 January 2023, with a time estimate of two days; and that it was open to any shareholder, with the court's permission, to submit evidence in the proceedings, or to address the court at the hearing. In the absence of any of the shareholders, the company represented their interests; and Mr Thornton had opposed the relief sought by the claimants. There was therefore nothing to be made of the fact that no other shareholder was present before the court, or that their interests were somehow affected. All the company's shareholders had been put on notice of this claim, and of their entitlement to come and be heard and make submissions; and they had apparently been content for the company (through Mr Thornton) to make the running on their behalf. As for those shareholders who had not signed up to the conversion notice, they were clearly content for matters to remain as they were. The claimants were not seeking any relief against them as such, but were merely seeking to undo what the claimants say has been done improperly, invalidly, and unfairly in relation to themselves.

90. During his brief rejoinder, Mr Thornton drew my attention to s. 629 (1) of the 2006 Act, providing that: *"For the purposes of the Companies Acts shares are of one class if the rights attached to them are in all respects uniform"*. Mr Thornton illustrated the difference between the rights attached to the preferred shares, and the rights enjoyed by the preferred shareholders, by reference to the different rights enjoyed by Ventura and by SMTB: both of them enjoyed the preferential priority return conferred by the articles, and they both also enjoyed the put option granted by the shareholders' agreement; but only Ventura enjoyed the additional rights conferred by the shareholders' agreement to appoint a director and a representative to attend board meetings. Therefore, that right could not be considered to be a *'class'* right because it did not attach to **all** of the preferred shares, and it was not enjoyed by **all** of the preferred shareholders. The rights attached by the articles to the preferred shares were in all respects uniform, so they formed one class of **share**; but the rights enjoyed by the preferred shareholders were not in all respects uniform, so those shareholders did not form one class of **member** but two.

91. Mr Thornton made it clear that his only concern regarding the absence from these proceedings of any of the ordinary shareholders relates to the assertion that the *'Investor Majority'* (as distinct from the company) might be in breach of any of the provisions of the shareholders' agreement by joining in a conversion notice. Mr Thornton emphasised: (1) the complete absence of any allegation by the claimants that the *'Investor Majority'* had acted for any improper purpose, or otherwise in bad

faith, in joining in the conversion notice; and (2) the fact that no allegation of any breach of the shareholders' agreement features in the claim form, or the supporting evidence, but was raised, for the first time, in Mr Collingwood's skeleton argument, so the ordinary shareholders have had no opportunity to address it.

X: Analysis and conclusions

92. I have sought to set out the parties' submissions in considerable detail; and I have borne them all firmly in mind. If, in this section of my judgment, I do not address all of those detailed submissions expressly, it is not because I have overlooked any of them, but rather because I do not consider it necessary for me to do so in order to explain the reasoning underlying, and leading to, my conclusions.

93. Perhaps chastened by the treatment accorded to my first instance decision in *Britvic*, I derive considerable assistance from the judgments of all three members of the Court of Appeal in that case.

94. First, the judgment of Sir Geoffrey Vos MR at paragraphs 31 – 33:

> 31. This is not a case where there has been sloppy or unclear drafting. The words used by the skilled professionals involved are clear. I accept that the factual matrix and the commercial consequences are not to be ignored in the necessary unitary exercise even in such a case. But even giving those factors full weight, it seems to me that the judge's interpretation can only properly be reached if it were to be concluded that there had been a clear mistake on the face of the instrument, and that it was clear, either from the instrument itself or from admissible extraneous evidence, what correction ought to be made in order to cure the mistake (see *Chartbrook* at [22]-[24]).
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> 32. Unlike the judge, however, I cannot satisfy myself that there has in this case been a clear mistake on the face of Rule C.10(2). I can quite see that there **may** have been such a mistake. I can even see, as I have said, that it looks suspiciously likely that the draftsman simply pulled Rule C.10(2) from the Six Continents Pension Plan without considering that it had not appeared in the Six Continents Executive Pension Plan, so that continuity for all members was thereby jeopardised. I can see also that the provision as drafted is unsatisfactory in the ways eloquently expostulated by Mr Bryant, and arguably inconsistent with some of the immediately surrounding materials. What I find impossible to hold, however, is that the cure for the mistake (if mistake it was) is clear. I accept that substituting the word 'higher' to make Rule C.10(2) read 'or any higher rate' would be a desirable alteration, but it is very far from the only possible redrafting that would cure the mistake just as well. One might, for example, add a percentage range for the employer's discretion above LPI. There are several quite reasonable possibilities, and neither the BPP itself nor the admissible factual background tell the objective observer for sure which it should be.
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> 33. Moreover, the process of corrective construction adopted, in the alternative, by the judge at [137] is only normally adopted where there

> really is an obvious mistake on the face of the document. There is no obvious mistake here as there was, for example, in *Mannai* as to the date or in *Doe d Cox v. Roe* as to the name of the pub. The objective observer might well think that the power could have been more felicitously drafted, but that is not enough to allow the court to depart from the clear language, on the unequivocal authority of *Rainy Sky* and the later Supreme Court decisions I have cited. That is particularly so when the rules of a pension scheme are being interpreted.

95. Next, the concurring judgment of Coulson LJ: Adopting a unitary interpretation exercise, and considering all the background documents as well as the deed itself, he concluded that the words were clear and unambiguous: They meant what they said. At paragraph 55, Coulson LJ emphasised that: *"No other part of the deed, and no other part of the background material, suggests that these words could or should mean anything other than what they say."* On one view, that was the end of the matter: where the parties had used unambiguous language, the court must apply it. In the absence of ambiguity, it should be unnecessary to consider those arguments which were conventionally parasitic upon ambiguity, namely commercial common sense on the one hand, and excessive literalism or undue technicality, on the other; but to the extent that it was necessary to consider such arguments, the conclusion was that giving these words their natural meaning would not flout commercial common sense, nor give them an excessively literal interpretation. On the contrary, the words made complete commercial sense.

96. Finally, it was necessary for the court to consider the possibility that something had gone wrong with the language, and, if so, whether the mistake could be put right through *'corrective construction'*. In Coulson LJ's view, the conditions for such corrective construction had not been made out. There was neither an obvious error nor an obvious solution to any error. There was nothing to suggest that the draughtsman had made any mistake. The language was plain. So it was not possible to find that something had gone wrong with the language. Neither was there any obvious means of resolving any alleged error. At paragraph 61, Coulson LJ concluded that:

> The authorities suggest that corrective construction should be confined to those case, like *Mannai* and *Chartbrook*, where something has obviously gone wrong in a description, a date, a figure or a calculation, and the correct description, date, figure or calculation is obvious from the material before the court. That is all very far from the facts of this case.

97. Finally, Nugee LJ emphasised (at paragraph 67) *"... that not all questions of construction raise the same problem"*. He proceeded to illustrate this by referring to some of the authorities that had been provided to the Court of Appeal. Sometimes the provision to be construed was unclear because a word had two different meanings. Genuine ambiguities of that sort were probably quite rare. More commonly, there was no real dispute about what a word meant, but there was disagreement as to how it should be applied in the particular context. For such questions, understanding the context was therefore an important - indeed an essential - element in determining how the language was to be understood. In such cases, the language, either by itself, or, at any rate, once read in context, could be seen to give rise to possible rival interpretations. To resolve which of the rival interpretations was to be preferred, the court had recourse to a number of familiar tools and techniques, in accordance with

the guidance from the Supreme Court cases. This guidance included the fact that the aim was to ascertain what a reasonable person, armed with all the background knowledge reasonably available to the parties, would have understood them to have meant; that textualism and contextualism were both tools available for that purpose; that the exercise was a unitary and iterative one; and that the court was entitled to prefer that construction which was consistent with business common sense.

98. Nugee LJ emphasised that it was also entirely clear from the authorities that one could not jettison the language used by the parties. The consistent teaching of the Supreme Court was that one did not get into the question of choosing which interpretation was more consistent with business common sense unless there were two rival interpretations available. So one must first ask if there were two possible rival interpretations. There was a difference between, on the one hand, having regard to the context or factual matrix, and to considerations of commercial common sense, with a view to resolving which of two rival interpretations was to be preferred, and, on the other hand, having regard to such matters to create an ambiguity that was not there in the language. The former was part of the familiar task of construction which arises whenever a provision gives rise to possible rival interpretations. The latter was a much more doubtful exercise, that ran the risk of impermissibly using such matters to displace the language that the parties had actually chosen.

99. At paragraph 75, Nugee LJ reiterated:

> … that not all questions of construction are of the same type. As well as choosing between rival interpretations, the Court can correct mistakes as a matter of construction. It is clear from the Supreme Court authorities that this is a separate interpretative tool from those involved in choosing between rival interpretations.
>
> 76. These cases are cases where there has been a drafting *mistake*. Sometimes the mistake is a simple transposition obvious on the face of the document, as where John is written for Mary, or Landlord for Tenant, or a decimal point is put in the wrong place. Sometimes the language of the contract as written is obviously garbled: *KPMG LLP v Network Rail Infrastructure Ltd* [2007] EWCA Civ 363 was an example of this type of case. In such a case the mistake is plain enough, and the issue becomes whether it is also obvious what the provision was intended to be. Sometimes however the mistake does not readily appear when reading the provision, but it becomes apparent on examination that this cannot have been what the drafter meant, as it makes no rational sense. *Chartbrook* was a case of this type, where the formula on its natural reading led to a wholly irrational result that, in the judgment of the House of Lords, could not possibly have been what was meant. Another example was my decision in *Sterling Insurance Trustees Ltd v Sterling Insurance Group Ltd* [2015] EHWC 2665 (Ch) where adding the word 'due' to 'accrued' led to such odd consequences that I was persuaded that it must have been included by mistake.
>
> 77. This type of case is in principle quite different from the type where there are two rival interpretations. In such a case it is not a question of choosing which interpretation is more consistent with commercial or

> business common sense, or gives more reasonable and practical effect to a scheme. They are unusual cases, *'fortunately rare'*, because we do not easily accept that people have made linguistic mistakes, particularly in formal documents, and it requires a *'strong case'* to persuade the Court that the interpretation is sufficiently irrational to justify the conclusion that there has been a mistake: *Chartbrook* at [14]-[15].

Nugee LJ agreed with the Master of the Rolls and Coulson LJ that in *Britvic* there was no basis for concluding that the drafter had made a drafting mistake.

100. In a case like the present, the first two essential staging posts on the road to a final judgment are to identify: (1) the extrinsic evidence which is admissible as an aid to the true construction of the relevant document, and (2) the particular question, or questions, of construction that fall to be determined.

101. Here, the first staging post presents no real problem because there is agreement as to precisely what extrinsic evidence is admissible as an aid to construction, and no real dispute as to precisely what this would convey to any reasonable reader. Since the court is concerned with construing a company's articles of association, the court's role is more limited than that which it adopts when construing a general commercial contract. When construing articles of association, the court must not take into account any matters which might, or might not, be known to the parties by way of commercial context. The court can only consider those matters which would be available to a third party looking at the company's constitutional documents available from public sources, comprising those documents that are publicly available on the file maintained by the Registrar of Companies at Companies House.

102. In construing the rights attached to the preference shares, the admissible extrinsic evidence is restricted to what any reader of the articles could reasonably be supposed to know from the articles themselves and the information on the public register maintained by Companies House. Amongst the public filings, and thus part of the admissible extrinsic evidence, are the returns of allotment of shares in Form SH01. This clearly shows the nominal value, and the price paid, for each ordinary and preferred share, and the number of each class of shares that had been allotted. It would therefore have been apparent to any person inspecting the publicly filed documents that the holders of the preferred shares in the company had paid a substantial premium for the special rights attached to those shares, in preference to the inferior rights enjoyed by the numerically far greater number of ordinary shareholders in the company. Mr Thornton emphasises that it is clear from the admissible extrinsic evidence that the preferred shares may be converted into ordinary shares *"in the circumstances set out in the company's articles of association"*; and he submits that anyone reading the articles would also know, from the number of different classes of shares that had been issued, that the conversion right in the articles was capable of being exercised without the approval of the preferred shareholders. However, that seems to me to beg the question of what the articles of association actually require for such conversion to be effected.

103. So one moves on to consider the true construction of the company's articles. Since both the claimants' case on construction, and their claim of unfair prejudice under s. 633 of the 2006 Act, depend upon them establishing that the conversion of the preferred shares into ordinary shares involved a *variation or abrogation* of the class

rights attached to the preferred shares, that is the first issue of construction that falls to be addressed. On its face, and viewed in isolation, the wording of article 9.2 (a) is clear and unambiguous: the preferred shares automatically convert into ordinary shares upon notice in writing from an *Investor Majority*. Read literally, this article gives the ordinary shareholders the right to convert the preferred shares into ordinary shares, thereby depriving the preferred shareholders of the valuable special rights attached to those shares. In my judgment, anyone reading the articles with knowledge of the substantial premium paid for those rights by the preferred shareholders would be surprised by that result.

104. Any reader of the articles would move on from article 9 to consider article 10. They would see that the special rights attached to the preferred shares *'**may only** be varied or abrogated'* with the consent in writing of more than 75% in nominal value of the preferred shares. They would note that article 10.2 provides in terms that *'the creation of a new class of shares with preferential rights to one or more existing classes of shares shall not constitute a variation of the rights of those existing classes of shares'*. An astute and assiduous reader would note that neither article 9 nor article 10 expressly addresses the question whether the *conversion* of preferred shares is to be treated as constituting a *variation or abrogation* of rights for the purposes of article 10.

105. Notwithstanding all the points so eloquently advanced by Mr Thornton for the defendant in support of his submission that article 9.2 does not involve any variation of the rights attached to the preferred shares, but rather an exchange of shares, with the rights attached to the preferred shares (in contrast to the former preferred shareholders) remaining identical both before and after the share conversion, I have no doubt that any reasonable reader of the articles would regard the conversion of the preferred shares into ordinary shares as varying or abrogating the rights attached to the former class of shares. In my judgment, one has to look at the reality of the situation. The conversion of the preferred shares operates to vary, or abrogate, the rights attached to those shares because, once the share conversion takes effect, for all practical purposes the special rights that formerly attached to the preferred shares have been taken away from them, and no longer exist, because there are no longer any preferred shares in issue. The special rights attached to the preferred shares have been extinguished, and ceased to exist, because the preferred shares are now ordinary shares. I agree with Mr Collingwood that the fact that redundant rights might persist in the articles, bereft of any shareholder entitled to take any advantage of them, is neither here nor there. With respect to Mr Thornton, his submissions on this aspect of the case are unduly legalistic and technical, and they are not founded in reality. By purporting to convert the preferred shares, the ordinary shareholders have sought to extinguish (or abrogate) the rights attached to those shares. For the same reasons, I cannot accept Mr Thornton's further submission that the conversion of the preferred shares amounts to the performance of the rights attached to those shares, and not to any variation or abrogation of those rights.

106. As I recognise below, this conclusion creates a clear tension between articles 9.2 (a) and 10.1; but in my judgment, such tension cannot alter the fact, as a matter of the true construction of the articles, that the conversion of the preferred shares into ordinary shares operates to vary or abrogate the special rights attached to the former shares. I agree with Mr Collingwood that Mr Thornton's greengrocer analogy is of no

assistance to the court because it ignores the existence of article 10.1, and focuses exclusively upon article 9.2 (a).

107. On the footing that the conversion of the preferred shares into ordinary shares constitutes a variation or abrogation of the special rights attached to those shares, there is a clear tension between the provisions of articles 9.2 (a) and 10.1. Under article 9.2 (a) the conversion notice automatically operates to convert the preferred shares into ordinary shares, thereby (on my interpretation) varying or abrogating the rights attached to them; but by article 10.1 such rights can only be varied or abrogated with the consent in writing of more than 75% of the preferred shareholders, which has not been obtained. This is not a case of ambiguity, where article 9.2 (a) has two possible meanings. I agree with Mr Thornton that the natural meaning of the words used in article 9 permits of only one construction, namely, that the preferred shares convert into ordinary shares automatically upon an *'Investor Majority'* notice being served. Nor is this a case where there is any disagreement about how article 9.2 (a) falls to be applied in its particular context. This is not one of those cases where there are two possible rival interpretations of article 9.2 (a) since its meaning is clear on its face. But nor is this a case like Britvic where, as Coulson LJ explained (at paragraph 55): *"No other part of the deed, and no other part of the background material, suggests that these words could or should mean anything other than what they say."* Rather, in my judgment this is one of those rare cases, recognised by Nugee LJ in Britvic (at paragraph 76), where *"... the mistake does not readily appear when reading the provision, but it becomes apparent on examination that this cannot have been what the drafter meant, as it makes no rational sense"*.

108. If article 9.2 (a) were capable of operating in the manner for which Mr Thornton contends, so that the special rights attached to the preferred shares are simply extinguished without the requisite consent of the holders of those shares, by the simple expedient of converting them to ordinary shares, then this would be inconsistent – indeed incompatible - with article 10.1. I agree with Mr Collingwood that the proper construction of article 9.2 (a) – both so obvious that it goes without saying, and also necessary to give business efficacy to the contract constituted by the articles - is that it cannot operate to effect any removal or abrogation of the special rights attached to any shares to be converted without the consent required by article 10.1. In my judgment, no reasonable person reading the company's articles, with knowledge of the substantial premium paid for such rights, would regard article 9.2 (a) as being capable of enabling a qualifying majority of ordinary shareholders to abrogate the special rights enjoyed by Ventura and SMTB, as the holders of preferred shares in the company. Had an officious bystander been asked whether the preferred shareholders could lose the rights attached to their shares, without their consent, by the simple device of the ordinary shareholders converting the preferred shares to ordinary shares, in my judgment the answer would be an unqualified and resounding negative.

109. In my judgment, the only way to give business efficacy, and integrity, to the articles as a whole is to construe article 9.2 (a) as being subject to the comprehensive protection of special class rights contained in article 10.1, which must also be complied with in order to effect any abrogation of the special rights attached to the preferred shares. That is the manner in which reasonable business efficacy is to be given to the interrelation between the two provisions. I would therefore insert, by way

of implied limitation, at the end of article 9.2 (a), the words *'... subject always to having first obtained the consent required under article 10.1'*. I have slightly amended the formulation proposed by Mr Collingwood (as recorded at paragraph 50 above) in order to meet the objection raised by Mr Thornton that Mr Collingwood's proposed implied term does not actually work because it is circular, and begs the real question: is any relevant consent required under article 10.1?

110. Although chastened by the reversal of my decision at first instance in *Britvic*, I am satisfied that this is one of those rare cases where there has been a drafting error. In my judgment, there is a clear mistake on the face of article 9.2 (a) in failing expressly to provide that it is subject to the consent required by article 10.1; and it is also clear, from article 10.1, and the limited admissible extraneous evidence, what correction ought to be made in order to cure that mistake.

111. Considering the relationship between the two articles, the inconsistency between them, and the absurdity of treating article 9.2 (a) as a stand-alone provision, unaffected by article 10.1, I accept Mr Collingwood's submission that something has clearly gone wrong with the drafting because the two articles do not work together. The results for which Mr Thornton contends cannot be reconciled with the articles as a whole; and the problem is clear: the conflict between article 9.2 (a) and article 10.1, and the absurdity of the situation whereby the special rights of the preferred shareholders can be lost at the whim of an Investor Majority simply by the service of a conversion notice from those with an interest in inflicting such loss. It is plain that that is not what was contemplated by the parties. So the problem is clear; and once the problem has been clearly identified, the solution to it is equally clear: Article 9.2 (a) is to be read as subject to article 10.1, which takes precedence. That is the clear solution, and is clearly what any reasonable person at the time the new articles were adopted would have understood the shareholders and the company to have intended.

112. I am therefore satisfied that the court should imply a limitation on the apparently wide scope of article 9.2 so that it does not apply to a case to which article 10.1 applies. I reject Mr Thornton's submission this would completely reverse the effect of article 9.2 (a), depriving the ordinary shareholders of part of the bargain for which they have contracted. By implying a term into the company's articles, the court is not engaged in reversing the bargain struck by the parties in article 9.2 (a) in order to protect a sophisticated, offshore investment fund from a drafting error of its own making. Rather, I am satisfied that the court is simply giving effect to the true bargain made between the company and all its shareholders, whereby they always intended that the special rights attached to the preferred shares should enjoy effective protection from any attempt to vary or abrogate them. This is not, as Mr Thornton contends, a case where Ventura and SMTB are simply seeking to escape from the consequences of a bad bargain. What they bargained for was the protection afforded by article 10.1, in the sense for which Mr Collingwood contends, rather than the illusory degree of protection which would follow on from the construction advanced by Mr Thornton, which produces a result so absurd, and uncommercial, that no rational reader of the articles, with the knowledge available from reading the publicly accessible documents at Companies House, could ever have contemplated or understood it as forming part of the parties' bargain.

113. I agree with Mr Thornton that when considering, as a matter of the true construction of article 10.1, whether there has been any variation or abrogation of class rights, the

court is only concerned with the special rights that are attached to the relevant class of shares by the company's articles, and not with legal rights that are conferred upon, and enjoyed by, the holders of a particular class of shares by reason of some other contractual arrangement, such as a shareholder's agreement. Thus, when considering whether there has been a variation or abrogation of the special rights attached to the preferred shares, one should ignore the loss of the put option, and Ventura's loss of the right to board representation, since these are conferred by the shareholders' agreement rather than the company's articles. Indeed, were it necessary to do so, I would accept Mr Thornton's further submission that the loss of the right to board representation does not involve the loss of any special right attached to the preferred shares, as a distinct class of shares, because it is only available to a member holding a minimum threshold number of preferred shares, and so does not attach to all the shares of that class. However, none of that avails the defendant because the result of the share conversion (if effective) would clearly be the loss of the preferential interest and priority on distribution or exit conferred by articles 5.1 and 6; and these are indisputably special rights attached to the preferred shares.

114. For these reasons, I will grant a declaration that the conversion of the preferred shares into ordinary shares is invalid, void and of no effect.

115. On that basis, it is strictly unnecessary for me to consider the claim for relief under s. 633 of the 2006 Act, which only arises on the hypothesis that the conversion of the preferred shares was authorised under the company's articles of association because only then would it have been of any effect. Indeed, since both the claimants' case on construction, and their claim of unfair prejudice under s. 633 of the 2006 Act, depend upon them establishing that the conversion of the preferred shares into ordinary shares involved a variation or abrogation of the class rights attached to the preferred shares, it is difficult to see that the s. 633 claim adds anything to the claimants' challenge to the conversion of the shares under the articles: if (as I have found) such conversion amounted to a variation or abrogation of the class rights attached to the preferred shares (so that s. 633 is potentially engaged at all), then it was not authorised by article 10.1, and was invalid for that reason, so Ventura and SMTB have no need to seek any relief under s. 633. It is only if (1) there was a variation or abrogation of class rights, but (2) article 10.1 yields to article 9.2 (a), so that the share conversion was effective notwithstanding the variation or abrogation of the special rights attached to the preferred shares, that ss. 630 and 633 are engaged at all. I will therefore set out my conclusions on this aspect of the case very briefly.

116. First, as regards the true scope of the section, I am satisfied that relief under s. 633 is potentially available even though the variation of class rights is effected in accordance with a provision in the company's articles of association. I would reject Mr Thornton's submission that, properly construed, the right to apply for relief under s.633 only arises if the variation of class rights is undertaken pursuant to the default variation provision under s. 630 (2) (b) of the 2006 Act, and not when undertaken pursuant to a bespoke provision specifically adopted in the articles by the members themselves. Mr Thornton contends that in the present case, any alleged variation was not carried out *'under'* s. 630 but under the contract between the company and its members constituted by s. 33 (1) of the 2006 Act. However, I agree with the statements in the leading company law practitioner texts (*Gore-Browne on Companies* at paragraph 21 [14] and *Palmer's Company Law* at paragraphs 6.032 and 6.034),

albeit without citation of any supporting case law authority, that s. 633 applies to a variation of class rights effected under a provision in the company's articles, as well as to a statutory variation effected outside the articles under s. 630 (2) (b). This follows from the wording of s. 633 (1), which expressly states that s. 633 applies *"where the rights attached to any class of shares in a company are varied under* ***section 630****"*; and from s. 630 (1), which provides that s. 630 *"is concerned with the variation of rights attached to a class of shares"*. It follows that the scope of s. 633 is not limited to variations effected under s. 630 (2) (b), where the company's articles contain no provision for the variation of class rights, but extends to variations effected in accordance with a provision in the company's articles under s. 633 (2) (a). In my judgment, the clear statutory purpose of s. 633 is to create a comprehensive statutory scheme governing all variations of class rights, howsoever effected. S. 633 ensures that the remedy afforded by that section is available whenever there is a variation under s. 630, whether by way of a provision in the articles or the specific statutory fall-back. Of course, the fact that the variation has been effected in accordance with a provision in the company's articles is clearly relevant, maybe highly so, to the issue of whether the variation would *"unfairly prejudice"* the shareholders of the class represented by the applicant and, if so, to the exercise of the court's discretion whether to disallow the variation or to confirm it.

117. Second, when considering, as a matter of the true construction of ss. 630 and 633, whether there has been any variation of class rights, I am satisfied that the court is only concerned with the rights attached to the class of shares by the company's articles, and not with any legal rights that may be conferred upon, and enjoyed by, the holders of a particular class of shares under some other contractual arrangement, such as a shareholders' agreement. Since it is the variation of the *"rights attached"* to the class of shares that has to be judged to be unfairly prejudicial, I have some difficulty in accepting Mr Thornton's concession that once one has passed through the gateway into s. 633, the court should not ignore any variation or abrogation of the rights conferred by the shareholders' agreement when considering questions of fairness and prejudice because the court should take all the consequences of the variation into account. Since s. 633 (5) directs the court to address the question whether *"****the variation*** *would unfairly prejudice"* the relevant class of shareholders, I am by no means satisfied that Mr Thornton was right to concede that once the court has reached the stage of considering the questions of fairness and prejudice, it would be wrong for it *"to put on blinkers"*, and ignore the fact that the conversion of the preferred shares has had a consequential impact beyond the scope of the company's articles of association. Although the court is enjoined to have regard to *"all the circumstances of the case"*, it must still be satisfied that *"****the variation*** *would unfairly prejudice"* the relevant class of shareholders.

118. Third, I accept Mr Thornton's submission that for a variation to *"unfairly prejudice"* the relevant class of shareholders, the variation must be both prejudicial (in the sense of causing prejudice or harm to the relevant class) and also unfairly so: both elements must be established. I am also satisfied that the burden rests firmly on the applicant because, if not satisfied that unfair prejudice has been made out, the court is required to confirm the variation.

119. Fourth, I have no doubt that the claimants have made out a case of prejudice to the class of preferred shareholders by the conversion of their shares into ordinary shares

because they have thereby lost the valuable special rights attached to those shares. The real question is whether that prejudice is unfair to them. I must approach that question on the artificial hypothesis that (contrary to my findings) the loss of those valuable rights was entirely in accordance with the company's articles, and thus with the statutory contract entered into between the company and all its members (including Ventura and SMTB). Indeed, as Mr Thornton points out, the conversion was effected in accordance with a term in the articles that the claimants themselves had drafted and proposed to the company.

120. Fifth, on that highly artificial basis, I find that I am not satisfied that the claimants have established the necessary unfair prejudice to found any entitlement to relief under s. 633. Mr Collingwood submits that: (1) Ventura (and later SMTB) specifically negotiated for and agreed special rights attached to the preferred shares, (2) the ordinary shareholders (who implemented the conversion in order to extinguish those rights) had agreed to Ventura (and SMTB) having the preferred rights granted to them, and, therefore, (3) it is quite unfair for the shareholder majority to extinguish those rights without the consent of the preferred shareholders, or any compensatory consideration. However, on this hypothesis, Ventura (and SMTB) also agreed that their preferred shares should automatically convert into ordinary shares (with the consequential loss of those special rights) upon notice in writing from an Investor Majority. There is nothing inherently unfair in holding Ventura and SMTB to their bargain.

121. Mr Collingwood next submits that the share conversion constituted a breach of the spirit and intent of the shareholders' agreement by the ordinary shareholders (and thus a breach of clause 12 thereof) since it sought to deprive Ventura (and SMTB) of the benefit of the put option in order to raise and induce additional investment into the company, as described in the circular to shareholders. However, in order to engage the remedy under s. 633, there must be a variation of the rights **attached** to the preferred shares; and the put option is a right conferred by the shareholders' agreement, rather than the articles, so it is not a relevant right for present purposes.

122. Mr Collingwood further submits that the extraordinary circumstances of the present case are all the more unfair since none of the preferred shareholders voted in favour of, but opposed, the extinction of their rights. However, this was inherent in the terms of article 9.2 (a), by which the preferred shareholders are bound. Finally, Mr Collingwood submits that the ordinary shareholders have sought to improve their own financial position at the expense of Ventura (and SMTB). However, absent any allegation by the claimants that the *'Investor Majority'* acted for any improper purpose, or otherwise in bad faith, when joining in the conversion notice, I do not consider that this amounts to any unfair prejudice to Ventura or SMTB.

123. Thus, whilst it is strictly unnecessary for me to do so, and it does not affect the ultimate outcome of this claim, I am not satisfied that the claimants have made out their alternative case of unfair prejudice for the purposes of s. 633 of the 2006 Act.

124. However, for the reasons I have already given, I will grant a declaration that the conversion of the preferred shares into ordinary shares is invalid, void and of no effect.

125. I would invite the parties to agree a draft order to give effect to this judgment. If the parties are unable to reach agreement on the terms of a draft order, or on any consequential or other matters I will adjourn the determination of such matters (and of any application for permission to appeal) to a remote hearing by Teams, to be arranged on the first convenient date following the remote hand down of this judgment.

126. I conclude by expressing my sincere thanks to both counsel for the quality of their written, and oral, submissions, and for the considerable assistance that these have given me in arriving at a just disposal of this interesting and novel claim. I also apologise for the time that it has taken me to produce this written judgment.

XI: Postscript

127. I released my draft judgment on 28 February, and this was circulated to the parties and their legal representatives, on the usual confidential basis, on the following day. On the morning of Monday 6 March, I received suggested typing and other obvious corrections from both leading counsel. Those I have accepted are now incorporated in this approved judgment. In addition, I received from Mr Thornton KC a four-page note, accompanied by three further case law authorities. Mr Thornton informed the court that it is the defendant's intention to seek permission to appeal my judgment. To enable the defendant to identify with precision which findings it is required to appeal, and to settle the grounds of its application for permission to appeal (as well as to prepare its submissions on costs), Mr Thornton invited the court to provide some points of clarification in relation to the draft judgment. I consider that the appropriate way of responding to this invitation is to address the contents of Mr Thornton's post-draft judgment note by way of this postscript to my judgment.

128. First, Mr Thornton's reading of paragraphs 109 to 112 (inclusive) of the draft judgment is that the court has rejected the claimants' case on construction but has accepted that a term (or limitation) should be implied into article 9.2 (a) (albeit rejecting the implied term advanced by the claimants and substituting one of the court's own drafting). Mr Thornton invites the court to make that position clear in the judgment. The claimants put the arguments in the alternative, arguing (1) that the express words of the articles required consent for a share conversion, or (2) if not, an implied term should be adopted. Reference is made to paragraphs 38 to 50 of the claimants' skeleton argument for the construction argument, and to paragraph 51 for the implied term argument.

129. Second, Mr Thornton invites the court to confirm whether it has found that the purported conversion of the preferred shares amounted to (1) a variation of the rights attached to those shares or (2) an abrogation of those rights (those being alternatives under article 10.1). This issue is primarily addressed in paragraph 105 of the draft judgment, but also in paragraph 108. Paragraphs 103 to 105 of the draft judgment address, amongst other things, the defendant's submissions, as summarised in paragraphs 65 and 66 of the draft judgment. This was Mr Thornton's argument that the changes to the articles amounted to an alteration of the enjoyment of the claimants' rights, and not a variation or abrogation of those rights. The court rejected that argument at the end of paragraph 105. Although the court held (at paragraph 103) that *"on its face, and viewed in isolation, the wording of article 9.2 (a) is clear and unambiguous: the preferred shares automatically convert into ordinary shares upon*

notice in writing from an Investor Majority", the court went on to hold (in paragraph 105) that *"the reality of the situation"* is that:

> The conversion of the preferred shares operates to vary, or abrogate, the rights attached to those shares because, once the share conversion takes effect, for all practical purposes the special rights that formerly attached to the preferred shares have been taken away from them, and no longer exist, because there are no longer any preferred shares in issue. The special rights attached to the preferred shares have been extinguished, and ceased to exist, because the preferred shares are now ordinary shares … For the same reasons, I cannot accept Mr Thornton's further submission that the conversion of the preferred shares amounts to the performance of the rights attached to the shares, and not to any variation of those rights.

130. In that regard, Mr Thornton wishes to draw the court's attention to the judgments of Buckley J in Re Saltdean Estate Co Ltd [1968] 1 WLR 1844 and the House of Lords in House of Fraser Plc v ACGE Investments Ltd [1987] AC 387.

131. In the former case, the company's articles of association required the consent of a class meeting to any proposal to *"affect, modify, deal with or abrogate in any manner"* the rights and privileges of that class of shareholders. The company proposed to reduce its share capital by paying off (and cancelling) its preference shareholders, who opposed the reduction on the ground that no separate class meeting had been held. Buckley J confirmed the capital reduction. Mr Thornton referred me to the judgment at pages 1849C to 1850A, the effect of which is summarised at holding (1) of the headnote, as follows:

> The proposed reduction of the company's capital, by means of the cancellation of the preferred shares, was in accordance with the rights attaching to the preferred shares, and was not an abrogation of those rights within the meaning of article 8 of the company's articles of association, and that the liability to prior repayment, forming as it did an integral part of the bundle of rights which went to make up a preferred share, was a liability, of which a person had only himself to blame if he were unaware.

132. Delivering the only reasoned speech (with which the other four law lords all agreed) in House of Fraser Plc v ACGE Investments Ltd, Lord Keith of Kinkel (at page 393A-H) described Buckley J as *"a judge of unrivalled experience in company law"*; and he proceeded to cite this passage from his judgment in Re Saltdean Estate Co Ltd as *"an entirely correct statement of the law"*. In the later case, the company had passed a special resolution reducing its capital by paying off and cancelling cumulative preference shares, without holding a class meeting of preference shareholders. The House of Lords held that the proposed reduction of capital involved the fulfilment and satisfaction of the contractual rights of the shareholders. One of the rights attached to the preference shares was the right to a return of capital in priority to other shareholders where any capital was appropriately to be returned as being in excess of the company's needs. That right was not being '*affected, modified, dealt with or abrogated'*, but was being *'given effect to'* in priority to other shares. Whilst the cancellation necessarily meant that all of the other rights attached to the shares would

come to an end, that is something to which the holders of the shares must be taken to have agreed as a necessary consequence of their right to prior repayment receiving effect.

133. Mr Thornton points out that that principle was applied by Patten J in *Re Hunting Plc* [2004] EWHC 2591 (Ch). There the court confirmed a reduction of capital on the basis that if the company chose properly to exercise its power to reduce capital under statute and its articles, that did not constitute unfairness to the class of preference shareholders whose shares were being cancelled.

134. As the implied limitation the court has articulated in the instant case depends upon there being *'a variation or abrogation'* of class rights involved in a purported conversion under article 9.2, Mr Thornton considers it important that this court should be aware that its finding that there is a variation or abrogation appears to be inconsistent with the conclusions reached by the House of Lords in the *House of Fraser* case.

135. About half an hour after I received Mr Thornton's note, the court received an email from Mr Collingwood KC, alerting it to the fact that he had only received that note after he had already submitted his own typing corrections. At first blush, the note appeared to Mr Collingwood to seek to go rather further than one might consider appropriate in the circumstances. He noted the reference to certain cases where preference shares had been purchased by the company (such that the shareholders no longer held any such shares), to which reference had not previously been made by the defendant, but that was obviously very different. Mr Collingwood's immediate thought was that the court had already addressed *"the true bargain"* in its draft judgment.

136. Towards the end of the court day, I received a further email from Mr Collingwood in which he commented briefly as follows:

(1) Both of Mr Thornton's points are already addressed in the draft judgment, which is sufficiently clear and requires no clarification.

(2) The note is an apparent attempt to repeat and re-argue the second point (which was decided against the defendant for the reasons given in the draft judgment). This is not appropriate, and ought not to be countenanced.

(3) In any event, there is no inconsistency as Mr Thornton suggests. The cases referred to concerned preference shares being paid out and cancelled in fulfilment of their priority on a return of capital. The shareholder no longer holds the shares. The present case does not concern a repayment of capital at a bargained-for rate. Here (as addressed in the draft judgment) the company did not give effect to the shareholders' preferred rights; rather, it purported to take them away. It was a **loss** of preferred rights. The draft judgment already addresses the issue of construction of the articles in some detail. It sets out the true bargain between the parties, and rejects the argument that there was no variation or abrogation. The draft judgment already explains how it is clear that something has gone wrong with the drafting of the articles in the present case.

137. I agree with Mr Collingwood's further submissions. Mr Thornton's note goes further than is appropriate in the circumstances. Without attempting any exhaustive exposition on the subject, I consider that it is appropriate for counsel to seek clarification about any apparent uncertainties, ambiguities or inconsistencies in a draft judgment. What is not permissible is to seek to bolster submissions that have already been advanced, addressed, and rejected, by reference to further citation of authority, that was available at the time of the original hearing, otherwise there will never be an end to litigation. It is unfair both to the opposing litigant and their legal representatives, and to litigants in other cases awaiting consideration by the judge hearing the particular case. If invitations of the kind extended by Mr Thornton in the instant case were to become common form, then this would tend to have the stifling effect of discouraging the circulation of draft judgments in advance of formal hand-downs. I agree with Mr Collingwood that Mr Thornton is effectively seeking to repeat, and re-argue, a point which has already been expressly decided against the defendant, for the reasons given in my draft judgment. This is not appropriate, and ought not to be countenanced.

138. I agree with Mr Collingwood that both of Mr Thornton's points are already adequately addressed in the draft judgment, which I consider to be sufficiently clear, and to require no further clarification. I really do not see how I can improve upon the way I have addressed the issues, in particular at paragraphs 103 to 113 of my judgment. However, for the assistance of Mr Thornton, I make the following further points by way of clarification and elucidation.

139. Read literally and in isolation, the wording of article 9.2 (a) is clear and unambiguous: the preferred shares automatically convert into ordinary shares upon notice in writing from an *'Investor Majority'*. This is not a case where a provision in a contract is unclear because a word has two different meanings. Nor is this a case where the language of the articles, either read on their own, or, at any rate, when read in context, could be seen to give rise to possible rival interpretations. Rather it is a case where, in my judgment, some limitation must be placed upon the apparent width of article 9.2 (a) because, without such an implied limitation, it makes no sense, when read in conjunction with article 10.1, construed against the admissible background material.

140. For the reasons I have given, I am satisfied that the conversion of the preferred shares into ordinary shares constitutes **either** a *'variation'* **or** an *'abrogation'* of the special rights attached to those shares. I do not consider that it is necessary, or helpful, to seek to differentiate between the two terms because both attract the protection afforded by article 10.1; although, if required to do so, I would hold that the special rights were *'abrogated'* rather than *'varied'* because the conversion of the preferred shares involved the extinction of the special rights attached to those shares. If I am wrong, however, those rights were *'varied'* so as to conform to the different rights attaching to the ordinary shares in the company.

141. On that basis, there is a clear tension between articles 9.2 (a) and 10.1 so it becomes apparent, on examination, that the drafter cannot have meant clause 9.2 (a) to be read literally as it makes no rational sense, when construed in light of the protection afforded to the special rights of the preferred shareholders by article 10.1. I am satisfied that there is a clear mistake in the drafting of the earlier article (9.2 (a)), and that the solution to that mistake is clear: article 9.2 (a) must be read subject to the consent required in accordance with article 10.1. In my judgment it matters little what

route one takes to arrive at this result: whether by a process of corrective construction, or by the implication of a term (or, more precisely, by implying a limitation upon the apparently unlimited width of the power conferred by article 9.2 (a)). In my judgment, the requirements for both interpretative techniques are satisfied. My judgment is founded upon an application of both of them, in the alternative. As Mr Collingwood points out: both routes lead to the same destination. I do not consider that the court has rejected the implied term advanced by the claimants, substituting one of the court's own drafting (as suggested by Mr Thornton). Rather, the court has slightly finessed Mr Collingwood's drafting to address a charge of circularity directed to it by Mr Thornton.

142. I also agree with Mr Collingwood that the court's finding that there is a variation, or abrogation, of the special rights attached to the preferred shares involves no inconsistency with the conclusion reached by Buckley J in *Re Saltdean Estate Co Ltd*, as later approved and applied by the House of Lords in the *House of Fraser* case and later applied by Patten J in *Re Hunting Plc*. The further three authorities belatedly cited and relied upon by Mr Thornton concerned the proposed reduction of the company's capital by means of the cancellation of the preferred shares in fulfilment of their priority on a return of capital. At the end of the process, the preferred shareholders no longer held any shares in the company. The present case does not concern any repayment of capital at the rate the shareholders concerned had bargained for. Here (as addressed in my draft judgment) the company did not **give effect** to the preferred shareholders' special rights; rather, it purported to take them away. It involved the **loss** of the preferred shareholders' special rights. I am satisfied that my draft judgment already addresses the issue of the true construction of the company's articles in sufficient detail. It sets out the true bargain between the parties; and it rejects Mr Thornton's argument that there was no variation or abrogation of the special rights of the preferred shareholders. The draft judgment already explains how, in the instant case, it is clear that something has gone wrong with the drafting of the company's articles. I do not consider that the cases relied upon by Mr Thornton are truly analogous to the facts of the present case. Indeed, had Mr Thornton considered those authorities to be of any relevance to, or supportive of, his submissions, I have no doubt that he would have cited them in support of those submissions at the hearing, along with his various other case law authorities.

143. That finally concludes this judgment. It will be handed down remotely; and I will adjourn all consequential matters, including any application for permission to appeal (as now foreshadowed by Mr Thornton) , to a convenient date, to be fixed through the usual channels, and to be conducted by way of a remote hearing. I invite both counsel to agree an appropriate order to give effect to that.