Neutral Citation Number: [2025] EWHC 303 (Comm)

Case No: CL-2022-000590

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

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

Date: 13th February 2025

Before :

SIMON BIRT KC
(Sitting as a Deputy Judge of the High Court)

- -

Between :

QATAR INVESTMENT & PROJECTS DEVELOPMENT HOLDING CO W.L.L.	**Claimant**
- and -	
ELANUS HOLDINGS LIMITED	**Defendant**

- -
- -

Roger Stewart KC and Clarissa Jones (instructed by **Fieldfisher LLP**) for the **Claimant**
Sa'ad Hossain KC and James Nadin (instructed by **Farrer & Co LLP**) for the **Defendant**

Hearing dates: 11-14, 18, 19, 25, 26 November 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 13th February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Simon Birt KC:

Introduction

1. This is a dispute between certain members of the Qatari royal family over a 70.21 carat light blue diamond, known as the "Idol's Eye". The diamond has a history dating back to the 17th century, when it is said to have been discovered in a mine at Golconda in Southern India, though that history is not complete or certain. It is also said to have been owned at one point by the 34th Ottoman Sultan, Abdul Hamid II, who allegedly kept it as the eye of a secret idol in the Temple of Benghazi. It was acquired by the New York gem dealer, Harry Winston, in 1946, at which time it was probably set in its current setting – a platinum diamond necklace and pendant, itself containing 152 diamonds with a combined estimated total weight of 47.30 carats. Where I refer to "the diamond" in this judgment it is a reference to the Idol's Eye in this setting, unless otherwise stated.

2. After changing hands a number of further times, in around 2001-2004 the diamond was acquired by Sheikh Saoud bin Mohammed Ali Al-Thani ("Sheikh Saoud"). There was no documentation at the trial relating to that acquisition (and no documented record of the date or the price at which it was bought), but nobody at the trial disputed that Sheikh Saoud did come to own the diamond.

3. In early 2014, Sheikh Saoud agreed to lend the diamond to his second cousin once removed, Sheikh Hamad bin Abdullah al Thani, for which purpose the diamond was transferred to the Defendant ("Elanus"), a Guernsey company established in 2014. Elanus lent the diamond to the Claimant ("Qipco"), a Qatari private investment company of which Sheikh Hamad bin Abdullah al Thani is the CEO (and which he said he and his brothers use for their investments). The loan agreement between Qipco and Elanus (governed by English law) was completed on 2 May 2014 ("the Loan Agreement"), under which Elanus agreed to loan to Qipco the diamond for a period of 20 years on the terms set out, including certain rights of pre-emption.

4. Sheikh Saoud died in late 2014, leaving a wife, a son and two daughters. When I refer in this judgment to "the family" it is a reference to these individuals.

5. The dispute arises from the events of early 2020. In very brief general summary, Qipco contends that its pre-emption right was triggered in February 2020 because (it says) Elanus "wished" to sell the diamond. Qipco says this gave it an option to purchase the diamond at a price to be determined by a machinery set out in the Loan Agreement. It says it exercised that right, and now seeks an order for performance of that transaction. Elanus contends it had no "wish" to sell such that the pre-emption right was not triggered, but that in any event Qipco did not exercise any right before the "wish" no longer existed or was withdrawn. There are, as I will explain below, a myriad of sub-issues (of both fact and expert evidence of foreign law) in particular in relation to the question whether the pre-emption right was triggered at all.

6. As I explain in detail in this judgment, the conclusion I have come to is that if there ever was any "wish" of Elanus to sell the diamond such as to trigger the

pre-emption right, that wish no longer existed at the time Qipco sought to exercise its right (or, to put it another way, had been withdrawn), with the result that Qipco did not have any right to exercise at the time it sought to exercise it. But in any event, as I also explain in detail, there was never any "wish" held by Elanus within the meaning of the pre-emption provision, or indeed by any individual or entity whose state of mind is said to be attributable to Elanus, and Elanus was not otherwise bound to any expression of a wish to sell the diamond. Qipco's claim therefore fails.

7. In this judgment, I deal with matters in the following order:

Factual background and those involved

8. Before giving a more detailed factual account, it is convenient to give some further explanation and identification of those involved in the key events from each side.

9. Sheikh Saoud was a former Minister of Culture of Qatar (from 1997 to 2005). He was also an avid collector of art, antiquities and other property. Sheikh Saoud died in November 2014, at the age of 48. He was survived by his wife, Sheikha Amna bint Ahmad bin Hassan bin Abdullah bin Jassim Al-Thani ("Sheikha Amna"), and three children: (i) Sheikha Sara bint Saoud Al-Thani ("Sheikha Sara"), (ii) Sheikh Hamad bin Saoud Al-Thani, and (iii) Sheikha Moza bint Saoud Al-Thani ("Sheikha Moza").

10. In order to ensure clarity as to who was being referred to at the trial, the parties in their submissions avoided using "Sheikh Hamad" to refer either to Sheikh Saoud's son (Sheikh Hamad bin Saoud Al-Thani) or to Qipco's CEO (Sheikh

Hamad bin Abdullah al Thani). They agreed the nomenclature "HBS" to refer to the former, and "HBA" to refer to the latter. I adopt the same in this judgment.

11. In December 2013, Sheikh Saoud had established the Al Thani Foundation ("the Foundation"), a Liechtenstein foundation set up in order to hold his (and his family's) assets. Under the By-Laws of the Foundation, its sole beneficiary was Sheikh Saoud, and on his death his rights would pass "*to the heirs according to the binding heirship rules of the Islamic Law (Sharia).*" Among the assets transferred to the Foundation was the diamond (transferred shortly before the loan agreement was entered into), as well as two paintings known as the "Maharaja Paintings."[1]

12. Dr Dieter Neupert is a Swiss lawyer, and a partner at the Swiss firm of Neupert Vuille Partners. He was a lawyer to Sheikh Saoud for a number of years, and was also a lawyer to the Foundation. At the establishment of the Foundation, its Council members consisted of Sheikh Saoud, Dr Neupert and Ann Näff-Oehri (who ceased to be on the Council in 2017). After the death of Sheikh Saoud, HBS and Sheikha Sara (along with one other) were appointed to the Council. By the time of the events material to this claim in 2020, the Foundation's Council consisted of HBS, Sheikha Sara, Dr Neupert, another individual called Khofiz Shakhidi, and Sequioa Treuhand Trust (a Liechtenstein Trust company).[2] HBS's evidence was that the beneficiaries of the Foundation included Sheikha Amna and the three children.[3]

13. At the time of the events central to this dispute, HBS had an assistant called Jordan Raymond. The two had been at school together, had lost touch, but then were reintroduced during 2017. Mr Raymond had a background in real estate and, in October or November 2019, came to be employed by Earth Creation Limited (a vehicle established by HBS to invest in UK property) as a property investment consultant. However, he fairly quickly came to have a broader role as an assistant to HBS more generally, which included having some involvement in matters concerning the art collection of HBS and his family, although he had no previous experience in such matters. Emphasis was placed by Elanus at trial on Mr Raymond's inexperience and lack of understanding, suggesting he was "*out of his depth*".

14. As described in more detail below, as part of the arrangements whereby the diamond was lent to Qipco, it was first transferred by the Foundation to Elanus, a Guernsey company beneficially owned by the Foundation. Elanus was set up by Saffery Champness Management International Limited (latterly, Saffery Trust (Guernsey Limited) ("Saffery"), which was part of a group known as the Saffery Group providing private client and company services. The single share in Elanus was held by a corporate nominee shareholder provided by Saffery, namely Rysaffe Nominees (C.I.) Limited ("Rysaffe"), which held that share on trust for the Foundation (pursuant to a Declaration of Trust dated 1 May 2014).

[1] These were two paintings by a French artist, Boutet de Monvel, entitled "Portrait of Yeshwant Rao Holkar II of Indore in Maratha" and "Portrait of Maharaja of Indore Yeshwant Rao Holkar II in western costume".

[2] Sequoia Treuhand Trust was replaced on the Council in September 2023 by Mr Peter Kaiser.

[3] The respective interests being: HBS 43.75%; Sheikha Sara and Shaikha Moza, 21.875% each; the remainder held by Sheikha Amna.

Elanus had two corporate directors – Saffery Director Limited (formerly Saffery Limited) ("Saffery Director") and Rysaffe Director Limited (formerly Champness Limited) ("Rysaffe Director"), both of which were also provided by Saffery. The two individuals at Saffery who had principal involvement in the matters the subject of the dispute were Lisa-Jayne Vizia (a client director at Saffery, who was also a director of Rysaffe, Saffery Director and Rysaffe Director) and Karin Brehaut (an Administrator at Saffery).

15. As to Qipco's side, I have explained that HBA was its CEO. The other key individual involved in communications from the Qipco side was Mr Richard Hart, an English lawyer who was (and is) a partner at Pinsent Masons acting in private client matters. He has acted for Qipco in a wide range of legal matters, and was involved in the setting up of the arrangements by which the diamond was lent to Qipco and also in the events of early 2020. In relation to the valuation of the diamond in early 2020, Mr Hart consulted Mr Martin Travis, a jewellery expert, who was shareholder in and director of an independent jewellery advisory company called SC Bond Street Limited, trading as Symbolic & Chase. Individuals from auction houses, in particular Christie's, were also consulted (by both sides) as I will explain further below.

16. One other point I simply note at this stage is that HBS is dyslexic and says he rarely uses any form of written communication apart from instant messaging. I will return to this point later.

The agreement to lend the diamond to Qipco

17. Both Sheikh Saoud and HBA were experienced in the purchase, sale and collection of valuable art and objects. HBA said he had known Sheikh Saoud for the whole of his life, but that over the last 8-10 years of Sheikh Saoud's life he had become a close friend and mentor to HBA, a friendship that had begun in around 2005 or 2006 when HBA started collecting antiquities including Indian jewellery and Mughal artefacts. Among the items in Sheikh Saoud's collection that HBA greatly admired was the diamond, which is believed to originate from the Mughal period.

18. During late 2013 and/or early 2014, Sheikh Saoud and HBA discussed the diamond being loaned to HBA for his collection. There was a dispute as to why Sheikh Saoud agreed to lend it: HBS and other family members saying that HBA pressurised him to do so, leveraging the fact that Sheikh Saoud owed him financial debts; HBA denied that, saying Sheikh Saoud willingly agreed to lend it. But no challenge is made to the loan agreement on this basis.

19. The arrangements for the loan involved lawyers and other professionals. Qipco and HBA were represented by Pinsent Masons, in particular Mr Hart. Sheikh Saoud and the Foundation were represented by Dr Neupert and his firm. The key terms of the Loan Agreement were initially negotiated between Sheikh Saoud and HBA and their respective lawyers. It appears to have been the initiative of HBA or Pinsent Masons that an SPV should be incorporated to hold the diamond for the purpose of the loan, which resulted in Qipco paying for the incorporation of Elanus and for the corporate services provided to it by Saffery.

As Ms Fionnuala Rogers of Pinsent Masons wrote to Ms Vizia on 6 March 2014:

> "The Borrower wants to ensure that there are no third party claims to the Assets and we have therefore suggested that the Lender uses SPVs. This is also to avoid any insolvency issues and to avoid the Assets themselves falling to the Lender's estate under Sharia law (although the shares in the SPVs would fall to the estate)."

20. Saffery was recommended for this purpose by Mr Hart, who had worked with Saffery, and in particular Ms Vizia and her team, for several years and rated them highly. Pinsent Masons were involved in explaining the arrangements to Saffery and Saffery also asked Pinsent Masons to assist with review of, and any bespoke drafting in relation to, the Articles for Elanus.

21. In addition, Guernsey lawyers were involved on both sides. Qipco had Guernsey lawyers who were said to have reviewed the documentation to ensure consistency with Elanus's Articles and Memorandum, and Saffery engaged the Guernsey lawyers' Collas Crill LLP to provide Guernsey law advice on the establishment of Elanus and comments on the draft agreements.

22. On 31 March 2014, a draft of the Loan Agreement for the Maharaja Paintings (along with a draft of the Asset Transfer agreement, by which the assets would be transferred by the Foundation to Elanus, and the form of draft SPA, to be attached to the Loan Agreement to be used in the event the pre-emption right was exercised) was sent to Dr Neupert and Saffery by Pinsent Masons. Ms Rogers of Pinsent Masons explained in her covering email:

> "The Asset Transfer Agreement, the Loan Agreement and the form of SPA (together the "Agreements") are English law documents. Our client's Guernsey lawyers have reviewed the Agreements from a Guernsey law perspective only, to ensure consistency with the Articles and Memorandum. We assume that the Lender's Guernsey lawyers will do the same and that Dieter, you will provide any commercial comments on the Agreements themselves."

The draft agreements for the diamond followed on 1 April 2014 with only slight differences.

23. Pinsent Masons were pushing to have the agreements finalised on 1 April, however Saffery were not prepared to do that because, from their point of view, due diligence needed first to be completed on the Foundation and Sheikh Saoud. Ms Greta Allman of Saffery explained this to Ms Rogers in an email on 1 April 2014:

> "Loan Agreements: I note on your email to Dieter you are stating these need to be signed today – please note that until the Due Diligence process is complete, we cannot take on Sheikh Saoud / the Al-Thani Foundation as our client and therefore cannot

> formally incorporate the SPV's as yet. I am in the process of preparing an email to Dieter outlining the precise documentation we require now that the Foundation is being involved. The Loan Agreements cannot therefore be signed until the due diligence documentation has been received (I will copy yourself and Richard on the email to Dieter this morning) as well as receipt of the Enhanced due diligence report we have ordered – in addition we will also need Sheikh Saoud / the Foudation's [sic] due diligence to share with the Guernsey lawyers we engage who will then have to review the agreements on our behalf. Finally we will review the agreements from an administration perspective and revert if we have any queries."

24. Negotiations in relation to the draft agreements then continued over the course of the next week.

25. On 8 April 2014, Saffery were provided with a letter of instruction from Sheikh Saoud on behalf of the Foundation. This confirmed instructions for the Elanus Directors to enter into the asset transfer agreements and loan agreements (for the Maharaja Paintings and for the diamond), saying he wanted the Directors to enter into the agreements as soon as possible. He also provided confirmation of various matters to enable Elanus to give the warranties contained in the Loan Agreement.

26. Matters were slightly delayed whilst Saffery waited for sufficient documentation and confirmation on a number of matters, including evidence of ownership of the assets. On 29 April 2014, Ms Allman confirmed that "*we have now received the compliance documents we require*" but Ms Vizia made it clear that they still needed evidence regarding ownership. In the absence of contemporaneous written records of acquisition of the diamond, Saffery was looking at obtaining affidavits to confirm ownership of the assets. Mr Hart was chasing for completion, with his client HBA said to be "going nuts" about how long it had taken. In an internal email, Ms Vizia noted:

> "Richard can shout as much as he wants but at the end of the day we need the affidavit or evidence of ownership …"

Matters were ultimately dealt with to Saffery's satisfaction (including after discussion at their internal risk committee) during the course of 1 May, and the transactions then moved to completion.

27. Elanus was incorporated on 1 May 2014, and its sole shareholder, Rysaffe, entered into a declaration of trust (on the same day) by which it acknowledged and declared that it held its share in Elanus as nominee of and trustee for the Foundation. Rysaffe also undertook and agreed, in the declaration of trust, to act as the Foundation may from time to time direct or determine.

28. The Loan Agreement (as well as the Asset Transfer Agreement by which the diamond and the Maharaja Paintings were transferred from the Foundation to Elanus) was fully executed on 2 May 2014. The loan of the Maharaja Paintings was executed just over a month later, on 3 June 2014.

29. In the Loan Agreement Elanus was referred to as the "Lender", Qipco as the "Borrower", and the diamond as the "Asset". It provided for a loan of the diamond for a term of 20 years (subject to the terms of the agreement), but that the agreement would continue indefinitely unless terminated under its paragraph 16. Qipco was to arrange for collection of the diamond, and keep it insured throughout the period of the loan.

30. The rights of pre-emption were contained in paragraph 10 of the Loan Agreement, which was amended in manuscript before final signature. It provided as follows (with the handwritten additions marked in italics):

> "10. **RIGHTS OF PRE-EMPTION**
>
> 10.1 Should at any time during the Loan Period (or at any time thereafter):
>
> 10.1.1 the Lender wish to sell the Asset; or *the Asset is transferred other than to the [Foundation]; or*
>
> 10.1.2 save where the same is due to an act or omission of the Borrower, the Lender becomes insolvent, enters administration, is subject to insolvency proceedings, if any application is made to have the affairs of the Lender declared en état de désastre and/or is unable to pay its debts and/or creditors in full (or equivalent in any jurisdiction to which it is subject) *or there is a forced sale of the Artworks*;[4] or
>
> 10.1.3 any of the events listed in Paragraph 7.1 above occur without the Borrower's express written consent, such consent not to be unreasonably withheld,
>
> the Borrower shall be entitled to purchase the Asset by giving written notice to the Lender within 6 months of being made aware of the occurrence of any of the events listed at paragraphs 10.1.1 to 10.1.3 above. Such sale shall:
>
> (a) be on the terms of the draft SPA attached at Appendix 2; and
>
> (b) *(i) be at a price being the higher of* a price equal to the average "mid estimate" valuations provided by two major auction houses selected, one chosen by the Borrower, one chosen by the Lender, and which valuations shall be no more than 6 months old*; and*

[4] The "Artworks" was not a defined term in the Loan Agreement, rather it was the term used to identify the Maharaja Paintings in the (similar) loan agreement under which they were lent to HBA.

(ii) $10 m (ten million dollars).

10.2 The Lender agrees that it will not sell or agree to sell or otherwise encumber the Asset (or any part of it) and will immediately notify the Borrower of the occurrence of any of the events listed at paragraphs 10.1.1 to 10.1.3 above.

10.3 The Lender agrees that should the Borrower exercise its right to purchase the Asset that it will execute any documents reasonably required by the Borrower (including but not limited to a sale and purchase agreement substantially on the terms of the draft SPA attached at Appendix 2 (the "SPA")) to transfer free, unencumbered title in the Asset to the Borrower."

31. There were cross-references between paragraph 10 and paragraph 7 of the Loan Agreement. For completeness, paragraph 7 provided:

"7. LENDER'S OBLIGATIONS

7.1 If any of the following events occur the provisions of clause 7.2 below shall apply:

7.1.1 the Lender changes, replaces and/or amends the Articles of Incorporation and/or Memorandum of Incorporation of the Lender;

7.1.2 the Lender complies with any resolution or direction of the members of the Lender which may directly or indirectly cause the Lender to incur any liability (whether actual or contingent), other than as may be required by applicable laws and regulation or under the terms of this Agreement; or

7.1.3 the Lender is struck-off, wound-up or dissolved or its incorporation migrated to a jurisdiction other than Guernsey.

7.2 The occurrence of any of the events in this Paragraph 7.1 shall be deemed to be a material breach of this Agreement; and

7.3 The occurrence of any of the events in this Paragraph 7.1 shall without further leave or notice permit the Borrower to exercise the Rights of Pre-emption pursuant to Paragraph 10 of this Agreement.

7.4 The Lender agrees that it shall promptly notify the Borrower in writing (and provide supporting documentation where applicable) upon: (i) the occurrence of, or any circumstance or fact which may lead to the same, any of the events in Paragraph 7.1 and/or Paragraph 10; and/or (ii) in the

> event that the Lender receives information that any of the warranties and/or representations under this Agreement are false and/or the Lender is no longer able to continue to give such warranties and/or representations."

32. Clause 13 provided a mechanism for return of the diamond before the expiry of the loan term:

> "13. **RETURN OF THE ASSET**
>
> 13.1 Not withstanding [sic] termination of this Agreement in accordance with Paragraph 16 below and subject to Paragraph 10 and Paragraph 7.1 above:
>
> 13..1.1 the Lender shall be entitled to request the return of the Asset from the Borrower without cause upon giving the Borrower at least 18 months notice in writing.
>
> 13.1.2 the Borrower shall be entitled to return the Asset to the Lender without cause upon giving the Lender at least 3 months notice in writing.
>
> 13.2 In the event of either party requesting the return of the Asset under Paragraph 10.1 above, the provisions of Paragraph 5.2 shall apply.[5]
>
> 13.3 Nothing in this Paragraph 13 shall be deemed to constitute a waiver of the Borrower's pre-emption rights in Paragraph 10 above, which shall, for the avoidance of doubt, continue indefinitely after the expiry or termination of the Loan Period, *or until transferred by the Lender to the [Foundation]*."

33. Paragraph 16 identified circumstances in which the Loan Agreement could be immediately terminated at the election of the non-defaulting party. Paragraph 16.4 provided:

> "All provisions of this Agreement that need to survive its termination in order to be effective, including for the avoidance of doubt Paragraphs 6, 7, 10, 12.4, 14, 18, 19 and 20, shall remain in full force and effect after termination *save that Paragraph 6.1 + Paragraph 7 shall remain only to the extent that the Asset has not been transferred to the [Foundation] by the Lender*."

34. Under paragraph 17 of the Loan Agreement, any notice required to be given under it had to be in writing, sent by "*pre-paid first-class post, or recorded delivery or registered post, or registered airmail in the case of an address of service outside the United Kingdom*" and was not valid if sent by email. Notices

[5] The reference to "Paragraph 10.1" in paragraph 13.2 was likely a typo and should have referred to "Paragraph 13.1". Paragraph 5.2 made it the Borrower's obligation to arrange and pay for the return of the Asset to the Lender.

were to be sent (for Elanus) to Ms Vizia at an address in Guernsey and (for Qipco) to Kareem Al-Taji, at Qipco, with a copy to Mr Hart at Pinsent Masons. The Loan Agreement was (under paragraph 21) expressly governed by English law.

35. Appendix 1 to the Loan Agreement contained pictures and a description of the diamond, and stated that its value for insurance purposes was $10 million. Appendix 2 contained the terms of the SPA to be entered into in the event of the valid exercise of the pre-emption right.

36. The Articles of Elanus contained a bespoke article referring to "The Loan Agreement":

> "14A **The Loan Agreement**
>
> 14A.1 In this article 14A "**Loan Agreement**" means the Loan Agreement relating to certain art works entered into by the company as transferee dated on or around the date of the adoption of these articles.
>
> 14A.2 The directors shall at all times exercise their powers and discretions, so far as they lawfully can, to ensure due compliance by the company with the terms of the Loan Agreement.
>
> 14A.3 The directors shall not be bound by any resolution or direction of the members which may and shall not exercise their powers and discretions in a manner which way:
>
> (a) directly or indirectly cause the company to breach or default under the Loan Agreement; or
>
> (b) directly or indirectly cause the company to incur any liability (whether actual or contingent), including the acquisition of any art works of artefacts other than as provided under the Loan Agreement, and other than as may be required by applicable laws and regulation."

The sale of the Maharaja Paintings

37. As explained above, the Maharaja Paintings had also been transferred to Elanus and were the subject of a loan agreement in similar terms to that relating to the diamond, except that the Maharaja Paintings were lent directly to HBA (rather than to Qipco). Both parties placed some reliance on the events relating to the decision, in early 2015, to sell the Maharaja Paintings to HBA.

38. As I have noted, Sheikh Saoud died aged 48 on 9 November 2014. HBS, who was 22 at the time and still at university, described this as "*a big shock as he had only been unwell for a fairly short time.*" In January 2015, both HBS and Sheikha Sara were appointed to the Council of the Foundation, HBS as President and Sheikha Sara as Vice-President, each with single signature rights.

39. In late 2014, HBA met Sheikha Sara in London, and offered to buy the Maharaja Paintings. On 28 December 2014, Mr Hart informed Dr Neupert that Qipco had agreed (subject to contract) to purchase the Maharaja Paintings from Elanus. Mr Hart also dealt directly with Sheikha Sara in relation to the proposed sale.

40. Saffery were informed of the potential sale by Ms Rogers of Pinsent Masons on 9 January 2015. Ms Allman's note of that call records:

> "Fionnuala called regarding Elanus and wanted to give us a heads up that Sheikh Hamad has been in discussion with Sheikh Saoud's children about the Maharajas paintings being sold to the current borrower under the loan agreement with Elanus.
>
> Fionnuala thinks the simplest way for this to be actioned would be to terminate the loan agreement and action a straight sale from Elanus, however Pinsents are acting for Hamad on this transaction and so can not act for Elanus. Dieter Neupert has been advised and will be able to provide us more details shortly.
>
> I asked Fionnuala to confirm this was just in regard to the paintings and she said it is at present, however there may be a similar transaction with the Idols Eye in the future."

41. On 16 January 2015, Ms Rogers emailed Dr Neupert recording her instructions from HBA that he and Sheikha Sara had agreed a purchase price for the Maharaja Paintings, and that it was proposed to terminate the loan agreement (which, for the paintings, was between Elanus and HBA) at the same time as Qipco acquired the paintings, and attached a draft SPA to effect the same. Dr Neupert suggested that he act as "escrow agent" for the funds, which he said he could then transfer to the Foundation, in response to which Mr Hart noted that Elanus would have to be comfortable with and agree to such an arrangement.

42. Dr Neupert emailed Saffery (copied, among others, to Sheikha Sara as well as to Mr Hart and Ms Rogers of Pinsent Masons) on 18 January 2015 confirming that "the Family of the late Sheikh Saoud" had decided to sell the Maharaja Paintings to Qipco, and enclosed the SPA, saying:

> "In the name of the Al Thani Foundation, the shareholder of Elanus Holdings Ltd, I would like to ask you to instruct the directors of Elanus to duly execute the SPA – you may of course liaise directly with Fionnuala or Richard regarding the countersignature and the completion of the Agreement."

43. Saffery responded on 20 January (also copied to Mr Hart and Ms Rogers) saying Saffery would revert once the draft SPA had been reviewed, and noting that:

> "…a formal letter of recommendation/request from the Al Thani Foundation, addressed to the Directors of Elanus Holdings Limited, will be required in respect of this transaction, outlining the rationale for the sale of the assets and the proposed use of the sale proceeds."

44. There followed further negotiations on the price (largely involving other transactions which might provide a partial off set), and Saffery also provided its own comments (and comments from its Guernsey lawyers, on this occasion Babbé LLP) on the draft SPA. Mr Hart reported to Ms Vizia on 4 February 2015 that the purchase price had been agreed, and Ms Vizia responded that, once they had the necessary letters from the Foundation, they would execute the transaction (which included an amendment to Elanus's Articles to deal with a concern raised by Babbé concerning the transaction).

45. The following day, 5 February 2015, Saffery was sent two letters from the Foundation, both signed by Dr Neupert and Ms Näff-Oehri. One was addressed to the directors of Elanus (FAO Ms Vizia) confirming, as ultimate beneficial owner, that it recommended the directors of Elanus to enter into the SPA for the Maharaja Paintings for the agreed price, with the sale proceeds to be paid to the Neupert Vuille Partners client account. The other letter was addressed to the directors of Rysaffe (again, FAO Ms Vizia) noting that a special resolution needed to be passed to amend the Articles and instructing Rysaffe, as shareholder, to ratify and approve the sale.

46. Those letters having been received, the relevant corporate steps were taken later on 5 February (including Elanus's board meeting resolving to accept the recommendation of the Foundation to sell the Maharaja Paintings to QIPCO and to approve the sale on the terms of the SPA and a Rysaffe board meeting resolving to amend Elanus's Articles and to ratify the sale and passing the necessary resolutions to that effect). The SPA selling the Maharaja Paintings to Qipco was fully executed on 12 February 2015.

47. The treatment of the sale proceedings was not straightforward. As noted, it had been agreed the sale price would be paid to the Neupert Vuille Partners client account. However, without prior notice to the Elanus directors, Dr Neupert instructed the payment out of the funds from that account to a subsidiary of the Foundation, a Qatari company called Ashes Ltd, something which Ms Vizia was not at all happy about. As a result, Saffery was required to seek urgent due diligence on that company. The Elanus directors ultimately ratified the payment on 27 April 2015, but even as late as 2018 the directors remained concerned about the funds that had been dealt with in this way. This was finally dealt with by the Foundation (by Dr Neupert and HBS) providing a letter to Elanus, on 28 June 2018, confirming that the payment to Ashes Ltd had been made on its request because the Foundation did not hold a bank account at the time.

Discussions about the diamond in 2015

48. It is clear that after Sheikh Saoud's death, his family considered over the course of time whether to sell certain assets. It appears that among the reasons for this was the fact that Sheikh Saoud had left certain debts (although there was no clear evidence at trial of the amount of those debts) and also because the family were considering investing in different assets. HBS was keen for his family to invest in real estate, and for that purpose came to set up his company, Earth Creation Limited.

49. In 2015 this consideration had included an exploration of what price the diamond might fetch. HBS had a discussion with William Robinson, then International Head of Christie's World Art, in April 2015 which led to Mr Robinson sending an email to Sheikha Sara on 25 April 2015:

> "Your brother Hamad asked me to send him a written confirmation of my verbal comments on the Idol's Eye diamond. He was going to send me his email address but does not seem to have done so, so I am sending it to you.
>
> We valued the diamond a couple of years ago as collateral for a potential loan, a value which was intended as a price that one could realise immediately if the diamond were sold. This was $10,000,000. Last week Hamad asked us to suggest the highest price that we could justify as a strong retail price, a very different proposition. I spoke to my colleague Rahul Kadakia, the head of the jewellery department in our New York office. He commented that the ideal auction estimate would be $15,000,000-20,000,000. He would in principle be prepared to take it for auction at $20,000,000-30,000,000. In an auction situation its great rarity, the possibility of recutting it so that it became fancy light blue, it being a very large Golconda stone, and its wonderful romantic history could all combine to give an exceptional result, potentially achieving above the top estimate. Bearing this in mind, were we to be asked to handle it privately we would recommend starting with a price of $35,000,000 as an asking price.
>
> Please bear in mind that we have not examined the stone physically. These figures have been derived from a careful examination of the papers that you sent us. As you will appreciate, nothing serves as a substitute for a physical examination of the stone to appreciate accurately its commercial potential. All these figures are thus provisional and could only be confirmed after a physical examination."

HBS recalled that his sister had reported the figures in this email to him at the time.

50. There was a discussion between HBS and HBA around this time about HBA possibly purchasing the diamond. HBS gave an account of it in his witness statement, saying he told HBA about the Christie's figures, that he did not think his family would be keen to sell for $25m, would be more happy if they could get $30m, but that in any event HBS had not spoken to his mother (Sheikha Amna) about it, and she would need to be convinced about any sale. He said HBA suggested he would be willing to pay only about $16m. HBA, for his part, did not dispute a meeting took place (he confirmed they met a lot around this time), but said any process should go through Mr Hart (and could not recall being aware of any specific valuation having been given for the diamond or whether he had said he would pay only about $16m for it).

51. There were some further email exchanges about this. Mr Hart and HBS had a discussion, which Mr Hart followed up with an email to HBS dated 27 April 2015, repeating HBA's request that discussions went through Mr Hart, and saying:

> "Qipco will choose Sotheby's for the mid estimate valuation. I note from Abdul Razak's email that you would wish to choose Christie's, from your side. This is fine, but HH Sheikh Hamad has stipulated that Raul [Kadakia] must not carry out the valuation, or be involved on behalf of Christie's. The instructions to Christie's must also exclude any increase in value due to any Exhibition or Publication that Qipco are involved with. The Idol's Eye will be back in the UK in early August.
>
> If, after the valuations are carried out, one or both are not to Qipco's agreement, then there is no absolutely no obligation for Qipco to proceed with the sale and purchase of the Idol's Eye. The loan agreement will continue for the full term."

There was no reference to any terms of the Loan Agreement in this email, nor any suggestion that the pre-emption right had been triggered or was being exercised.

52. HBS's then assistant, Abdul Razak, responded by email the same day (copied to, among others, HBS and Sheikha Sara):

> "On Behalf of sheikha[6] Hamad and the family we cannot accept the conditions you emailed him.
>
> Upon the wishes of Her Excellency Sheikha Amena, the offer is to get two estimates and for QIPCO to agree with the family of HE Sheikh Saoud on a price for purchase which will be based on two evaluations by Sothebys and Christies, OR the second option is to sell the piece in auction and QIPCO can purchase it then."

At trial, HBS maintained that the reference to Sheikha Amna in this email was a deliberate misdirection. HBS's evidence was that his mother had no knowledge of any suggestion that the diamond might be sold, but that her name was being used in the email to add weight to what was said.

53. Mr Hart responded:

> "…I'm sure that we are essentially saying the same thing. The contract/loan agreement dated 2 May 2014 provides that the borrower and the lender each appoint their own valuer to advise on the mid estimate valuation (and the two will be averaged), but there is no obligation to buy- the borrower (Qipco) has a right of pre-emption, rather than being subject to a call option. Any third party would be able to buy only subject to the 20 year loan. I

[6] No doubt a typo for "Sheikh".

> think that you have a copy of the contract/loan agreement, but please let me know if you would like a further copy."

54. After this, the discussions about a possible sale of the diamond at this time appear to have fizzled out.

Events leading to the 6 February letter

55. By early 2020, HBS was returning to the thought of potentially selling the diamond. As he put it in his witness statement:

> "Around the end of 2019 and early 2020 I was considering possible property purchases and thought that if I found something that might excite me and my family, they might be persuaded to consider a sale of The Idol's Eye to fund the purchase of new assets."

56. As noted above, although Mr Raymond was employed by Earth Creation Limited, and had started his role on the basis he would be advising on potential real estate investments, by early 2020 he had also started to assist HBS more broadly, including by arranging meetings and dealing with communications relating to art. Mr Raymond and HBS said that, in late January 2020, HBS suggested to Mr Raymond that they should explore the possibility of a sale of the diamond, and asked him to find out what would be involved in such a sale and to contact Dr Neupert. Mr Raymond explained in his witness statement (and I accept) that he had not previously heard of the diamond, did not know it was owned by Elanus or that it was on loan to Qipco, and although he knew Dr Neupert was a Swiss lawyer with some involvement with the Foundation, did not really understand what his role was.

57. On 23 January 2020, Mr Raymond emailed Dr Neupert's assistant, Ms Susanne Aalam, stating:

> "I have a request from Sheikh Hamad, he wishes to have the contract for the Idols Eye. As we wish to look through it, please let me know if this can be done asap."

58. Documents disclosed (by HBS) shortly before the trial started showed that there had been a meeting between HBS, Mr Raymond and Mr Robinson of Christie's on 23 January 2020 before this message was sent. This appears principally to have been arranged to discuss some pieces that Wallace Chan had been commissioned to make for HBS, as well as to discuss the sale through Christie's of items from what was referred to as "the Ashleck Collection" that Sheikh Saoud had assembled. These were items whose sale HBS had discussed with the rest of the family, and they had previously together agreed he could go ahead and discuss selling them. HBS also had dinner that evening with Mr David Warren (Christie's Director of Jewellery London and Head of Jewellery Middle East). Qipco suggested that the possible sale of the diamond was discussed at one or both of the meeting with Mr Robinson and the dinner with Mr Warren; that might have been the case, but it was not clear.

59. It was clear HBS was keen that his lawyers consider the Loan Agreement. On 25 January 2020 (a Saturday), HBS told Mr Raymond by WhatsApp that he wanted the "*Idols eye contract*" by Monday and he wanted "*our lawyers to read it … Also I want our Swiss lawyer opinion [sic] on the rights of sale.*"

60. On 27 January 2020, Dr Neupert (by an email from his assistant, Ms Aalam) sent what he seems to have thought was an unsigned copy of the Loan Agreement (along with the Asset Transfer Agreement) to Mr Raymond and HBS, saying he could ask Safferys to provide a signed version if required. However, what he sent was not an unsigned copy of the final version of the Loan Agreement, but an earlier draft version, which was in a number of respects different. Along with a number of other points, this included some differences in Paragraph 10.1, for example one of the "triggers" for the pre-emption right in this draft version had been the death of Sheikh Saoud (which was not in the final version), and the $10m "floor" on the price that appeared at paragraph 10(b) in the final version (in handwritten addition) did not appear in this draft.

61. Having received what he thought was the Loan Agreement, Mr Raymond confirmed to HBS by WhatsApp the same day:

> **"JR**: Contract of idols eye received
> **HBS**: Ok bro send it to our lawyers
> I want an answer tonight please
> And ask DR to give us his feed back
> **JR**: On how we can proceed with selling?
> …
>
> **HBS**: Yes"

62. HBS followed this up with two voice notes, sent by WhatsApp to Mr Raymond, the transcripts of which read as follows:

> "Just get back to me ASAP on the rights for sale and how we can enforce it as soon as possible, 'cause I'd like to go ahead with this. Thank you."
>
> "However, when we do [unclear] enforce the, em the sale, I'd like Dieter to do it, not our English lawyers. Just let them come back to us of what the best way, what the best way is and then we'll go from there."

63. Also on 27 January 2020, Mr Raymond emailed Mr Mark Gauguier, a partner in the commercial real estate practice at Farrer & Co, asking:

> "Please may you look through this contracts [sic] and see if there is any constrictions moving forward in terms of selling the item and additional what would be the best way to sell moving forward?"

Mr Raymond followed up a few minutes later with:

> "One further point,
>
> It is to do with "ability to enforce sale immediatly" [sic] can this be done? and are there and restrictions as to how."

64. Mr Raymond also emailed Ms Aalam, in response to her having sent the agreement, saying:

> "Susanne, the Sheikh wishes to have your opening on putting forward the Idols eye for sales asap, with Dr Dieter at the forefront of handing such sale."

65. On 28 January 2020, Mr James Carleton, a partner at Farrer & Co, responded to Mr Raymond setting out some summary points about the agreement which Mr Raymond had sent to Mr Gauguier the previous day (and noting Farrers had not seen a signed and dated copy of the agreement). Farrers were not aware they were looking at a draft in different terms from the final version. Mr Carleton noted a number of points, including the existence of the pre-emption right and the fact that, if the right were exercised by Qipco, the price payable would be the average "mid-estimate" valuations provided by two major auction houses.

66. On 29 January 2020, Dr Neupert emailed HBS and Mr Raymond with some thoughts (which he termed "*(provisional) opinion*") about selling the diamond. It is clear that he, too, was not looking at the final version (because his points included noting that Qipco might have exercised its pre-emption rights after learning of Sheikh Saoud's death, which was not the case by reference to the final agreed version of the Loan Agreement). His points included:

> "In case the lender (Elanus) wishes to sell the Idol's Eye, it has to inform the borrower (Quipco) of such intention immediately (Articles 10.1.1 / 10.2), then the procedure of calculating the average "mid estimate" value of the Idol's Eye (Art. 10.1.7 (b)[7] LA) will start automatically."

67. His email ended with:

> "If you chose to follow one of the described options, I would ask Safferys anyway to send me copies of the actual signed Agreements on file to make sure that my opinion is 100% correct."

68. Mr Raymond spoke to Mr Carleton of Farrers on 31 January, and then confirmed in a voice note sent to HBS that:

> "I had some good direction from James so I know exactly how we're going to approach and the process we're gonna do with the Idol's Eye, so that's fine."

[7] Paragraph 10 in this draft ran to sub-paragraph 10.1.7, compared to sub-paragraph 10.1.3 in the final signed version.

Whether, in fact, Mr Raymond did understand the process involved was controversial between the parties. He certainly had no experience of dealing with these sorts of issues, and had started out by knowing nothing of the loan arrangements or the ownership structure of Elanus. The messages that he sent do not demonstrate any particular grasp of the legal process that might be engaged. His message to HBS set out above is more likely to have been one sent by an inexperienced, but enthusiastic, assistant (and a relatively recent recruit) who was trying to give HBS reassurance that he was on top of things, rather than evidence of any real understanding. I return to this below.

69. On 4 February 2020, Mr Raymond emailed Mr Carleton stating:

> "…thank you again for your time on Friday, your insight and support is much appreciated. James, I was told yesterday that Dr Dieter speaks on behalf of Elanus, therefore, I shall be emailing him with instruction with you Cc'd."

It was not clear from where Mr Raymond had got the impression that Dr Neupert "*speaks on behalf of Elanus*", but in his witness statement Mr Raymond said he thinks he must have understood it from something HBS had told him.

70. Mr Raymond, also on 4 February, emailed Dr Neupert stating:

> "I request a formal letter from yourself as the representative of Elanus informing QIPCO that we wish to sell the Idol's Eye indie [sic] course.
>
> Outlining any key formalities that you feel necessary.
>
> Please may you do this ASAP as the Sheikh requests this urgently."

It is reasonably clear that instead of "indie" Mr Raymond had intended to type "in due".

71. Dr Neupert responded to Mr Raymond saying that he would contact Mr Hart on behalf of Qipco and HBA the next day. Mr Raymond responded:

> "Thank you so much, however, please may I ask you send us the letter for our approval?"

72. Also around this time, HBS was meeting with Mr Robinson of Christie's in Doha. HBS had returned to Doha around 25 January, and he had asked Mr Raymond to come to Doha for the meeting with Mr Robinson; Mr Raymond arrived in Doha on the morning of 4 February. HBS also invited Sheikha Sara to join the meeting, but she could not make it.[8]

[8] There is nothing to suggest that Sheikha Sara thought anything important would be decided at the meeting. HBS told her about it only in response to her request to HBS for him to take her son to football practice, which she could not do as she had pilates.

73. HBS and Mr Raymond had a long meeting with Mr Robinson on the afternoon of 4 February 2020 which seems mainly to have been about the proposed sale of part of the Ashleck Collection. It appears they must also have had some discussion, even if only briefly, about the diamond. Mr Robinson reported that day on the meeting to Mr Guillaume Cerutti (the CEO of Christie's):

> "I spent 3 hours with Sh Hamad this afternoon and am joining him again for supper. The main things were:
>
> …
>
> 3. It is possible the Idols Eye diamond will come into play within the next year. He needs our help extricating him from his agreement with Sh Hamad (Qipco) first. This should be fine."

The 6 February letter

74. Dr Neupert did not comply with Mr Raymond's request, in his 4 February email, that he sent a draft letter for approval. Rather, on 6 February 2020, Dr Neupert sent a letter to Mr Hart (the "6 February letter"), the terms of which are central to this dispute. It was sent by email by Ms Aalam, on behalf of Dr Neupert, to Mr Hart (with HBS and Mr Raymond in copy). The 6 February letter was on Neupert Vuille Partners headed paper, was signed simply "*Dieter*", and stated as follows:

> "It has been some time since we last spoke and I hope this mail finds you well.
>
> I just learned from Sheikh Hamad, the son of the late Sheik Saoud Al Thani, that the family would like to sell the Idol's Eye. Therefore I would like to inform you according to Articles 10.l.l /10.2 of the Loan Agreement between Elanus and Qipco of such desire in order io start the procedure of getting a "mid estimate" value of the Idol's Eye according to Article 10.1.7 (b) of the Loan Agreement.
>
> Just for good order's sake, we would like to point out that if Qipco is not interested in buying the jewelry, Elanus would like to give herewith notice to Qipco according to Article 13.1.1 of the Loan Agreement to return the Idol's Eye within l8 months at the latest.
>
> A hard copy of this letter will follow by registered mail and I am looking forward to hearing from you."

75. Elanus's position at trial was that what was said in this letter was fundamentally incorrect in at least two respects. First, Elanus said HBS (or Mr Raymond) had not discussed a potential sale of the diamond at this time with any other member of the family, such that the statement that "the family" would like to sell the diamond was completely wrong. Second, Elanus said that HBS (or Mr Raymond) had not discussed the possibility of a sale of the diamond with any

representative of Elanus, such that the suggestion in the letter that "Elanus would like to give notice" under article 13.1.1 was also completely wrong.

Events following the 6 February letter

76. After receiving the 6 February letter in copy, Mr Raymond sent it on to Mr Carleton at Farrers (on 6 February), saying:

> "Please may you see the attached letter from Dr Dieter and let me know if you have any thoughts you wish to raise?
>
> Furthermore, after receiving this, what are the next steps we need to take? I believe we need to write a letter outlining to the otherside our approach to valuation and who we wish to do so, resulting in Qipco doing the same as us for transparency and fairness."

77. Mr Carleton responded the following day:

> "1. Dieter needs to inform Saffery Champness directors as legal owners (who you will recall we think are acting as directors of Eranus [sic] unless they have been replaced);
>
> 2. It would be helpful to see a copy of the full Agreement with the Appendices included (the version we were working from did not have these). In particular, we need to see the Sale and Purchase Agreement;
>
> 3. We might await the response from QUIPCo before getting our valuation team in place unless we know we want Christie's and want to reserve them conditionally before QUIPCo approach them in which case we can make an approach now to stop them acting for QUIPCo and agreeing terms with them;
>
> 4. If QUIPCo do not take up its right of pre-emotion, then we are free to sell and we can consider and agree what would be the best and most optimal sale process (eg private or through auction);
>
> 5. If QUIPCo do want to go for the piece then the formal two auction house valuation process is engaged and we go down that route formally engaging either Christie's or Sotheby's as we discussed and as set out above."

78. On 11 February 2020, in a WhatsApp message, Mr Raymond told HBS that he had "*put our lawyers in touch with dr dieter and explained to them that we wish for dr dieter to lead this process but be overseen by our UK lawyers.*"

79. Meanwhile, shortly after receipt of the 6 February letter, HBA had instructed Mr Hart to obtain an auction estimate for the diamond, and Mr Hart engaged Mr Travis (of SC Bond Street) for that purpose. HBA explained in his witness statement:

> "I recall telling Mr Travis to ensure that he obtained the lowest valuation possible from one of the major auction houses, such as Christie's, Sotheby's or Bonham's. I gave him this instruction because this was in my best interests."

80. On or around 10 February 2020, Mr Hart and Mr Travis spoke to Mr Rahul Kadakia, Christie's Head of Jewellery, for this purpose. Mr Kadakia followed up the discussion with an email to Mr Hart in which he said "*we would probably estimate the diamond at $8-10m for auction*" (albeit without having inspected the diamond). He also said:

> "With the right marketing and a bit of luck, the stone could achieve the top end of the estimate and more. We could possibly try an estimate of $10-15m but I fear it would be a challenging starting price and make it more difficult to engage prospective collectors."

81. On 11 February 2020, Mr Hart asked Mr Kadakia to produce this as a formal estimate, in response to which Mr Kadakia said that could be done following the physical inspection in London, which was being arranged that Mr Warren would carry out. That then took place on 18 February.

82. Also on 11 February 2020, Mr Raymond emailed Mr Carleton saying he would "*link you into an email with Dr Dieter today and will explain that you will be assisting/overseeing the process of the sale. The Sheikh wishes Dr Dieter to take the lead on this.*" He also messaged HBS saying they "*await response from qipco side chief*". On 14 February 2020, Mr Robinson of Christie's sent an email to Mr Raymond with an update on various points relating to Ashleck sales. He also said that he needed to give HBS "*a quick update on the Idol's Eye.*" On 17 February, Mr Raymond asked Dr Neupert whether any reply had been received from Qipco, to which the latter responded a reply was still awaited.

83. Following the inspection of the diamond, on 18 February 2020 Mr Kadakia confirmed to Mr Travis by WhatsApp:

> "Just had a word with David [Warren] and we both agree that $8-10m is the correct auction estimate."

I should note that there are two messages around this time from Mr Travis (one email to Mr Hart, and one WhatsApp message to HBA) where he says, in respect of the Christie's $8-10m valuation, that he had "talked them down" from $10-15m. That is not borne out by the exchanges with Christie's themselves, and it may well be that Mr Travis was here exaggerating his own impact or influence on the process and/or seeking to give HBA context so he did not try to drive an even lower valuation (the WhatsApp to HBA was in response to HBA asking whether the Christie's $8-10 was "*exaggerated*" and saying "*7 to 10 is more logical*").

84. On 24 February 2020, the Qipco side gave its first substantive response to the 6 February letter. Mr Hart emailed Ms Aalam stating:

> "I confirm that we are instructing Christie's to provide the mid auction estimate and will be in touch as soon as this has been received.
>
> Please note that the provision of the two valuations does not mean that our client intends to proceed with the purchase which will remain strictly subject to completion of formal contract."

85. Dr Neupert (via Ms Aalam) forwarded that message on to HBS and Mr Raymond, and suggesting "*maybe you – as you are in constant contact with Christie's – might back check with who is handling the evaluation?*" Mr Raymond in turn forwarded this on to Mr Carleton, drawing attention to Mr Hart's email and asking: "*Please could you let me know where he says doesn't mean he will purchase, does this work in our favour as we shall have the stone back in 6months?*" Mr Carleton responded on 26 February saying he thought Mr Hart's email was saying his client would assess its options in light of Christie's valuation, and effectively had 6 months to decide whether it wished to exercise its right to acquire the diamond.

86. On 2 March, Mr Hart sent a further email to Ms Aalam saying:

> "Further to my recent email, please can you let me know where you are with the valuation for the Idol's Eye?"

87. Dr Neupert passed this on to HBS and Mr Raymond noting they should ask another "*auction house, maybe Sotheby's to come up with their valuation*" and asking: "*Do you have – through your close connection with Christies – an opportunity to find out what Christie's valuation for Qipco was?*"

88. Up until this point in time, the directors of Elanus had no knowledge of the 6 February letter or otherwise about the discussions relating to valuation or sale of the diamond. However, on 4 March 2020, a meeting took place (at Pinsent Masons' offices in London) between Mr Hart, Ms Vizia and Ms Brehaut, to discuss various different mutual client matters. During the course of the meeting, Mr Hart mentioned that the family of Sheikh Saoud wanted to sell the diamond, and referred to the 6 February letter; he subsequently emailed a copy to Ms Vizia and Ms Brehaut (confirming in his evidence that he recalled Saffery had not previously been provided with a copy of it). The Saffery attendance note of the meeting recorded this:

> "RH brought up the matter of the sale of the Idol's Eye which we knew nothing about, he provided us with a copy of the letter from Dieter Neupert on behalf of the family addressed to RH re QIPCO."

89. On 6 March 2020, Mr Robinson sent Mr Raymond a summary of a meeting that had taken place the previous day with HBS. It included:

> "Sh Hamad discussed the Idol's Eye diamond, and then afterwards went to David Warren to continue to do so. David and I have both recommended that he retain it at the moment."

(As I have mentioned above, David Warren was Christie's Director of Jewellery London and Head of Jewellery Middle East). I should also note that, in mid March, HBS was also speaking to Sotheby's about the diamond.

90. On 16 March 2020, Saffery emailed Dr Neupert, asking for updated information about the Foundation and also asking whether the diamond was to be sold. This was Saffery's attempt to find out what was going on from their own client, without revealing that they had already been put in the picture by the other side (namely, Mr Hart).

91. Dr Neupert's response in relation to the diamond, on 18 March, was:

> "Concerning Idol's Eye, the Family has indicated to Qipco that Elanus would like to sell the valuable piece of art. Qipco has now informed us that they would like to start the procedure for an eventual preemption right and have asked Christies to come up with a valuation of Idol's Eye. The Family will now order a valuation of their own and then eventually Qipco will make a purchase offer, otherwise the Family intends to sell the piece,"

92. Meanwhile, on 17 March 2020, Dr Neupert had sent an email to Firdavs Shakhidi, copied to Sheikha Sara and Mr Raymond, the body of which concerned Dr Neupert reporting on the results of inquiries made with the Liechtenstein Tax Office relating to certain matters concerning the Foundation. The end of the email included:

> "P.S. May we remind you that you should get a valuation by Sothebys or another Auction House for Idol's Eye as Qipco already has its valuation from Christies."

Sheikha Sara's evidence was that this did not alert her to a potential sale, and that she could have understood this as a reference to the insurance valuations that she understood had to be regularly obtained.

93. On 25 March 2020, Saffery responded to Dr Neupert, saying (based on what they had been told in Dr Neupert's email) "*we note and acknowledge the shareholder's desire to sell the Idol's Eye.*" They enclosed a copy of the Loan Agreement, noting that due process should be duly considered and followed, and saying:

> "In this regard, can you kindly ensure that we, as Elanus, are copied on all communications with QIPCO concerning the proposed sale of the Idol's Eye and note that any instructions, concerning the sale or chosen valuation providers, must be considered and approved by the Directors of Elanus, as the controllers of the Company – this is very important. …
>
> We will require a shareholder recommendation letter from the Foundation in relation to the above transaction and action."

94. Dr Neupert forwarded this email from Saffery to HBS, Sheikha Sara and Mr Raymond the same day, and asking whether they had decided which auction house should provide the second valuation. This, said Sheikha Sara, was the first time she had realised there was a proposal to sell the diamond. She said she was shocked on learning about it. She told Sheikha Amna, who said in her statement that the family had never discussed selling the diamond and she would never agree to or be happy with its sale. Sheikha Sara said that the family then discussed the position, which she said was "*the first time we had all properly discussed whether any of us wanted to sell the Idol's Eye. It was clear that as a family we did not.*" It appears that from this point on, Sheikha Sara became more involved in the matter.

95. On 31 March 2020, Mr Hart emailed Dr Neupert asking for confirmation whether they now had the Sotheby's valuation and asking to move forward. Dr Neupert responded as follows:

> "…please be informed that the Family has decided to put an eventual sale of the Idol's Eye on hold because due to the present crisis there is no market and therefore no valuation possible."

The "crisis" there referred to was the Covid pandemic and the lockdowns that had, by then, started to be implemented.

96. Mr Hart's response was that the "*the procedure itself has been triggered and the wording of the contract itself does not permit for the notice to be retracted*" but saying he would take instructions. Dr Neupert passed that on to HBS and Sheikha Sara, asking whether he should "*call the deal off due to force majeure*". Sheikha Sara responded: "*Do we have the right to exercise force majeure? If yes, we would like to state that. As we no longer intend to sell.*"

97. Dr Neupert in turn reverted to Mr Hart on 1 April with:

> "…as the Family does not want to sell the Idol's Eye anymore due to *force majeure* the Family has not formally instructed the directors of Elanus to go ahead with the project which we hereby consider without any effect, especially since we have not been informed about the valuation of Christies.
>
> So no harm is done and we reassure you that we shall revert back to you in case the situation changes and the Family reconsiders its decision."

Following this, Mr Hart suggested to Dr Neupert they might have "*a quick without prejudice call*".

98. In light of the emails, Ms Brehaut called Mr Hart on the morning of 2 April 2020, which she recorded in an internal file note that included:

> "…he firstly noted that he can't ethically discuss the transaction with us and suggested that we speak to Dieter direct. I mentioned that we had sent an email to Dieter, although were yet to hear

> back. I also mentioned that technically the notice hadn't been issued or agreed by Elanus, as Dieter had signed the notification to QIPCO without the consent of Elanus, as Lender. RH acknowledged this and noted that he can't comment on the internal issues of Elanus."

99. It appears a without prejudice conversation took place between Mr Hart and Dr Neupert, following which, on 8 April 2020, Dr Neupert sent Mr Hart the following by email:

> "Following our "without prejudice" conversation I have been instructed by the shareholder of Elanus, the Al Thani Foundation, to convey the following message to you as representative of Qipco:
>
> - It proved impossible to get an auction house which is prepared to give a fair valuation without taking into account the Coronavirus crisis.
> - Therefore, the Foundation has decided not to formally ask the directors of Elanus to trigger the preemption right proceedings.
> - As we both agreed to an insurance value of USD 25 Mio for the Idol's Eye the Al Thani Foundation is not in a position to continue further negotiations due to *force majeure*.
>
> As soon as normality is back in the markets and economics we may of course continue with "without prejudice" calls in case Qipco I still be interested in purchasing the object."

Once sent, Dr Neupert forwarded that email on to Sheikha Sara and HBS, to which Sheikha Sara responded "*The family are not willing to make a sale in the future either.*"

100. Meanwhile, Qipco had been in contact again with Christie's in relation to getting a formal valuation. On 1 April 2020, Mr Travis sought a formal valuation from Mr Kadakia, asking him in a WhatsApp that it be "*dated closer to when we discussed it and not now … so mid feb*".

101. When Christie's produced a draft formal valuation (unsigned) on 9 April 2020, it was for $10-12m. Mr Kadakia emailed Mr Warren that day, seemingly in respect of this valuation, saying:

> "Fair to all sides and keeps us in the running if ever there is a chance the stone comes to auction.
>
> Thanks for your insight about Hamad during our call."

102. Mr Kadakia sent the valuation to Mr Hart, and followed it up later that day with a signed version. Mr Hart queried why the valuation had increased, to which Mr Kadakia responded that Christie's had done some research of comparable gems,

examples of which had "*out performed at auction and hence our slightly higher auction estimate which takes into account the quality, rarity and historical importance of the Idol's Eye.*" Mr Hart sent it on to Mr Travis (accompanied by the message that he "*will expect an ear bending later!*") who, on 11 April, sent it by WhatsApp to HBA.

103. It is fair to say that HBA was not pleased with the fact that the Christie's estimate was $10-12m, rather than the $8-10m discussed in February. His first response was "*What the hell is this?*". Mr Travis sought to suggest that HBS had "*got to*" Christie's, that Christie's had wanted to increase to $10-15m, but that he (Mr Travis) had "*got him [Mr Kadakia] down*". This did not placate HBA. During the course of 12 April, he sent Mr Travis a series of messages expressing his anger (e.g. "*HE BETRAYED US*", "*Tell him IT WILL COST THE RELATION WITH HIM VERY SERIOUSLY*"), and explained he had sent Mr Kadakia "*a message like hell*" (*"I simply WASHED THE FLOOR BY HIM"*). He said Christie's would lose the relationship with him completely, and HBA would not buy or sell a single piece with Christie's whilst Mr Kadakia was working there, and that he would pull "*all the rest of the jewellery from Al Thani Collection promised to them and will give to Sotheby's*".

104. HBA also sent messages to Mr Kadakia, among other things calling him "*SO UNGRATEFUL AND SO UNLOYAL*". Mr Kadakia offered to change the valuation if HBA so wished, in response to which HBA said that unless Mr Kadakia reverted to his initial valuation, he could "*EXPECT THE DOORS OF HELL TO OPEN*." When Mr Kadakia said he would change the valuation to $8-12m, HBA insisted on $7-10m - "*Not one pound different.*" Mr Kadakia agreed, saying: "*If I can mention that the value has to take into context today's market then we can adjust to $7/10m. Is that OK*", which HBA said was the "*minimum you can do after your mess*".

105. Mr Kadakia emailed Mr Warren and Mr Robinson very briefly summarising (saying HBA had been furious), and recording that he had said "*if we can put the current market into context, that would allow me to adjust the estimate*." Mr Warren noted that it was "*terribly difficult trying to keep both parties happy*".

106. Following this, later on 12 April 2020, Mr Kadakia sent to Mr Hart a formal auction estimate of $7-10 million, dated 12 April 2020.

107. However, Mr Hart was concerned with the 12 April 2020 date on this valuation, and on 15 April asked Mr Travis whether they could ask Christie's to date it in February ("*That way there are no Coronavirus issues*"). Mr Travis thought they would struggle to persuade Christie's to do that, but Mr Hart asked and Mr Kadakia agreed to do so, saying an 18 February date reflected the date the "*stone was viewed in London*" and sent Mr Hart a further version of the estimate, giving the same valuation, but now bearing a date of 18 February 2020.

108. On 17 April 2020, Qipco purported to serve on Elanus a written notice pursuant to Paragraph 10 of the Loan Agreement, though it is disputed that it was effective ("the April Notice"). Among other things, it was marked "subject to contract" and expressly stated that Qipco was not bound to purchase the diamond. I will return, below, to this letter in considering whether it was

effective under the Loan Agreement. The April Notice attached the auction estimate valuation of the diamond provided by Christie's of $7-10m ("*Appraised on February 18, 2020*" by Mr Kadakia: the "February Estimate").

109. A copy of the April Notice was sent by Oliver Tapper, of Pinsent Masons, to Dr Neupert in an email in which he also responded to Dr Neupert's email of 8 April 2020, reiterating Pinsent Masons' view that: "*The pre-emption procedure under the Loan Agreement was initiated by your letter of 6 February 2020, and Elanus is not entitled to revoke or withdraw such notice.*"

110. Meanwhile, Sheikha Sara had been trying to piece together what had taken place and to stop whatever process her brother seemed to have started. She had emailed Dr Neupert on 3 April saying: "*The family has absolutely no intention to sell*". Dr Neupert responded on 4 April saying that his 6 February letter "*(as per the instructions of your brother) that the family intends to sell triggered the valuation and purchase opcion [sic] process.*"

111. On 7 April, she asked Mr Raymond to put her in touch with the English lawyers who had looked at the Loan Agreement " *'cause Hamad got me into a mess that I need to get myself out of.*" Mr Raymond put her in touch with Mr Carleton, and at the same time emailed him separately saying "*the entire family sisters and mother did not agree to the sale of the piece.*" Mr Carleton's response to Mr Raymond was: "*It is really a matter for the directors of the Owner (taking instructions from the beneficial owner as required which is I think the Foundation?)*". Also on 7 April, Sheikha Sara sent Mr Raymond a voice note stating:

> "When Hamad told them to get a valuation or an estimate, he did it without my consent, or my sister's consent, or my mother's consent and w, we hold more shares than him in that Idol's Eye."

112. Mr Carleton later that day emailed both Mr Raymond and Sheikha Sara asking on what basis Dr Neupert had sent "*the Notice on behalf of Elanus?*" He noted that there "*needs to be authority from the Directors of Elanus and I cannot see that this was given…*" as well as providing some views on other matters (including the absence of any *force majeure* provision in the agreement).

113. Further exchanges between Mr Carleton, Dr Neupert and Sheikha Sara followed on 20 April 2020, including Dr Neupert explaining, in relation to the 6 February letter, that he had been instructed by HBS to "*draft the preliminary offer letter*" but that "*there was neither a Board Decision/Minute, nor was I asked to give Elanus formal instructions which would have to be signed anyway of two Directors of Al Thani Foundation…*". Sheikha Sara responded asking Dr Neupert whether the Elanus directors had been informed on or before 6 February of the letter being sent to Qipco.

114. It appears that HBS was still hoping he could persuade the rest of his family to sell the diamond and avoid a fight with HBA. He left a voice note for Sheikha Sara on 20 April 2020, in which he told her why he thought the Family should sell the diamond even for $10m, stating "*making 10 million on 6.5% today or 7% today is better than having 20 in 14 years*", anticipating therefore that he

could make a better return from $10m to invest (in property) than would be gained from an appreciation in value of the diamond over time.

115. Ms Brehaut of Saffery emailed Dr Neupert on 20 April 2020, asking for an update, and noting that Saffery had not received a copy of the 6 February letter and requesting a copy. She raised the fact that the directors had not been involved with the sending of that letter:

> "Regarding the "notice" provided to QIPCO, triggering the pre-emption rights clause 10 of the loan agreement, we note that technically the Directors of Elanus have not formally given such notice to QIPCO. We further note that in accordance with clause 17.5, any such notice concerning the loan agreement must be given in writing by Elanus, as specifically set out within. Therefore, technically the letter dated 6 February should have been provided by Elanus and not the Foundation. Going forwards, please ensure that all communications are dealt with in the correct manner, via Elanus Holdings Limited."

116. Dr Neupert responded on 21 April, copying in Farrers, Sheikha Sara and Mr Raymond, stating:

> "Please find enclosed the preliminary information we sent to Richard Hart on 6 February 2020. Please note that this letter was sent in the name of the Family but neither in the name of Al Thani Foundation, nor in the name of Elanus. This is why we did not contact you – we just reserved our right to instruct you for an eventual returning of the Idol's Eye in case Qipco is not interested in negotiating a Sale and Purchase Agreement.
>
> As for the time being, you are not involved in the discussions, so please note that Al Thani Foundation (as sole shareholder of Elanus) does refrain from giving you any instructions in the above matter.
>
> Due to the Corona virus crisis, the Family does not want to sell – you know that the latest Sothebys valuation by the end of last year was USD 25 mio. and it would not make any sense to ask them for a new valuation in which they would have to explain what the effect of the Corona pandemic is and why there are no auctions at all at the moment.
>
> As soon as there are any developments which would involve Elanus, I shall revert to you with further information. …"

117. On 5 May 2020, Dr Neupert sent a letter to Mr Hart in response to the purported notice under Paragraph 10 from Qipco dated 17 April. Dr Neupert stated:

> "On behalf of the Al-Thani Foundation and Sheikh Hamad, I am asked to write further to the previous correspondence between us and also your letter of 17 April 2020 addressed to Elanus

> Holdings and headed "Subject to Contract" which you kindly copied to me. The Loan Agreement dated 2 May 2014 is between your client QIPCO and Elanus Holdings Limited. Following the contact with Sheikh Hamad to which I referred in my letter to you of 6 February, my correspondence was intended, as requested by the Sheikh, to test the waters and establish whether your client might be interested in acquiring the Idol's Eye from Elanus should the latter subsequently decide to follow formal advice to sell from and wish to explore a sale.
>
> I can see and apologise for the fact that my letter may have confused the situation in its reference to the terms of the Loan Agreement. However, it will have been obvious that it was no more than an invitation to explore the possibility of a sale, should the terms be attractive to both parties and should Elanus decide to follow the family's wishes. The points I have in mind include that:
>
> - I was clear as to the source of my instructions: it was not Elanus and I have subsequently learned that Elanus knew nothing of the Sheikh's thinking at the time I wrote. Elanus has had and has no wish to sell the piece.
> - I did not have authority to act on behalf of Elanus and there was no basis to assume I had any such authority.
> - My reference to the mechanism of clause 10 of the Loan Agreement was mistaken and unnecessary. That mechanism permits a right of pre-emption which assumed circumstances where Elanus has made its decision and intends to sell or transfer the piece to a third party. That was not the case here. My invitation was made only to you for your client.
>
> For the avoidance of doubt, I should also confirm that I am required by all the directors of the Foundation to notify you and your client that the invitation to treat is revoked. In so doing, I should finally confirm again that, of course, I have no ability to act on behalf of Elanus and of course I have no authority (ostensible or otherwise) to act on its behalf."

118. On 13 May 2020, Pinsent Masons wrote a formal letter on behalf of Qipco to Elanus (FAO Ms Vizia) stating Qipco's position that Dr Neupert's 6 February letter had provided notice of the desire of Elanus to sell the diamond, and that all that was required in order to entitle Qipco to exercise its rights under Paragraph 10 was that Qipco be made aware of Elanus' wish to sell the diamond, and that Elanus was now bound to, and could not resile from, the process set out in Paragraph 10. It went on to say that, by the April Notice, "*the remainder of Article 10 has been triggered and Elanus is now required to procure a valuation … from a major auction house, following which a purchase price may be determined in accordance with Articles 10.1(b)(i) and (ii)"*, and that once a

valuation was received from Elanus and a purchase price determined, "*Qipco may then elect whether to exercise its entitlement to purchase.*"

119. Farrer & Co responded, on behalf of Elanus, on 18 June 2020, contending that no Paragraph 10 process had been triggered. The letter stated (among other things) that Elanus did not wish, and had not ever wished, to sell the diamond, and that:

> "Dr Neupert does not act for and is not authorised to represent Elanus. If his letter of 6 February 2020 may have given rise to an understanding to the contrary, he has since clarified and corrected that in his letter of 5 May 2020. That letter stated correctly, "I have no ability to act on behalf of Elanus and of course I have no authority (ostensible or otherwise) to act on its behalf"."

120. On 21 July 2020, Qipco served a further purported notice pursuant to Paragraph 10 of the Loan Agreement, without prejudice to its earlier purported notice ("the July Notice"). This notice attached another auction estimate valuation of the diamond provided by Christie's of $7-10m (this one "*Appraised on April 12, 2020*" by Mr Kadakia: the "April Estimate").

The issues

121. Against the above factual background, the key issues that arise for determination include the following:

i) Did Elanus "wish" to sell the diamond within the meaning of Paragraph 10 of the Loan Agreement such as to trigger the pre-emption right? This includes (a) issues of construction of Paragraph 10, including what constitutes a "wish" and whose state of mind counts, as a matter of construction of the Loan Agreement, for that purpose, (b) was there such a "wish" by any entity or natural person, (c) if so, can that "wish" be attributed to Elanus (or to any other entity whose state of mind counts as a matter of construction) or is Elanus otherwise fixed with such a "wish"?

ii) If there was such a "wish", could it be "withdrawn" or, to put it another way, did it need to continue until the time that Qipco exercised its right of pre-emption? If the answer is yes, was it withdrawn / did it cease before Qipco exercised its right?

iii) Was the April Notice, alternatively the July Notice, effective?

iv) If Elanus did have a "wish" to sell within Paragraph 10, which was not or could not be withdrawn, and if the April and/or July Notice was effective, what relief is Qipco entitled to?

122. Most of the factual evidence given at the trial related to the issues at i)(b) and (c) (although there was also factual evidence relating to the attempts to get a valuation for the diamond which went to issue iv)). In addition to the factual

evidence relating to issue i)(c), the parties also addressed the issues of attribution by reference to the law of Liechtenstein and the law of Guernsey, as I explain further below when considering this issue.

The evidence at trial

123. Factual evidence was given on behalf of Qipco by HBA, Mr Hart and Mr Travis, and on behalf of Elanus by HBS, Sheikha Sara, Sheikha Amna (who gave evidence through an interpreter), Sheikha Moza, Ms Vizia, Ms Brehaut and Mr Raymond.

124. As to Qipco's witnesses:

i) HBA was confident in giving his evidence, though sometimes displaying a touch of arrogance. He was content to seek to cast aspersions on the closeness of Sheikh Saoud's relationship with his wife and with Sheikha Sara. He clearly thought he was entitled to loyalty from Christie's when it came to valuation of the diamond, and was incensed at what he perceived as disloyalty or at any sense that Christie's might bow to HBS's influence in preference to, or even at the same time as, his own, and he did not hesitate to launch into his tirade in his attempt to force Mr Kadakia to change his view. However, none of that suggests he was not seeking to give honest evidence at the trial.

ii) Mr Hart was a careful, but honest, witness, though (understandably) without a complete memory of all the events. Similarly, Mr Travis was a straightforward witness, though it was clear (as he accepted) that he had no real recollection of the events and his evidence was essentially based on the documents. I have no concerns about the honesty of either Mr Hart or Mr Travis.

125. When it came to the witnesses called by Elanus, there was a concerted attack on the credibility of HBS and Mr Raymond (which I deal with below). There was, by contrast, no similar suggestion made in relation to the evidence given by the other family witnesses. That was not surprising – each of Sheikha Amna, Sheikha Sara and Sheikha Moza was clearly giving honest evidence and seeking to do their best to assist the court. In Sheikha Amna's case, it was apparent she had a genuine and sentimental attachment to the diamond and would not have countenanced its sale.

126. The two Saffery witnesses – Ms Vizia and Ms Brehaut – both gave their evidence carefully. It was apparent from her evidence that a key consideration for Ms Vizia was maintaining client relations as well as adhering to her various duties, though she was keen to ensure there could be no suggestion that she or Saffery might not have been adhering to her/their duties or to any of the regulations that governed their work. That to some extent tended to make her a slightly defensive witness, and sometimes led to an attempt to anticipate some of the questions. However, I have no reason to think she was other than honest in giving her evidence. Ms Brehaut's cross-examination was much shorter than that of Ms Vizia, and I found her straightforward and honest in her answers.

127. HBS's evidence needs to be given some context. When he gave his oral evidence, certain additional measures were put in place to deal with certain conditions that had been the subject of a confidential medical report served on his behalf. That report was seen by Qipco and its representatives, and the measures were then agreed between the parties following a discussion in court. The measures included the provision of more regular breaks in the oral evidence than would usually be taken, and the absence from the physical court room of all but myself, counsel, the court staff and the EPE operator (and, to maintain the public nature of the hearing, the evidence was livestreamed to a screen in another court in the Rolls Building to which the public were directed and had access).

128. Although the detail of that medical report remains confidential, some aspects of HBS's medical condition were deployed (in open court) by him and Elanus, and were relied upon to give context to his conduct at the time and to his evidence. These included the fact that HBS is dyslexic and, as a result, does not find it at all easy to concentrate on and to read lengthy text, nor to write or to type. As a result, he rarely uses any form of written communication other than instant messaging. This was borne out by the disclosure (which did not include any emails sent by HBS). He said (and I accept) that he would read emails only when specifically asked to do so (for example, in a message sent by WhatsApp).

129. HBS was clearly well-prepared in terms of giving his evidence – occasionally he asked to be shown certain documents before giving answers and sometimes sought to pre-empt certain points he thought were coming his way. He became slightly rattled at some of the points that were put to him, and occasionally became prone to exaggeration. However, I do not find (as Qipco urged me to) that he had come to court deliberately to lie.

130. Mr Raymond was a slightly less satisfactory witness. He appeared in cross-examination very wary of being caught out, which led to an unfortunately defensive attitude to dealing with the questions. He had a clear loyalty to HBS, and gave the impression of wanting to make sure his evidence supported HBS's position. That is not to say that he was not seeking to give accurate and honest answers, but rather that his evidence did not come over as straightforwardly as it might have done. However, it was clear from his evidence that he had been out of his depth during much of the period in question, and indeed was to an extent when he was giving evidence. It was clear that, in the period leading up to the sending of the 6 February letter, he had little grasp on the legal arrangements relating to the diamond, but was seeking to follow HBS's (fairly briefly put) instructions whilst also trying to convey to HBS that he was on top of things.

131. Qipco's main submission about the evidence of HBS and Mr Raymond was that they had conspired with each other to give false evidence. I deal at other points in this judgment with the factual points as they arise (for example in relation to HBS's state of mind around the time of the 6 February letter). However, in relation to that overarching submission of conspiracy and a deliberate plan to lie, I reject it. The suggestion was based in part on WhatsApp messages between Mr Raymond and HBS in April 2020, in which Mr Raymond said to HBS on 7 April: "*We Need to establish how much authority dr dieter has – then knowing*

this we can find out how best to proceed" and on 20 April "*Sheikh it was only ever me and you*" and "*And even the letter … it is not got any of your authority on it.*" However, the first of those messages was taken slightly out of context in Qipco's submissions – it had been immediately preceded by HBS asking "W*hat did they say*" before Mr Raymond replied "*There is no force majeure within the contract*" before going on to send the first message set out above. This was, no doubt, Mr Raymond reporting on the exchanges in which he had been involved that day with Mr Carleton (and also with Sheikha Sara), which had included Mr Carleton asking on what basis Dr Neupert had sent the notice on behalf of Elanus, given he could not see that any authority had been given. The second messages were sent on a day (20 April) where there was clearly a wider discussion about the sending of the 6 February letter within the family – Sheikha Sara had been asking Mr Raymond to give her Mr Carleton's contact details, and she emailed Dr Neupert asking him whether the Elanus directors had been informed on or before 6 February about the letter he sent to Qipco. It is not surprising that Mr Raymond started to dig back into his exchanges of early February. Mr Raymond's message "*And even the letter … it is not got any of your authority on it*" (followed by the message "*Or Sheikha's*") is redolent of someone thinking they have helped to find an answer in the documents to the problem (the problem that now included Sheikha Sara having had to get involved to sort out "the mess" her brother had created) – it was a statement by Mr Raymond of what he understood the position to be, rather than the first step in the formulation of a false story.

The absence of Dr Neupert

132. In its closing submissions, Qipco drew attention to the fact that Dr Neupert had not been called to give evidence by Elanus. Qipco said that its solicitors, Fieldfisher, had contacted Dr Neupert on 1 October 2024 (after it became clear that he would not be called by Elanus) to ask him for his account, but received no response. Qipco contended (relying on ***Wisniewski v Central Manchester Health Authority*** [1998] PIQR 324 and ***Royal Mail Group Ltd v Efobi*** [2021] UKSC 33; [2021] 1 WLR 3863) that adverse inferences should be drawn to the effect that (a) Dr Neupert would likely have given evidence contrary to the accounts of HBS and Mr Raymond as to whether he was instructed to send the February Letter; and (b) he would likely have given evidence showing that the Foundation was accustomed to acting on the instructions of HBS to the knowledge and with the consent of the rest of the Family.

133. As is well known, in ***Wisniewski***, Brooke LJ stated (at page 2973):

> "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified"

134. The Supreme Court in ***Royal Mail Group Ltd v Efobi*** (Lord Leggatt at paragraph 41) warned against making the process "*overly legal and technical*" and stated that: "*Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances.*"

135. Elanus drew my attention to what was said by Cockerill J in ***Magdeev v Tsvetkov*** [2020] EWHC 887 (Comm) at paragraph 150:

> "… the tendency to rely on this principle in increasing numbers of cases is to be deprecated. It is one which is likely to genuinely arise in relatively small numbers of cases; and even within those cases the number of times when it will be appropriate to exercise the discretion is likely to be still smaller."

And also at paragraphs 151-152.

136. When asked about Dr Neupert's position, HBS said that whilst he still acted for the family, Dr Neupert had been made uncomfortable with the situation because Qipco had tried to sue him personally (this was a reference to an application that Qipco had made to join HBS, the Foundation and Dr Neupert as defendants to this action, which was refused in May 2024 by order of Bright J – I was told that was on case management grounds, on the basis that the attempt to join had been made too close to trial). It is readily understandable, in particular (as Elanus pointed out in its closing submissions) given that Dr Neupert is 82 years old, that the fact that it had been suggested by Qipco that he was personally in line to be sued as a result of these events would make him wary of giving evidence and being cross-examined. That does not suggest that his evidence would have been contrary to that of Elanus, but rather that he was keen to avoid encouraging any further thought of his personal liability or involvement in the litigation as a party. This is not a case where there is no, or no satisfactory, explanation for the absence of the individual in question.

137. In addition, in terms of the inferences sought to be drawn, the second (that Dr Neupert would likely have given evidence showing that the Foundation was accustomed to acting on the instructions of HBS to the knowledge and with the consent of the rest of the Family) is one for which there is no other sound evidential basis. The first (that Dr Neupert would likely have given evidence contrary to the accounts of HBS and Mr Raymond as to whether he was instructed to send the February Letter) is one which needs to be assessed closely

in the context of the circumstances of this case (which I do later in this judgment), rather than in isolation and simply based upon a suggestion of adverse inference from the failure to call a witness.

138. It does not, therefore, seem to me appropriate to draw an adverse inference from the fact that Elanus did not call Dr Neupert to give evidence.

Expert evidence

139. The parties had permission to call expert evidence in the fields of (i) the law of Guernsey, (b) the law of Liechtenstein, and (c) diamond valuation.

140. In relation to the law of Guernsey, expert reports were served from Advocate Sarah Brehaut (of Walkers (Guernsey) LLP) on behalf of Qipco, and from Advocate Abel Lyall (of Mourant Ozannes (Guernsey) LLP) on behalf of Elanus. The experts also produced a joint memorandum. Before the start of the trial, the parties agreed (subject to my views) that the Guernsey law experts would not be called to give oral evidence and be cross-examined, but rather that the parties would make submissions at the trial by reference to the material identified in the experts' reports (and their exhibits). Given the measure of agreement between the experts, and that the remaining disputes between then were largely differences of interpretation of case law from England and other common law jurisdictions which the parties were content I could read and determine as if they were points of English law, and having taken into account paragraphs H3.3 and H3.4 of the Commercial Court Guide, I was content to proceed in the manner the parties had agreed.

141. In relation to the law of Liechtenstein, expert reports were served from Nicolas Reithner (of Seegar Frick & Partner AG) on behalf of Qipco, and Dr Michael Nueber (of Nueber Konzett, and who is also a Professor of Practice at the University of Liechtenstein) on behalf of Elanus. The experts produced a joint memorandum and were both called to give evidence at the trial. Both gave their evidence in a careful and professional manner.

142. In relation to diamond valuation, Qipco called Mr Donald A. Palmieri and Elanus called Dr Richard Taylor. Although the evidence was useful in providing some background to diamond valuation in a general sense, there were issues with the way in which each of them had approached their valuations in their reports. By the time of closing submissions, the relevance of this evidence had, in any event, greatly diminished. Permission had been granted for the evidence in relation to Qipco's alternative claim for damages. However, it became clear at the trial, and in particular in closing submissions, that if Qipco was to succeed on liability both parties accepted that the appropriate order would be one for specific performance, rather than damages. In its closing submissions Qipco did not advance its alternative claim for damages at all. I will return to this below. As a result, given that neither party ultimately sought determinations based upon the valuations provided, I will not go into detail here in relation to the opposing valuations, the valuation processes adopted by each of the experts or the problems each process presented.

Disclosure

143. There was a concerted criticism in Qipco's submissions of the approach that had been taken to disclosure on the Elanus side of the case. Much of this complaint was that some of the contemporary documents (including some of the important communications involving HBS) were only provided shortly before, or even during the course of, the trial from HBS (who was separately represented by Kingsley Napley for this purpose). I will not rehearse in detail the history of the attempts Qipco had taken to get documents from, in particular, HBS (which had included a non-party disclosure application) or the length of time it then took for documents from HBS to be produced. Ultimately, they were produced and I have been able to take them into account in this judgment.

144. Complaints persisted in Qipco's closing submissions that there had not been full disclosure relating to the operation of the Foundation, or from Dr Neupert, that documents provided by Sheikha Sara might not be complete, and that the lateness of some of the disclosure from the family had prevented proper checking that complete disclosure had in fact been given. However:

i) These complaints have to be seen against the background of the disclosure parameters that the parties agreed in the Disclosure Review Document, and the requests that were made (and when those requests were made).

ii) In relation to how decisions of the Foundation were made, the agreed disclosure issue in the DRD was:

> "Who acted and made decisions on behalf of any of Elanus, Rysaffe, the Foundation and the Family between 1 May 2014 and 5 May 2020 in matters relating to Elanus."

There was no application to amend that issue for disclosure. There can be no complaint, therefore, that documents were not disclosed relating to decision-making by the Foundation other than in matters relating to Elanus. There was not a disclosure issue that would have encompassed documents showing more generally how the Foundation was operated and its decisions taken. There was, in evidence at trial, formal documentation that had been sent on behalf of the Foundation regarding entry into the arrangements whereby the diamond was loaned to Qipco by Elanus, and regarding the sale of the Maharaja Paintings. Any other material (if there was any) relating to any Foundation decisions in earlier 2020 about the diamond is likely to have been caught by the searches of HBS's material that were ultimately carried out (given his role in relation to the Foundation). It is not, however, surprising that there were no documents emanating from or relating to decision-making by or on behalf of the Foundation in relation to the early 2020 discussions over the diamond given that the evidence otherwise demonstrated that the Foundation was not approached in relation to those discussions.

iii) Dr Neupert was asked by Farrer & Co (representing Elanus) to produce any documents or material he held relevant to the claim, and he

responded confirming that he believed Farrers were already holding all such relevant documents (which therefore would have been reviewed as part of Elanus's disclosure exercise).

iv) Sheikha Sara was not the subject of a third party disclosure application, though Qipco applied on the first day of the trial to issue a witness summons that she produce documents (which was refused for the reasons I gave at the time). However, following the exchanges in court relating to that, she agreed to undertake a search (in addition to the search she had previously carried out), and a small number of further documents were provided.

v) The complaint that some of the disclosure arrived too late to allow proper checking that full disclosure had been given must be seen against the background of the long running exchanges concerning (in particular) documents disclosed by HBS, including the fact that the process by Qipco seeking to obtain such disclosure was only pursued with any vigour relatively close to trial. I will not attempt in this judgment to give anything approaching a full account of those exchanges but note the following:

a) Elanus's section 2 of the DRD set out the custodians it had identified for disclosure purposes, which included Ms Vizia and Ms Brehaut and did not include any of HBS, Mr Raymond, Sheikha Sara or Dr Neupert. Although points had been raised in correspondence in early May 2023 about obtaining documents from others, and there was some general discussion in Qipco's skeleton argument (dated 25 May 2023) for the CMC about scope of the search, at that stage Qipco did not press the point before the court that Elanus's custodians should be any wider. It was only after disclosure had started to be given according to the parameters set out in the DRD (in January 2024) that points were pursued in relation to documents that might be held by those individuals.

b) A third party disclosure application was ultimately made against HBS, though that was not issued until 10 July 2024 and, to a great extent, that seems to have been the driving impetus behind HBS providing his documents (and those of Mr Raymond) having instructed Kingsley Napley to assist with that process. HBS agreed to search his own documents in relation to certain issues in the agreed list of issues for disclosure.

c) Whilst criticism was made of the length of time taken for HBS's documents then to be produced, explanations were given which included: the large volume of data collected; difficulties in the process because of HBS's being away during August; difficulties in threading and deduplicating WhatsApp messages; the need to translate some of the documents into English from Arabic; the need to resolve questions concerning privilege, including the extent of a limited waiver of privilege made by HBS (and in order

to deal with certain questions that had arisen during the process of review, HBS instructed (through Kingsley Napley) his own barrister (Mr Justin Higgo KC) to review some of the documents); and there was also, at one stage, an error by the company engaged by Kingsley Napley to assist with the process which had led to a delay in disclosure of 6 of the documents. There was also a continuing debate between Qipco and Kingsley Napley about certain documents, and parts of documents, said to be confidential and originally said to be irrelevant but which ultimately were agreed could be disclosed. While none of that was ideal, the period of time taken was explicable, and the explanations given by Kingsley Napley did not demonstrate any kind of deliberate obstruction of the process.

d) There was a great deal of engagement on the part of Qipco's representatives with the documents as they were being produced, including interrogation in relation to the process followed and requests for further documentation. They were clearly able to follow up points they had identified in relation to the disclosure being given.

vi) Moreover, a particular point made in this respect was that there had been no searches of telephone records on (what Qipco referred to as) "the crucial days". However, I was told that (the point having been raised by Qipco on 5 November 2024) Kingsley Napley had informed Qipco that such searches would not be possible because, on the images of the phones they had taken as part of the disclosure process, the records of telephone calls did not go back far enough.

145. Whilst, therefore, some of the disclosure may have been provided later than ideally would have been the case, that was not because of any concerted plan to obstruct the disclosure process or to avoid giving disclosure of relevant material. I do not accept any suggestion (to the extent one was made) that there remained significant gaps in the disclosure by the end of the trial. In any event, I am confident that the evidential picture is sufficiently complete that I am able to make accurate and reliable findings of fact.

Construction of the Loan Agreement

146. It is convenient first to deal with the issues that arose between the parties as to the proper construction of the Loan Agreement. I have identified these above at paragraph 121 at i)(a) and ii).

The "wish"

147. As I have set out above, the opening part of Paragraph 10.1 reads as follows (with the handwritten additions in italics):

> "10.1 Should at any time during the Loan Period (or at any time thereafter):

> 10.1.1 the Lender wish to sell the Asset; *or the Asset is transferred other than to the [Foundation];* or…"

148. The parties agreed that the trigger for the pre-emption right was the "wish", not the giving of any notice in relation to it. So it was common ground that, in order for Qipco to be able to exercise the right, there was no need for the wish to be communicated to it by Elanus (or indeed anyone else), although there was a separate obligation for Elanus to notify Qipco (which appeared both at Paragraph 7.4 and Paragraph 10.2) – it was simply the existence of the wish which mattered.

149. There was little argument about what constituted a wish within the meaning of Paragraph 10. Elanus contended in its written opening that it meant "*a settled and unconditional wish to sell*", saying it would be commercially absurd if even a fleeting or conditional view would be sufficient. Qipco accepted it had to be something Elanus wanted to happen, and that if it was not sure about it, that would not count, but said that it could be an intention formed for only a short period of time. The point about the length of time for which Elanus needed to have the wish is important in relation to the issue I have identified above as ii), and I will return to it below.

150. However, Mr Stewart (for Qipco) also suggested one had to be careful about the idea that the "wish" to sell would only count if it was unconditional. I agree with that to some extent. If, for example, Elanus wished to sell the diamond, but only on condition that the sale was not under the Paragraph 10 mechanism, that could not have the effect of depriving the "wish" (if it otherwise qualified) of contractual effect, because otherwise the pre-emption right could easily be avoided and would effectively be illusory. Similarly, if Elanus held a wish to sell the diamond only to a specific third party, it could not say that condition rendered it a non-qualifying "wish" under Paragraph 10, for the same reason. However, there is a difference between saying "I wish to sell to Mr X" in circumstances where that is a settled intention to carry out that sale – which would be a qualifying "wish" – and "I wish to sell but only if I can sell to Mr X", where the intention, if the diamond cannot be sold to Mr X, is not to sell at all – which would not be.

151. The position is similar with conditions as to price. It could not be the case, for example, if Elanus had a wish to sell only for $35m or above, to say that was a "conditional wish" falling outside Paragraph 10 and that it was therefore free to sell for $35m to a third party. Because the wish to sell to the third party (for $35m or any other price), if it was a settled wish that Elanus was going to carry into effect, would qualify as a wish to sell under Paragraph 10. However, just because Elanus says it would like to sell if it can achieve a price of $35m does not mean it has a wish to sell under Paragraph 10, because that wish is conditional upon the price being achieved, and if it cannot be Elanus does not have a wish to sell at all.

152. So, a wish to sell at whatever price might be achieved (either following a Paragraph 10 process or another sale process, such as an auction), i.e. irrespective of the price, would satisfy the requirement of a "wish to sell", even if a specific buyer had not yet been identified. But that is not the only way in

which it might be satisfied. A settled intention actually to sell to a third party at a particular price would also count. However, a more generalised intention to sell "*if the price is right*" would not be.

153. The key is not what Elanus aspires to do, or hopes for, but what it has a settled intention to do and to carry into effect. The wish has to be a wish to sell, not just a desire to explore the possibility of sale (e.g. to see what price might be achieved before reaching a final decision as to whether or not to sell). There had to be a wish to sell, which was a firmly formed and unequivocal view to sell, which Elanus was willing to carry into effect.

Whose "wish"?

154. In ***Meridien Global Funds Management Asia Ltd v Securities Commission*** [1995] 2 AC 500, Lord Hoffmann (at 506B ff.) explained the rules of attribution applying to companies. The position was summarised by the Supreme Court in ***Singularis Holdings Ltd v Daiwa Capital Markets Ltd*** [2019] UKSC 50; [2020] AC 1189 as follows (at paragraph 28):

> "Companies being fictional persons, they have of course to act through the medium of real human beings. So the issue is when the acts and intentions of real human beings are to be treated as the acts and intentions of the company. The classic exposition is to be found in the opinion of the Judicial Committee of the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, delivered by Lord Hoffmann. He identified three levels of attribution (at pp 506-507). The primary rule is contained in the company's constitution, its articles of association, which will typically say that the decisions of the shareholders or of the board of directors are to be the decision of the company on certain matters. But this will not cover the whole field of the company's decision making. For this, the ordinary rules of agency and vicarious liability, which apply to natural persons just as much as to companies, will normally supply the answer. However there will be some particular rules of law to which neither of these principles supplies the answer. The question is not then one of metaphysics but of construction of the particular rule in question."

155. In construing any such rule (which is intended to apply to a company), the question is (as framed in ***Meridien*** at 507F):

> "…given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc. of the company?"

156. There was a dispute between the parties as to what was meant, as a matter of construction of Paragraph 10.1.1 of the Loan Agreement, by "the Lender" which was to have the wish. Qipco argued that the reference to "the Lender" should

encompass the Foundation, whereas Elanus argued that it should be limited to the directors of Elanus. I will deal with each of those arguments in turn.

157. Qipco, although accepting that the pre-emption right would be triggered if Elanus wished to sell the asset, contended that the parties would have expected Paragraph 10 to be triggered by the wish of the Foundation and whoever was in control of it at the time. Based on this, Qipco contended that as a matter of construction the wish of the Foundation was what mattered for the purpose of Paragraph 10. In support of this, it was pointed out that at the time the Loan Agreement was entered into, it was known to all parties that Sheikh Saoud had given the diamond to the Foundation, that he was the sole beneficiary of the Foundation and that when it came to any potential sale of the diamond his view would have been the only one that mattered. It was also said that the factual matrix involved a common understanding that decisions of this nature would remain for the family and the Foundation, and not Elanus's directors, to make.

158. However, those points do not support the suggestion that, as a matter of construction, "the Lender" in Paragraph 10.1.1 should be read as "the Foundation". The words of Paragraph 10.1.1 are clear – "*Should … the Lender wish to sell the Asset*" – and "the Lender" was (as made clear on page 1) Elanus. The "Lender" was used throughout the Loan Agreement to refer to Elanus, and there was no suggestion that it meant, or encompassed, the Foundation anywhere else where it was used. Moreover, the Foundation was itself (in the handwritten amendments made to Paragraph 10.1.1) identified and defined in the Loan Agreement such that if the parties had intended to refer to the Foundation as the entity whose "wish" mattered for the purpose of Paragraph 10.1.1 it would have been straightforward to make that clear. The Loan Agreement was drawn up by lawyers, and Pinsent Masons (for Qipco) understood the details of the structure on the Elanus/Foundation side, and there is no reason to consider that when the word "Lender" was used in Paragraph 10.1.1, a reference to include "the Foundation" was intended.

159. The points made about Sheikh Saoud's role at the outset do not support Qipco's position. The structure had been established in order to separate Sheikh Saoud and the Foundation from the diamond, and reading "the Lender" as the Foundation for this purpose would have, in part, subverted that. Also, the parties would have anticipated that if there was a wish to sell, even if that originated with Sheikh Saoud (or the Foundation), it would have to be conveyed to Elanus's directors who would then implement matters, not anticipating any wish to sell could amount to anything without the involvement of the Elanus directors. So even if it was Sheikh Saoud (or the Foundation) that started the process, it would have been considered that any wish ultimately had to be that of Elanus to matter.

160. One other point made by Qipco in support of its construction was to note that, pursuant to Paragraph 13.3 of the Loan Agreement, Qipco's pre-emption right ceased to apply if the diamond was transferred to the Foundation, which (said Qipco) would give the Foundation a loophole should it wish to sell the diamond without being subject to the pre-emption provisions – it could give instructions for Elanus to have the diamond returned under Paragraph 13, and then to transfer the diamond to the Foundation, at which point the Foundation could do

what it wished with it (include selling it). Qipco suggested that loophole could be closed by reading "the Lender" as "the Foundation" in Paragraph 10.1.1.

161. However, subject to the fact the Elanus directors would have to agree to the transfer, that was the agreement that the parties had made. They had agreed that Elanus could call for return of the diamond from Qipco without cause (on 18 months' notice), and that the pre-emption right would cease if the diamond was transferred to the Foundation. To describe the situation that would then result as a "loophole" does not assist – these were the contours of the agreement that had been made.

162. Ultimately, the language of the Loan Agreement clearly refers to Elanus as "the Lender", and there is no reason to read that any more widely or differently in the context of Paragraph 10.1.1.

163. Elanus contended that, on a true construction of Paragraph 10.1.1, a wish of Elanus was *only* constituted by a resolution or decision of the directors of Elanus. In support of that contention, it referred to the fact that "the Lender" meant Elanus, as set out on page 1 of the Loan Agreement; that the shareholding structure had been put in place specifically for this transaction, and to create distance between the family and the Foundation and the diamond, as Qipco was aware given that it had requested the structure and had been involved in its setting up; that there was therefore an objective intention that the separate personality of Elanus, Rysaffe, the Foundation and the family was a fundamental feature of the transaction; that Elanus was a Guernsey company and that under Guernsey law the decision to sell the diamond would be one for the directors of Elanus alone, such that the parties could not have intended anything else; that other parts of the pre-emption mechanism only made sense if the wish was that of Elanus, and that it was inherently improbable that the parties would have intended that the wish could be found in the minds of a long (and undefined) list of other people.

164. Elanus's argument amounts to saying that Paragraph 10 intended to exclude the normal rules of attribution that would otherwise apply to determine whose state of mind was relevant when looking for Elanus's wish. The points advanced do not support that. Insofar as Elanus's arguments pointed out that "the Lender" meant Elanus and Paragraph 10 only made sense on that basis, that does not support saying that "the Lender" here meant only "the directors of Elanus" rather than "Elanus". The fact that the shareholding structure was put in place as it was means that it may be more difficult than it otherwise might have been to attribute a certain individual's state of mind to Elanus, but it does not exclude it. The point made about Guernsey law assumed Elanus was right in its contentions about the content of Guernsey law on this point (which was disputed) but also did not have the effect contended for – if Elanus was right in its contention about Guernsey law, there would have been no need to read "the Lender" as "the directors of Elanus" because that would have been the effect of Guernsey law anyway; if Elanus was wrong about it, there is nothing to suggest the parties intended to subvert that point of Guernsey law in their drafting. Moreover, Elanus's argument left no room for a situation where a sale of the diamond might be effected without the directors themselves having a positive "wish" – for example, if a third party had been clothed with the apparent

authority to sell on behalf of Elanus. There is nothing to suggest that the Paragraph 10 pre-emption mechanism was not intended to apply in those circumstances. Accordingly, I see no reason to read "the Lender" in Paragraph 10.1.1 as "the directors of Elanus" rather than as "Elanus".

165. The result is that "the Lender" in Paragraph 10.1.1 is not to be read as widely as Qipco contended (so that it necessarily encompasses the Foundation) or as narrowly as contended by Elanus (to refer only to the directors of Elanus).

166. The inquiry is whether Elanus had a wish to sell, in the sense I have described above i.e. a firmly formed and unequivocal view to sell, which Elanus was willing to carry into effect. As a result, the state of mind in question is to be found in the individuals or entities which are capable of carrying a sale of the diamond into effect. The relevant state of mind is therefore to be found by application of the primary rules of attribution (as described in ***Singularis***) and through application of the ordinary rules of agency. If, for example, a third party had authority from Elanus (whether actual or ostensible) to sell the diamond, or if Elanus's shareholder was able to bind Elanus to a sale of the diamond (through the application of the *Duomatic* principle), that party's state of mind must count for the purposes of Paragraph 10, otherwise a sale could be effected that would bind Elanus without triggering the pre-emption right. However, on its proper construction, Paragraph 10 does not supply a special rule of attribution that requires either a narrower, or a wider, view of whose state of mind will count as that of Elanus for this purpose.

Did Paragraph 10.1 require a continuing wish / could the wish be withdrawn?

167. As I have noted above, it was common ground between the parties that the pre-emption right was not triggered by the giving of any notice, but by the "wish" arising.[9] Against that background, it seems slightly awkward to talk of a "wish" being revoked or withdrawn, and it may sit more easily to consider whether the wish needs to remain in existence, or rather whether it is sufficient that there was once a wish even if it is no longer held. Either way, the same considerations arise.

168. Qipco contended that it was "in no way relevant" whether Elanus wished to sell the diamond by the time of the April or July Notices. Its case was that, under Paragraph 10 of the Loan Agreement, once the relevant wish had been formed, then Qipco had the right to purchase the diamond by giving written notice (within 6 months of being made aware of it), even if the wish subsequently (before that notice was given) ceased. It said the wish could not be "withdrawn", and it did not matter if the wish was formed or held for only a short period of time, or even if the wish was no longer held by the time that Qipco became aware of it.

169. Elanus contended that the wish could be withdrawn, or to put it another way that it needed to be held at the time that Qipco gave its notice exercising its right. It noted that the purpose of pre-emption is generally to ensure the property

[9] Neither party contended that it arose only on Qipco becoming aware of the matters set out in Paragraphs 10.1.1 to 10.1.3.

is not sold to a third party without the contracting party first having had the opportunity to acquire it; it is generally not to require a forced sale when the desire to sell is no longer present. It relied upon the case of ***Lyle & Scott Ltd v Scott's Trustees*** [1959] AC 763 in support of its case, suggesting it was authority that a pre-emption notice may be withdrawn at any time before the notified party serves notice to purchase, and that the same analysis ought to be applied here (where the trigger was not a notice, but the formation of a wish).

170. In relation to ***Lyle & Scott***, Qipco noted that the issue whether a notice (or wish) could be withdrawn was a question of construction of the contract in question, and that citation of cases relating to other contracts did not assist, because every document must be construed in accordance with its particular terms and unique setting (relying upon ***Minera Law Bambas v Glencore*** [2019] EWCA Civ 972 at paragraph 28 and ***Scotto v Petch*** [2001] BCC 899 at 897 and 901 (Nourse LJ, paragraphs 2 and 19) in the context of a pre-emption right). In any event, it sought to distinguish ***Lyle & Scott*** by reference to the different context and terms in issue.

171. In considering these arguments, it is useful to be reminded of the relevant term, which provides:

> "10.1 Should at any time during the Loan Period (or at any time thereafter): …
>
> 10.1.1 the Lender wish to sell the Asset; …
>
> the Borrower shall be entitled to purchase the Asset by giving written notice to the Lender within 6 months of being made aware of the occurrence of any of the events listed at paragraphs 10.1.1 to 10.1.3 above."

172. As Qipco pointed out, there is no express "right of revocation" or "withdrawal" of the wish, however that seems to me to be the wrong place in which to start. A wish is a state of mind, which through the rules of attribution can be found in a company, but nonetheless that is what it is. It is not like a notice, the giving of which is a one-off event, like the other triggers for the pre-emption provision that are listed under Paragraph 10.1 (or, indeed, the events listed in Paragraph 7.1 to which cross-reference is made in Paragraph 10). Despite the use of the word "events" seeking to encompass everything listed in Paragraphs 10.1.1-10.1.3 (in the phrase "*being made aware of the occurrence of any of the events…*") it is difficult to describe a "wish" as an event. Those words are simply a general description intended to encompass the matters in the list, such that in respect of the first part of Paragraph 10.1.1 what is meant is that Qipco is entitled to purchase the diamond by giving written notice to Elanus within 6 months of being made aware that Elanus wishes to sell the diamond.

173. Those words do not, however, mean that the notice can be served just because there once was a wish which is no longer held. The key part of the clause is that, in order for the right to purchase to arise, Elanus must wish to sell the diamond. The "wish" is (unlike the other triggers in Paragraph 10.1) not a one-off event, but a state of mind that has no effect (because nothing will happen, such as a

sale) if it does not continue in existence. So it is not sufficient that Elanus once wished to sell, it is necessary that it does wish (at the time the notice is served) to sell.

174. Qipco's construction (where there is no ability to "withdraw" a wish and it is sufficient if it exists for just one moment in time) would lead to odd and uncommercial results. It would mean, for example, that if Elanus wished to sell the diamond, but then changed its mind and decided not to do so an hour later, it would be locked into the mandatory pre-emption process (if Qipco chose to exercise it) even if its change of mind had taken place before Qipco had learnt of the short-lived wish. The parties cannot have intended that consequence.

175. There may be situations where Elanus wished to sell, communicated that wish to Qipco, and then Qipco acted in such a way that it would be unfair to Qipco for Elanus to back track and change its mind. However, such a situation would be adequately dealt with by the principles of estoppel. There was no argument from Qipco that any such situation had arisen in this case.

176. The purpose of Paragraph 10, insofar as it deals with a wish to sell, is to ensure that Elanus does not sell the diamond to another party without giving Qipco first refusal according to the agreed mechanism. Elanus's construction entirely gives effect to that purpose. Qipco's construction would go beyond it, forcing Elanus to sell to Qipco under the clause even when it did not want to sell at all (just because it had once, for a moment in time, wished to sell). There is no obvious reason why the parties would have intended that to be the case.

177. The reference in the opening words of Paragraph 10.1 to "*at any time during the Loan Period (or at any time thereafter)*" does not suggest that the "wish" needs to be held only for an instant of time. They say nothing about the duration of the wish. Rather, they make clear that the pre-emption regime applies immediately the Loan Period commences and extends throughout its duration and thereafter (albeit subject to the other terms of the Loan Agreement).

178. The words and the commercial sense of Paragraph 10.1, therefore, require the wish to continue to be held at the time when the pre-emption right was exercised by Qipco. I should add that I agree with Qipco that there is limited, if any, assistance to be derived from authorities dealing with the interpretation of differently worded clauses, particularly where they arise in different contexts (such as the pre-emption clauses that appeared in the companies' articles of association in ***Lyle & Scott*** and ***Scotto***). Still less do I consider there is a helpful analogy to be drawn with the statutory right of pre-emption under section 561 of the Companies Act 2006 (relating to the allotment of equity securities in a company) as argued by Qipco.

179. Accordingly, I hold that on a proper construction of Paragraph 10, in order for the pre-emption right to be exercised by Qipco by service of written notice, Elanus's wish to sell needed to remain at the time of service of that notice by Qipco or, to put it another way, the wish could be "withdrawn" before the service of Qipco's notice.

Did HBS have a wish to sell the diamond?

180. Qipco's primary case that Elanus had a wish to sell the diamond started with the contention that HBS wished to sell it, and then an argument that sought to attribute that wish to Elanus. I will first deal with the factual allegation that HBS had a wish (within the meaning of Paragraph 10 of the Loan Agreement) to sell the diamond.

181. It is clear from the evidence that HBS wanted to sell the diamond, at least if he considered that the price was right. In its closing submissions, Elanus invited the court to find that HBS was interested in exploring a sale of the diamond, and that he personally would have wished to sell if a sufficiently high price came out of the valuation process. The issue is how far that went, and whether his state of mind amounted to a wish to sell within the meaning of Paragraph 10 of the Loan Agreement. For the reasons I set out below, I find he did not have such a wish.

182. It is clear that HBS understood, in early February 2020, that the Loan Agreement constrained Elanus from freely selling the diamond, even if only because he knew it was on a 20 year loan to Qipco. However, I accept that he had never read the Loan Agreement, and he did not understand the detailed terms of the pre-emption provision. He had been urging Mr Raymond to obtain a copy of the Loan Agreement and seek legal advice on it, so he could take steps towards a potential sale. He must also have discussed potential sale of the diamond with Mr Robinson of Christie's at their meeting in Doha on 4 February 2020, given Mr Robinson's internal note that Christie's may have the opportunity to sell the diamond over the following 12 months but that HBS first needed help with "*extricating him from his agreement with Sh Hamad (Qipco) first*". That note is consistent with HBS understanding that there was some form of restraint on a free sale under the Loan Agreement, but not what it was or anything else about it.

183. Mr Raymond and HBS were in close contact about it over the course of the week or so leading up to the 6 February letter. This included HBS's messages to Mr Raymond on 25 January (saying he wanted the contract "*by Monday and I wanted our lawyers to read it*" and "*Also I want our Swiss lawyer openion [sic] on the rights of sale*") and on 27 January (instructing Mr Raymond to send the contract to "*our lawyers*" saying "*I want an answer tonight please*" on "*how we can proceed with the selling*") and his voice notes to Mr Raymond of the same day in which he said:

> "Just get back to me ASAP on the rights for sale and how can we enforce it as soon as possible, 'cause I'd like to go ahead with this."

And

> "…when we do [unclear] enforce the, em the sale, I'd like Dieter to do it, not our English lawyers. Just let them come back to us of what the best way, what the best way is and then we'll go from there."

184. These messages showed HBS as keen to sell, though one has to be slightly careful in over-reading the transcripts of the voice notes and in particular what HBS meant by the phrase "enforce the sale". He was not a lawyer, and had little (or no) understanding of the mechanism that would arise under Paragraph 10 of the Loan Agreement or what Elanus's rights were in respect of its ability to sell the diamond. He certainly wanted to get going, but the messages themselves do not say or suggest what precisely he wanted to get going with. They certainly do not say that he wanted to implement the process under Paragraph 10. In fact, the end of the second voice-note shows that he was still in the territory of wanting to find out what the best way was to go about a sale. A similar point can be made in respect of Mr Raymond's email to Farrers (after he had sent the (draft) agreement to Farrers and having received the above voice notes) saying there was a further point:

> "It is to do with "ability to enforce sale immediatly" [sic] can this be done? and are there any restrictions as to how."

185. HBS received advice from Dr Neupert (albeit based on an old draft of the Loan Agreement) by email on 29 January (though he says he did not read it, which would be consistent with his general practice), and Mr Raymond sought, and obtained, advice from Farrer & Co, which he received from Mr Carleton on 31 January, before confirming to HBS: "*I had some good direction from James so I know exactly how we're going to approach and the process we're gonna do with the Idol's Eye…*". However, quite how much Mr Raymond did understand and what he knew about the process remained unclear. He did not demonstrate in any contemporaneous documents or messages any handle on the legal mechanism or the detail of the Loan Agreement or the structure that was in place to hold the diamond. There is no record of his asking any questions of Mr Carleton or Dr Neupert about the advice they had given. He seems to have had some confidence that he could muddle along acting more or less as a postbox between HBS and others (including Farrers and Dr Neupert) in relation to this, but there was nothing in the documents which suggested he saw his role as materially greater than that. The words he used in the message to HBS of 29 January quoted above were more likely those of a young and inexperienced assistant, keen to give the impression he had everything under control, than of someone who actually fully understood the legal situation. Moreover, there was nothing to suggest that he discussed whatever he had learned about the process in any degree of detail with HBS.

186. In any event, one could forgive Mr Raymond for not picking up from the email Mr Carleton sent to him on 28 January 2020 that a "wish to sell" would potentially kick-off a process that would lock Elanus into a sale at a price to be determined under the agreement. The email made it clear that Qipco had a right of pre-emption, meaning that should Elanus wish to sell the diamond it had to be offered first for sale to Qipco, and that the price for such a sale to Qipco would be determined by the particular mechanism (which Mr Carleton set out). However, the email did not state that the price determination mechanism would only follow the start of a process from which Elanus could not resile or that Elanus would otherwise be locked-in once it had started.

187. Nor did Dr Neupert's email of 29 January 2020 suggest that would be a consequence of starting such a process. He explained that Elanus would have to inform Qipco of a wish to sell, which would start "*the procedure of calculating the average "mid estimate" value*", but not that Elanus would then have no choice but to sell to Qipco at the price thus determined. (This email was addressed to both Mr Raymond and HBS, though HBS said, and I accept, he did not read it).

188. The understanding of the position that HBS had, therefore, was essentially unchanged by the exchanges and engagement that Mr Raymond had had with Mr Carleton and Dr Neupert. HBS was dependent on what Mr Raymond told him about the process, and Mr Raymond said little more than that he understood the process and had it in hand. HBS understood (as he had done previously) that there was a process of obtaining valuations, which would involve engaging with Qipco, but not that starting such a process would commit anyone to anything. In his mind, the process might determine what the price for any sale would be, and he would then be able to take that price back to his family so as to decide whether or not to sell.

189. There is no reason to doubt that, when Mr Raymond emailed Dr Neupert on 4 February 2020 requesting a "*formal letter*" telling Qipco "*that we wish to sell the Idol's Eye indie [sic] course*", he had been instructed to do so by HBS at least in general terms (though it is unlikely that the precise wording Mr Raymond used had been dictated by HBS). Not only were Mr Raymond and HBS in touch about this generally, but it is inconceivable given the nature of their relationship that Mr Raymond would have sent such an instruction to Dr Neupert without having been asked by HBS to do so. Moreover, the email ended asking for Dr Neupert to act ASAP "*as the Sheikh requests this urgently*", confirming this request was made on behalf of HBS (and, as appears from Dr Neupert's email to Sheikha Sara much later, on 4 April 2020, he clearly thought he had instructions from HBS to send the letter). Mr Raymond was not entirely on some sort of frolic of his own.

190. However, none of that suggests that Mr Raymond, or HBS, had an understanding of what the process was or that it would potentially involve locking Elanus into a process where it was bound to sell the diamond to Qipco at a price to be determined by the contractually prescribed mechanism. There is nothing in any of the exchanges around this time to suggest that HBS or Mr Raymond had such an understanding. Mr Raymond had never explained to HBS that sending a formal letter to Qipco expressing a wish to sell the diamond might result in a compulsory sale process, no doubt because Mr Raymond himself did not understand the position.

191. HBS was keen to sell, and knew that a process needed to be followed with Qipco in order for that to happen. He understood that involved obtaining auction estimates to arrive at a value, but did not understand that the process would be a mandatory one from which Elanus could not exit once it had commenced. His understanding, such as it was, involved the obtaining of estimates to arrive at a price, following which the parties would each consider whether that price suited them. Further negotiation may have followed. It was clear that HBS had not got much further than that, or considered what then would happen if no price could

be arrived at with Qipco (whether e.g. Elanus would then have been free to sell elsewhere).

192. HBS repeated during his oral evidence that all he had intended to do was to explore the value of the diamond, and not definitely to sell it (at least not until after having explored the value and, if he thought he could get a sufficiently high price, then discussed it with his family). He knew that, at least in the first instance, such an exploration of value had to be through engagement with Qipco and the obtaining of auction estimates. But that did not mean that he wanted to start a process that would commit Elanus to a sale to Qipco at whatever price came out of that process.

193. The terms of the 6 February letter are themselves relevant. Elanus accepted in its closing submissions that Qipco, on receiving the 6 February letter may have had the impression that the family wished to sell the diamond, and that they wished to do so through the Paragraph 10 mechanism. However, given the common ground that the trigger for pre-emption was not any notice, but rather the existence of the relevant "wish", the letter itself is not sufficient. I deal below (in the section dealing with ostensible authority) with what assistance the 6 February letter provides in relation to the parties on whose behalf it might appear to have been sent, but even in relation to addressing the issue whether there was a qualifying "wish" (held by HBS) one cannot rely very heavily on the 6 February letter. As I explain below (see paragraph 233(ii)), it is clear Dr Neupert did on occasions make mistakes, and so it cannot necessarily be assumed that the statements he made in the 6 February letter were correct reflections of the position.[10] He had been asked to provide a draft of the letter before sending it, which he had failed to do. Moreover, it is readily apparent from the course of events set out above, including the fact that the channel of communication between HBS and Dr Neupert was Mr Raymond, who did not properly understand matters and was out of his depth, how a letter could have been sent by Dr Neupert that did not in fact reflect the correct position.

194. The conduct of HBS and Mr Raymond after the 6 February letter had been sent does not shed further light. Mr Raymond's reaction to receiving the 6 February letter (in copy) was to forward it to Farrer & Co, asking Mr Carleton if he had any thoughts. HBS did not read it. He assumed that a process had begun for the exchange of valuations, as part of exploring whether a sale to Qipco was on the cards, but not that a mandatory sale process had commenced. Nothing he did was inconsistent with that.

195. Similarly, the fact that Dr Neupert and Mr Carleton appear to have considered that the Paragraph 10 right had been triggered by the 6 February letter does not assist in relation to ascertaining what HBS's views were. They were receiving instructions from HBS through Mr Raymond, and as I have noted that was not a channel that would have been particularly reliable in terms of communicating

[10] See also the exchange between Dr Neupert and Sheikha Sara on 8 April 2020, referred to at paragraph 99 above, where Sheikha Sara appears to have had to correct Dr Neupert's statement to Mr Hart that "without prejudice" discussions might continue after normality has returned to the markets if Qipco still was interested in purchasing the diamond, with Sheikha Sara saying to Dr Neupert "*The family are not willing to make a sale in the future either*."

the nuance of a legal position such as this. They also both (in particular Mr Carleton) appear to have been proceeding on the basis that it was the notice, not the existence of the "wish" that triggered the process (contrary to what is common ground between the parties now). Moreover, Mr Carleton had been told by Mr Raymond that Dr Neupert "*speaks for Elanus*", when that was not in fact the case.

196. Moreover, whilst Qipco relied upon the voice note HBS left for his sister, Sheikha Sara, on 20 April 2020, seeking to persuade her of the merit of a sale at $10m, that does not take things any further. In that message, he explained why he thought the Family should sell the diamond even for $10m saying (among other things) "*I do believe it's not a bad deal*" and explaining his thinking by reference to the anticipated return on investing that amount in property would be greater than the increase in value in the diamond over the same period. However, by this time, Sheikha Sara had learnt of the 6 February letter, and Qipco had contended that there could be no backing out by Elanus. The April notice had by now been sent. Thus, HBS was making these comments against the irritation (perhaps the fury) of his sister (and mother) at the situation they saw him as having created, and against the background that it looked likely the family would have to dig in for a fight if they did not want to go ahead with a sale to Qipco on the basis Qipco was asserting. In those circumstances, HBS was seeking to suggest avoiding the upcoming conflict on the basis that $10m was perhaps not so bad after all. But it does not go further than that, and does not suggest he had wished (within the meaning of Paragraph 10) to sell the diamond at an earlier stage or that he thought, as at 20 April 2020, that he had committed to a mandatory sale process under Paragraph 10.

197. In addition, it is inherently unlikely that HBS would have sought to commit to a process, on or about 6 February 2020, to sell the diamond via the Paragraph 10 mechanism in circumstances where:

i) He had not discussed selling the diamond with any other member of his family. As I set out in further detail below, neither of his sisters nor his mother, Sheikha Amna, knew he was contemplating a sale of the diamond, and he had not discussed it with them either in general terms or specifically by reference to Paragraph 10 of the Loan Agreement. Although he was keen to sell the diamond, he knew he would have to get his mother and sisters on board before he could commit to anything. He would not have consciously committed to sell without involving them and getting their agreement to his proposed course of action.

ii) HBS had no knowledge of any floor in the price determination mechanism in Paragraph 10 of the Loan Agreement. (The draft agreement on which the advice provided by Farrers and by Dr Neupert was premised was a version that did not contain the $10m floor in the pricing mechanism, so even if HBS had, therefore, contrary to my findings above, had some knowledge of the mechanism based on the draft that had been sent by Dr Neupert at the end of January 2020 and/or the advice given by Farrers or Dr Neupert shortly thereafter, he would not have known there was a minimum sale price to Qipco). He would therefore have been proceeding on the basis that the price would be set

only by reference to the two auction estimates. It is inherently unlikely he would have committed to a sale process in those circumstances, in particular where he had not sought to obtain any form of formal valuation from an auction house in advance of starting such a process.

198. It is right, as suggested by Qipco, that HBS might have thought that, if the diamond was offered for sale, Qipco would not have wanted, or been able, to purchase it. This would be consistent with Dr Neupert's email much later, on 20 April 2020, where he said "…*the Family was under the impression that QIPCO would not be able to raise the required funds for the purchase of the Idol's Eye…*", but I do not consider that would have been sufficient for HBS to commit to a sale process from his side, in particular without having consulted his family or without any certainty over where the price might end up. It would have been far too much of a gamble for him to take, and there is nothing to suggest he would have been prepared to put himself (and his family) in that position.

199. The fact that HBS did not consider he was committing to a sale process shows that he considered he had maintained the ability not to sell the diamond to Qipco, such that the process he thought he had started was one that might identify a price at which a sale might be completed (if the parties agreed) or from which negotiations might take place, or which might lead to nothing in terms of a sale. He considered he could walk away from it.

200. To summarise, Elanus was right to say that HBS was interested in exploring a sale of the diamond, and that he personally would have wished to sell if a sufficiently high price came out of the valuation process. But he did not want to sell at any price, nor did he want to execute a particular sale that he already had in mind. He had no more than a generalised intention to sell if the price was right, which is not sufficient to trigger the Paragraph 10 process. To put it another way, although HBS was keen to explore how a sale could be effected and what price could be achieved, he had not reached a final decision definitely to sell, and he did not have a settled intention to carry a sale into effect. HBS did not, therefore, "wish" to sell the diamond within the meaning of Paragraph 10 of the Loan Agreement.

Did other family members have a wish to sell the diamond?

201. Whatever the intention or wish of HBS in the period February to April 2020, it is very clear that none of the other members of his family shared any wish to sell the diamond. In their evidence:

i) Sheikha Sara said that until around 25 March 2020, HBS had said nothing to her, her mother, or her sister, about the 6 February letter and she did not know at that time that HBS even wanted to explore the possibility of selling the diamond.

ii) Sheikha Amna's evidence was that she had learned about the suggestion of a sale from Sheikha Sara, at which point she was very angry, especially with HBS. She said the family had never discussed selling the diamond.

iii) Sheikha Moza thought she first discussed the current issues relating to the diamond at the stage when the lawyers became involved, at which point she agreed with her mother's position.

202. As I have noted above, each of them was a credible and truthful witness. Indeed, there was no sustained attack on their credibility in Qipco's written closing, where the focus moved to the suggestion (which I return to below) that HBS was trusted by members of the family to deal with assets including the diamond.

203. The only family member who Qipco even suggested might have had any involvement in HBS's considerations about a sale of the diamond was Sheikha Sara. However, there was no evidence that she was involved at all before late March 2020. For example, the fact that Sheikha Sara knew that HBS was meeting Mr Robinson in Doha on 4 February 2020 does not suggest that she knew HBS was even discussing (let alone contemplating a sale of) the diamond. The purpose of the meeting between HBS and Mr Robinson on 4 February was to discuss the proposed sale of part of the Ashleck Collection. That was something that the rest of the family knew about and approved of. It was entirely unsurprising to Sheikha Sara that HBS was meeting Mr Robinson. Indeed, it is not even clear that HBS would have mentioned the meeting to Sheikha Sara had it not been for the fact that Sheikha Sara had messaged him to ask HBS to pick up her son from football, which HBS said he could not do as he was meeting Mr Robinson "*regarding our sales*", meaning (and being understood as) the sales from the Ashleck Collection. As it turned out, there was also a discussion about the diamond as part of that meeting, but that does not suggest that Sheikha Sara knew about it either before or after it took place.

204. There is no basis for any suggestion that Sheikha Sara consented to the 6 February letter being sent, or wished in early February 2020 for the diamond to be sold, or even knew that a sale was being proposed to Qipco. There is no document to or from Sheikha Sara regarding the diamond in January, February or the first half of March 2020. The earliest mention is the reference in the postscript to Dr Neupert's email of 17 March 2020 (which postscript did not alert Sheikha Sara to any discussion about potential sale) and the first reference she noticed was the Saffery email of 25 March 2020 which Dr Neupert forwarded on to her with additional comment. Moreover, it is not just the absence of documentation that is telling, but also the content of her communications after she had discovered what was going on. Examples include: her email to Dr Neupert on 3 April stating: "*The family has absolutely no intention to sell*"; her first voice note to Mr Raymond on 7 April 2020 asking to be put in touch with the English lawyers because HBS "*got me into mess that I need to get myself out of*", consistent with her not having been any part of the process that led to "*the mess*"; and her later voice note to Mr Raymond on 7 April 2020[11] saying:

[11] It was not suggested to Sheikha Sara in cross-examination that what she had said in this voice note was wrong; in fact this voice note was not put to her at all in cross-examination.

> "When Hamad told them to get a valuation or an estimate he did it without my consent, my sister's consent, or my mother's consent …".

205. Qipco also sought to rely on Dr Neupert's emails at the end of March and in April saying, effectively, that the family had changed its mind, and (on 5 May) seeking to distance Elanus from the 6 February letter, rather than saying immediately that the family had never had any wish to sell. However, there is limited value in conducting that sort of inquiry in circumstances where there is clear and cogent direct evidence that the other family members did not even know about the 6 February letter or the communications HBS and Mr Raymond had been having with Dr Neupert leading up to it, let alone agree to any wish to sell. Moreover, it is easy to see why Dr Neupert's first attempts to reverse out of his 6 February letter were as they were. They did not require him to air the internal strife that had broken out once Sheikha Sara had realised the situation that had arisen, and they did not require him to confront or acknowledge his own errors and missteps (e.g. having not checked before sending the 6 February letter whether the message from Mr Raymond had been on behalf of HBS alone rather than the family, or allowed a draft to be checked before it was sent, or not ensured the Foundation's position had been properly formulated, or spoken at all to the Elanus directors about it). He was looking for a quick way out of things, including his alighting on the idea of *force majeure*. Also, the thinking at the time (at least on the part of Mr Carleton from Farrer & Co) seems to have been that it was the "notice" that was the trigger for pre-emption, rather than the "wish" arising (as is now the agreed position between the parties). It cannot be inferred from these *ex post facto* communications that the family beyond HBS had agreed to the sending of the 6 February letter (or had had a wish to sell the diamond).

206. In its oral closing submissions, Qipco sought to place reliance on Sheikha Sara's email to Dr Neupert of 31 March 2020 responding to his question whether to exercise *force majeure*, where she said "*yes*", "*[a]s we no longer intend to sell.*" This was not put to her when she was cross-examined, so it is difficult for Qipco to challenge, using this document, her evidence that she never had a wish to sell the diamond. But in any event, the inference that Sheikha Sara had previously had a wish to sell, but had changed her mind, cannot be drawn from this email. This exchange took place at a stage when Sheikha Sara had not yet investigated or understood the circumstances in which the 6 February letter had come to be sent, or any aspect of the Paragraph 10 process, but what she was hearing from Dr Neupert was that a process had been started and that Qipco was saying that "*the intention of selling cannot be retracted*". It may be she understood from the few communications she had seen that the family had become fixed, somehow, with an intention that had been expressed to sell (whether by Dr Neupert or by HBS), even though she knew she had not said anything about it. She may therefore have thought that was the position she had now to start from. That is, however, inevitably speculation given that she was never asked about this email. However, in light of the evidence she did give about her knowledge and state of mind, both in writing and orally, it seems to me most likely that the view she was seeking to communicate in this email was that, whatever Dr Neupert might have understood about the family's intention from his

communications with her brother and Mr Raymond, the position was that the family did not intend to sell.

207. The position, therefore, is that even if HBS did have a wish to sell the diamond in late January to early March 2020, that was not shared by (or even communicated to) any other member of his family.

Did Elanus have a wish to sell under Paragraph 10 of the Loan Agreement?

208. Qipco's case on this was advanced in three ways, as it described them in its written closing submissions:

i) Attribution via HBS. This took as its starting point HBS's alleged wish to sell.

ii) Ostensible authority, on the basis of what Dr Neupert had said in the 6 February letter (and possibly also based upon HBS).

iii) Ratification by the Elanus directors.

I will deal with each of those in turn.

Attribution via HBS

209. As noted above, this argument took as its starting point the allegation that HBS had a wish to sell within the meaning of Paragraph 10 of the Loan Agreement. As I have held above, HBS did not have such a wish. This argument therefore fails at the outset. I will, however, briefly outline the argument and explain why, even if HBS had himself held such a wish, it would not have been attributed to Elanus.

210. Qipco's argument on this issue proceeded in a series of steps. First, it was said that HBS's wish to sell the diamond could be attributed to each of the members of the family (Sheikha Amna, Sheikha Sara and Sheikha Moza) because he had actual authority to act on their behalf in relation to the diamond including its sale. Second, it was said that the wish of the family (as thus attributed to them) could in turn be attributed to the Foundation (although the basis for this was not entirely clear); it was also advanced that the wish of HBS alone could be attributed to the Foundation. Third, the wish of the Foundation could in turn be attributed to Elanus, as the Foundation was the sole beneficial shareholder in Elanus, through the operation of what is often referred to as the *Duomatic* principle (as it applies under the law of Guernsey).

Attribution from HBS to the other members of the family

211. It was contended by Qipco that HBS played a key role in managing the family's assets and was trusted by the other members of the family to deal with such assets. Mr Stewart explained in his oral closing submissions that this could take either of two forms: (i) a specific actual authority whereby HBS was expressly authorised to deal with the sale of the diamond with the knowledge and assent of each member of the family; (ii) a general authority, given that (said Qipco)

each member of the family was content to, and did, leave the management of its assets to HBS.

212. It is right that, after Sheikh Saoud's death, and particularly after Sheikha Sara had her second child (in around 2015) HBS came to have most of the day to day involvement in the family's assets. As Sheikha Sara explained in her witness statement, HBS had become the chairman of the Foundation and had inherited a 40% interest in the Foundation, whereas Sheikha Amna, Sheikha Sara and Sheikha Moza had 60% between them, reflecting Sheikh Saoud's decision that HBS would "*run the family business*". Moreover, HBS clearly had a close involvement in organising the sale of the part of the Ashleck collection that he was discussing with Christie's in early 2020, which the other members of the family were broadly content to leave to him.

213. However, that does not by itself mean that the other members of the family had given HBS authority to speak on their behalf or to bind them to legal positions (or to do the same through the Foundation, which was subject to its own legal regime, as I set out below). The fact that HBS might have taken the primary role in day-to-day matters relating to family assets is not sufficient. Similarly, the fact that HBS might generally have been taking the primary role for implementing sales of items once a decision in principle had been taken by the family (and formally by the Foundation) does not suggest he had a general authority to bind other family members to any contract.

214. The position in general terms was explained further by Sheikha Sara in her witness statement, having stated (as set out above) that Sheikh Saoud's decision had been that HBS would run the "*family business*":

> "However, it was equally understood that anything of any significance would be discussed between us and a consensus reached. Although Hamad is the chairman of the Foundation, he does not otherwise have more say than me, my mother or my sister in these matters, not least because between us we have more shares than Hamad when combined and therefore no single person has a majority share. Each of us – and over time this has included our younger sister – has an interest in the family's assets and a right to be consulted and to express a view."

215. She went on to explain that, in selling items from their collection (for example, to fund the acquisition of property assets), she and HBS, along with their mother and sister, would discuss and agree what to sell and how to sell it: "*This is true of every sale from the collection*". It would usually be HBS who would identify items for sale, the method of sale, the likely price that had been advised it might fetch, and the use to which proceeds would be put, and that would then be discussed and agreed between them. That would generally be HBS's role because he was, since the birth of Sheikha Sara's second child, more involved with the collection, but she explained "*we must all agree on sales from the collection*".

216. Sheikha Sara acknowledged that she had stepped back somewhat once she had her second child, but made it clear that did not mean she had no involvement at

all. It was not put to her that she had authorised HBS to deal with the sale of items in the family's collection without her consent.

217. Sheikha Amna's evidence included:

> "We meet as a family when making any decision about selling any piece of my husband's property. As a family, we discuss the decision and do not make any decision without the agreement and consent of all individuals. My family knows full well, as I have explained to them on numerous occasions, that I consider most of my husband's jewellery properties important to me, especially the Idol's Eye."

218. It was put to her in cross-examination that she trusted HBS to deal with the outside world on behalf of the Foundation, to which her answer was: "*Yes, apart from jewellery.*" It was clear from her evidence that, as far as she was concerned, HBS could not go and sell jewellery without her consent.

219. Sheikha Moza's evidence was short, both in writing and orally. In writing, it included the evidence, referring to her with her brother, sister and mother, that "*we make decisions regarding the family's collection together.*" That was not challenged, and nor was it put to her that she had given authority to her brother to deal on her behalf in any respect. In her oral evidence, when asked who had been dealing with the outside world on behalf of the Foundation, she said it was both her siblings (i.e. HBS and Sheika Sara), neither predominantly more than the other.

220. The clear evidence of each of Sheikha Sara, Sheikha Amna and Sheikha Moza (all of which I accept) was, therefore, contrary to the suggestion that HBS had actual authority (whether general or specific) from each of them to sell the diamond. It was clear that he did not have authority from them to take any decision of that sort.

221. Qipco sought to make something of the fact that, in 2015 when there had been some discussion about a potential sale of the diamond, the email sent to Mr Hart by Abdul Razak had started with "*On behalf of [sheikh] Hamad and the family …*" and went on to refer to the wishes of Sheikha Amna in suggesting obtaining two estimates of value. This was said to reflect the general authority of HBS to manage the family's assets held by the Foundation, and also to show that Sheikha Amna could be amenable to a sale of the diamond (alternatively that her children were confident enough in their ability to persuade her that they would include such a statement anyway). However, the use of the phrase "*On behalf of [sheikh] Hamad and the family…"* sheds no light on whether any authority had been given by other members of the family to make proposals, still less to commit to a sale of the diamond – if anything, it suggests that the family (and not just HBS) have a say. The point about the reference to Sheikha Amna goes nowhere. The explanation from HBS was that this was not a true statement, and that he told Mr Razak to use his mother's name to add weight to what was being proposed ("*I wanted my cousin to take it more serious*"). That seems to me a likely explanation, but it does not suggest that HBS had authority

from Sheikha Amna to sell the diamond in 2015 – he just thought he might be able to talk his mother into a sale if it looked like he could get the right price.

222. It is, therefore, clear that HBS did not have actual authority from any of his family to deal with or sell the diamond, whether by way of a general authority or a specific authority in relation to the diamond.

Attribution to the Foundation

223. In his oral closing submissions, Mr Stewart contended that the state of mind of the family members could be attributed to the Foundation because they were the beneficiaries of the Foundation, which ultimately he put on the basis that, as a matter of the law of Liechtenstein, the family had *de facto* control of the Foundation. Qipco's written closing submissions also suggested HBS's state of mind could be attributed to the Foundation, though the basis was not made clear. Mr Stewart also made a more general submission that Dr Neupert must, when writing the 6 February letter, have considered that HBS had had the authority of the Foundation to give the instruction to him (via Mr Raymond) to send the letter, and that through Dr Neupert's long association with the family and the Foundation, it can be assumed that he knew the position in respect of authority, such that it can be assumed that HBS did indeed have such authority (through some route or other).

224. At least part of this argument relied on how decisions could be made by the Foundation, an entity under the law of Liechtenstein, and reliance was placed by both parties in this respect on the evidence of the experts in Liechtenstein law. There was much that was common ground between the experts, and some of the evidence was, on the way Qipco's case was put in its closing submissions, not relevant. However, the position on the basis of the expert evidence insofar as it provides relevant background to the issues was as follows:

    i) Within the Foundation, the Council of the Foundation was the primary decision making body. One way the Council could make a decision was by resolution at a properly convened meeting of the Council. There was an issue between the experts as to whether resolutions of the Council needed to be recorded in writing in order to be valid,[12] although ultimately nothing turns on this. There was no case advanced that the Foundation had passed any relevant resolution (whether in writing or otherwise), there was no evidence that it had done so, and no case was put to HBS or Sheikha Sara (who were both Council members at the material time) that it had done so.

    ii) The experts also identified that the Council could also make decisions in two other ways: (a) decisions made at informal meetings if all Council members were present and agreed to dispense with the formalities

[12] Article 9(3) of the Statutes of the Foundation stated: "*The resolutions of the Foundation Board have to be recorded in writing and have to be signed by all of the present members*". Qipco's expert contended this was an "organisational" requirement, breach of which did not render a resolution invalid; Elanus's expert said it meant that unless recorded in writing, a resolution was not valid. I do not have to determine the point, but if I had had to do so, I would have preferred Elanus's case for the reasons set out in its written closing submissions at paragraph 89.

(referred to as a "universal meeting"); and (b) written resolutions made without a meeting if made unanimously by all Council members (referred to as a "circular resolution").

iii) The Council was also able to delegate the ability to make particular decisions, and that could be a delegation to a Council member or to a third party. This would require a council resolution.

225. Qipco did not suggest that the Foundation made any decision in this case concerning any wish to sell the diamond by way of universal meeting or by circular resolution, nor was it contended that the Council delegated its authority in relation to sale of the diamond by a resolution (and nor was a case to any of those effects put to any witness). Rather, the case advanced by Mr Stewart in his closing submissions was that there was a *de facto* control of the Foundation by the family.

226. It is right that the Liechtenstein law experts agreed that there was a concept in Liechtenstein law of a "*de facto organ*" (as Mr Nueber described it in his report) or "*de facto director*" as Mr Reithner labelled it). This was, in Mr Nueber's description, someone who is "*able to control the foundation through their right of influence without being properly appointed as such,*" or, in Mr Reithner's similar description, "*a person who in fact manages the entity or in fact participates in the formation of the corporate intentions and resolutions without formal position.*" Mr Nueber explained that whether a person is a *de facto* organ is usually determined by examining whether they are able to control the council members, e.g. by way of a mandate agreement. Mr Reithner accepted in cross-examination that there must have been a pattern of conduct from the Foundation which indicated that the individual in question was, in practice, permitted to take decisions for the Foundation.

227. However, there was no such pattern of conduct, and no evidence that any one or more of the members of the family were able to control the council as a whole. Indeed, both HBS and Sheikha Sara were on the Council, and it was evident that neither "controlled" the other in terms of decisions regarding what to do about Foundation assets. More generally, there were no examples given of when the family had made decisions on behalf of the Foundation, at least not without the formal process having been followed.

228. As I have said, as well as being beneficiaries of the Foundation (along with Sheikha Amna and Sheikha Moza), HBS and Sheikha Sara were on the Foundation Council. There was no evidence to suggest that their roles in relation to the Foundation were anything other than those roles; in other words, nothing to suggest that the Foundation Council had informally agreed to let one or other or both of them run the Foundation and take decisions on its behalf. There was no need for that to be the position – they were both on the Council in any event. In fact, such evidence as there was suggests that formal documentation was produced when steps were taken that required a Foundation decision (including for example the sale of the Maharaja Paintings, where formal letters from the Foundation were required by, and sent to, Saffery, in that case both signed by Dr Neupert and Ms Näff-Oehri).

229. Qipco complained that it had not had full disclosure from the Foundation in order to test whether or not this was, in fact, the case. However, given the points I have made above regarding documents from the Foundation (including the scope of the agreed issues for disclosure) and given that there is not even a *prima facie* case based on the evidence that has been adduced, that does not seem to me to help them. I cannot assume, in the absence of any positive evidence, that the family were in *de facto* control of the Foundation, effectively side-lining the Council and the formal processes, simply on the basis of an absence of disclosure from the Foundation.

230. The argument that HBS alone was in *de facto* control of the Foundation, such that his state of mind (even if shared with no other member of the family) should be attributed to the Foundation is even weaker. There is nothing to suggest that HBS took decisions for the Foundation on his own, and the structure was there so he could not do so. Sheikha Sara, and the other family members, would not have agreed (and did not agree) that he could or should do so.[13]

231. There is, therefore, no route in Liechtenstein law through which Qipco have been able to identify that any state of mind of the family, or of HBS alone, constituting a "wish" to sell the diamond should be attributed to the Foundation.

232. That leaves the broader point made by Mr Stewart that one can assume, from the fact that Dr Neupert wrote the 6 February letter in the terms that he did, that he must have considered that HBS had had the authority of the Foundation (whether through the family or not) to give the instruction to him (via Mr Raymond) to send the letter, and that as a result of Dr Neupert's long association with the family and the Foundation, it can be assumed that he knew the position in respect of authority, such that it can be assumed that HBS did indeed have such authority (through some route or other).

233. However, in the circumstances of this case, that is not a sufficient basis to find that HBS (or the family) did have such authority:

    i) Dr Neupert did not give evidence, and it is therefore difficult to draw firm conclusions as to what was in his mind at the time. I have already set out why I am not prepared to draw an adverse inference from the fact that he did not give evidence.

    ii) It has to be recalled when considering Dr Neupert's conduct that there were clearly occasions on which he did not always get things right. One example is the fact that he was prepared to give advice on the content and effect of the Loan Agreement on 29 January 2020 without checking the signed version, leading to his advice being based on a draft which, in respects which were material to the advice he gave, was different to

[13] Qipco did not contend in its closing submissions that HBS's state of mind should be attributed to the Foundation on the basis of his sole signature right for the Foundation. That would not, in any event, constitute a basis for attribution. As the Liechtenstein law experts made clear, Liechtenstein law distinguishes between i) internal decision making and ii) external acts towards third parties; signature rights are relevant to the latter, and are irrelevant to the former; so a person with sole signature rights could not pass a Council resolution on their own, and a decision of a person with sole signature rights does not constitute a decision of the Foundation.

the final version. Another is where he informed Mr Carleton on 20 April 2020 that Elanus had not taken separate legal advice in relation to the drawing up of the Loan Agreement, when in fact they had done so from Collas Crill. A further example is the way in which Dr Neupert dealt with the proceeds of sale of the Maharaja paintings, including paying out the money without the authorisation or knowledge of the Elanus directors. It is not, therefore, straightforward to make the assumptions suggested by Qipco.

iii) The terms of the 6 February letter itself do not reveal a clear and consistent position in terms of on whose behalf Dr Neupert considered he was writing. Although the third paragraph refers to Elanus giving a notice to return the diamond under Article 13.1.1 of the Loan Agreement, the rest of the letter is conspicuous in its failure to refer to Elanus. For example, it was not expressly written on behalf of Elanus – the letter was sent on Dr Neupert's firm's headed paper, and signed by him personally (not in any particular capacity or on behalf of anyone else); it did not describe him as acting on behalf of any particular client. In addition, whilst he records having heard from HBS that the family would like to sell the diamond, he says nothing expressly about any desire or wish of the Foundation, still less Elanus, to sell the diamond. He then goes on to say he is informing Mr Hart of this according to Articles 10.1.1/10.2 of the Loan Agreement, which may carry with it an implication that the wish is also that of Elanus, but it is far from clear whether Dr Neupert intended that or had it in mind – it may equally be the case that he knew he had nothing formal from the Foundation or Elanus, so that he could not represent their "wish" but nonetheless wanted to get the ball rolling given the urgent nature of the instruction he had been given. In other words, there is little consistency throughout the letter in terms of the person or entity on whose behalf it seems to have been written, or whose state of mind is being referred to.

iv) There appears in any event to have been a breakdown in communication between Mr Raymond (who did not understand the structure or the legal obligations) and Dr Neupert. Mr Raymond had said nothing about any other member of the family wanting to sell, but was simply passing on what HBS wanted, whereas Dr Neupert appears to have assumed the family were behind it. That may be because he assumed HBS would not have given him such an instruction if he had not already got his family on board, but if Dr Neupert did make such an assumption, he was wrong to do so.

v) It is, therefore, not at all clear whether Dr Neupert thought that HBS had the authority of the Foundation to send the letter – it is at least equally as likely that he thought that, if the family held this view (which Dr Neupert appears wrongly to have assumed) and he (Dr Neupert) was content with it, there was unlikely to be too much difficulty with getting the relevant resolution from the Foundation, such that he was willing to send this notice in anticipation of that.

234. As a result, even if (contrary to my findings) HBS had a "wish to sell" within Paragraph 10 of the Loan Agreement, that cannot be attributed to the Foundation.

Attribution to Elanus

235. Under this final step, Qipco contended that the wish of the Foundation to sell the diamond could be attributed to Elanus, as the Foundation was the sole beneficial shareholder in Elanus, through the operation of what is often referred to as the *Duomatic* principle (as it applies under the law of Guernsey). On the findings I have made, this point does not arise: both because HBS did not have a "wish to sell" within Paragraph 10 of the Loan Agreement, and because, even if he did, it was not shared by and could not be attributed to the family or attributed to the Foundation (whether directly or through the family). The Foundation, therefore, had no wish to sell within the meaning of Paragraph 10 of the Loan Agreement. However, I outline the argument that was advanced and deal with it, albeit in the circumstances relatively briefly.

236. What has become known as the *Duomatic* principle was encapsulated by Buckley J in ***Re Duomatic Ltd*** [1969] 2 Ch 365 as follows at 373:

> "…where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be."

237. The point advanced by Qipco was that the *Duomatic* principle would operate in Guernsey law so as to bind Elanus (a Guernsey company) to any decision taken by the Foundation (its sole beneficial shareholder) in relation to the management of Elanus. Both parties addressed this question by reference to whether a decision to sell an asset, if taken by the Foundation, would bind Elanus. That seems to me to the correct prism through which to view it given the views I have expressed above concerning what qualifies as a "wish" of Elanus.

238. There was a reasonable amount of common ground between the parties and between the Guernsey law experts on this, which included:

i) The *Duomatic* principle applies not only to registered shareholders but also to beneficial owners (at least where they take all the relevant decisions): ***Ciban Management Corpn v Citco (BVI) Ltd*** [2020] UKPC 21; [2021] AC 122 at paragraph 47; ***Satyam Enterprises Ltd v Burton*** [2021] EWCA Civ 287; [2021] BCC 640 at paragraph 42.

ii) Guernsey law recognises the *Duomatic* principle, including (following ***Ciban***) its extension to the informal decision of a beneficial owner in control of the company. The Guernsey law experts also agreed that (following ***Ciban***) a sole shareholder or beneficial owner can confer authority, both actual and ostensible, to act on behalf of the company.

iii) Section 134 of the Companies (Guernsey) Law, 2008 (as amended) ("CGL") provides that:

> "(1) The business and affairs of a company must be managed by, or under the direction or supervision of, the board of the company.
>
> (2) The board of a company has all of the powers necessary for managing, and for directing and supervising the management of, the business and affairs of the company.
>
> (3) Subsections (1) and (2) are subject to any modifications, exceptions or limitations contained in this Law or in the company's memorandum or articles."

iv) Guernsey law will usually look to English law where an issue of company law is not directly covered by a Guernsey statute or customary law.

239. The key points of difference between the parties were:

i) Elanus (and its expert Advocate Lyall) contended that the *Duomatic* principle in English and Guernsey law only permits shareholders to take decisions (albeit informally) which are within their competence, rather than taking any decisions which are reserved to the directors. Qipco (and its expert Advocate Brehaut) said it extended to matters that were *intra vires* for the company even if reserved to the directors.

ii) Elanus (and Advocate Lyall) contended that a decision to sell an asset of the company, being an issue for the company's management, was not within the competence of the shareholders under section 134 CGL, such that a decision of a sole shareholder for the company to sell an asset would not be treated as a decision of the company.[14] Qipco (and Advocate Brehaut) contended that because section 134 was subject to any modifications, exceptions or limitations in the company's articles, the company could amend its articles such that the shareholder could take this decision, and that amendment is also something that could occur informally by application of the *Duomatic* principle.

240. The issue here is whether, in the circumstances of this case, if there had been a decision by the Foundation to sell the diamond, that would be a decision to be treated as a decision of Elanus. In my view, it would not be, for the following reasons:

[14] Advocate Lyall also drew attention to the position in New Zealand, where section 128 of the New Zealand Companies Act 1993 is in materially identical terms of section 134 CGL, and where the New Zealand Supreme Court has said, in ***Ririnui v Landcorp Farming Limited*** [2016] NZSC 62: "*The allocation of management powers to the board of a company by s.128 of the Companies Act also suggests that, in the absence of a reallocation of such powers to shareholders by the company's constitution, assent by shareholders to an action requiring a board resolution would not be effective.*"

i) The principle articulated in ***Re Duomatic***, as set out above, is concerned with an informal agreement of shareholders being as binding as a resolution in general meeting. As explained by Neuberger J in ***EIC Services Ltd v Phipps*** [2003] EWHC 1507 (Ch); [2003] 1 WLR 2360 at paragraph 122:

> "The essence of the *Duomatic* principle, as I see it, is that, where the articles of a company require a course to be approved by a group of shareholders at a general meeting, that requirement can be avoided if all members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them to deny that they have given their approval."

(See also e.g. ***Re New Cedos Engineering Co Ltd*** [1994] 1 BCLC 797, Oliver J at 814 g-h).

ii) The authors of Gower, Principles of Modern Company Law (11th ed.) note (at paragraph 11-009) that whilst there are dicta in some cases suggesting that shareholders' unanimous consent can bind the company, even on matters that the constitution allocates to the board (e.g. ***Multinational Gas & Petrochemical Co Ltd v Multinational Gas and Petrochemical Services Ltd*** [1983] Ch 258; ***Meridien*** at 506E), none of the decided cases clearly present the situation of shareholders unanimously taking a decision that had been allocated by the constitution to the board. They describe the "*majority judicial view*" as "*that unanimous informal consent is confined to the exercise of those powers conferred upon the general meeting rather than the board*", and note this is consistent with the restatement of the principle in ***Ciban*** by Lord Burrows:

> "…anything the members of a company can do by formal resolution in a general meeting, they can also do informally if all of them assent to it."

Similarly, the principle was summarised by the Court of Appeal in ***Satyam*** (citing ***Ciban***) as follows:

> "The *Duomatic* principle is that anything the members of a company can do by formal resolution in a general meeting they can also do informally if all of them assent to it."

iii) There are cases where the unanimous acts of the shareholders are sufficient to amend a company's articles (e.g. ***Cane v Jones*** [1980] 1 WLR 1451) and it may be that by such a route, matters which were allocated to the directors could come within the provenance of shareholder decision. As Qipco noted, section 134 CGL is expressly made subject to any modifications, exceptions or limitations contained in the company's memorandum or articles, and the company could amend its articles by special resolution (under section 42(1) CGL), which could be effected informally pursuant to the *Duomatic* principle.

iv) However, not only was this not a course that was actually taken here,[15] but also there is nothing to suggest that the Foundation (as beneficial shareholder in Elanus) sought to alter the Elanus articles (or would have sought to, had it been considered), even on Qipco's view of the case where the acts of HBS might be attributed to the Foundation. There were no words or conduct (by anyone) suggesting the Foundation was seeking to exercise for itself a power of management of Elanus. On the contrary, there is nothing to suggest that HBS or Dr Neupert (or anyone else) considered that the diamond could be sold by Elanus without the involvement of the directors of Elanus or that they had any intention to change that position. Moreover, given that the Loan Agreement identified any change to Elanus's Articles of Memorandum as an event giving rise to a material breach (which would itself not only give rise to the pre-emption right but also potentially to a right to terminate under Paragraph 10.1) it is highly unlikely they would have sought to do so (at least without first seeking Qipco's agreement).

241. Reliance was also placed by Advocate Brehaut on (a) Article 14A.3 of the Elanus Articles (which I have set out above), which was amended as part of the arrangements in relation to the sale of the Maharaja Paintings, and (b) on the Saffery Terms & Conditions of Business, which provided (1) that Elanus's directors would be responsible for the day-to-day administration of the company (clause 5); (2) that Rysaffe as Elanus's nominee shareholder would vote in relation to Elanus as instructed by the Client (as defined therein)[16] (clause 8); and (3) that Elanus's directors were authorised to act and rely on instructions (where appropriate) from the Principal (as defined therein)[17] in all matters concerning the affairs of Elanus (see clause 15). However, none of that changes the position. As far as the directors were concerned, clause 15 authorised them to act and rely on such instructions, but did not oblige them to do so. Article 14A.3 was inserted to reinforce Elanus's obligations under the Loan Agreement, and does not (as Advocate Brehaut contended) suggest that there was an implied term that, otherwise, the directors were bound to follow any shareholder resolution or direction. But, even if the directors were, through one or more of those routes, obliged to follow such an instruction, resolution or direction, that would not demonstrate that the act of the shareholder was intended to be the act of the company; on the contrary, it would demonstrate a recognition that it was not so, and that the directors would have to act to make it an act of the company.

242. This does not mean (as appears to have been suggested by Advocate Brehaut) that "*almost without exception, the Duomatic principle could not be applied*" in Guernsey. The points I have set out above include ones specific to the facts of this case (which include that no amendment of the Articles could here be found

[15] Itself an answer to the point, see ***Ceredigion Recycling and Furniture Team v Pope*** [2021] EWHC 1783 (Ch) at paragraph 91, as upheld on appeal including in relation to this point at [2022] EWCA Civ 22 at paragraph 49.

[16] "Client" "means any person with a beneficial interest in a Client Entity or any person in whose favour SCRF owes a fiduciary duty in discharging its Services in respect of any particular Client Entity."

[17] "Principal" "means any person with a beneficial interest in a Client Entity or any person in whose favour SCRF owes a fiduciary duty in discharging its Services in respect of any particular Client Entity."

or implied), but also as a general matter it would depend on what the Memorandum and Articles of a given company said (in particular whether they modified Section 134), and in any event the principle could still be applied to any decision within the competency of the general meeting, e.g. to ratify a decision of the directors, or matters reserved under the Articles to the shareholders.

243. As a result, Qipco's contention that any wish of the Foundation to sell the diamond ought to be attributed to Elanus would have failed (even had there been any such wish).

Ostensible authority

244. The second way in which Qipco contended that Elanus had a "wish to sell" under Paragraph 10 of the Loan Agreement was by an argument based upon ostensible authority.

245. It relied upon the ostensible authority of both Dr Neupert and of HBS in the following way, as it explained in its written opening for trial:

i) Dr Neupert:

> "…the February Letter was sent with the ostensible authority of Elanus and should bind it to a sale regardless. The clear impression which had been given previously by the Family and the Foundation was that Dr Neupert was able to communicate their wishes to QIPCO in relation to Elanus. In those circumstances, the ostensible authority which they conferred on him to send the February Letter to QIPCO is binding on Elanus."

ii) HBS:

> "HBS himself was equally clothed with ostensible authority to act on behalf of the Family, the Foundation and Elanus when it came to such matters, including by virtue of his position as President of the Foundation and his sole signing rights."

246. In relation to Dr Neupert and the 6 February letter, as explained by Mr Stewart in his oral closing, the case was that Dr Neupert was held out as having authority to speak for Elanus (including, if necessary, by acts of the family and/or the Foundation which should be attributed to Elanus by virtue of the *Duomatic* principle), such that his 6 February letter was sent with the ostensible authority of Elanus and Elanus is therefore taken as having itself made the representation that it wished to sell the diamond. Elanus is, therefore, bound by that representation that it had such a wish. There are a number of problems with that case.

247. First, there was no holding out by Elanus of Dr Neupert as someone authorised to act on its behalf, either generally or specifically in relation to dealings with the diamond.

248. The holding out would have to be by Elanus – the general position is that for ostensible authority to arise the relevant holding out must be that of the putative principal (or by another agent authorised to act for the putative principal): see Bowstead & Reynolds on Agency (23rd ed.) at paragraph 8-019.

249. However, as pitched in Qipco's written opening, as set out above, the case advanced was: "*The clear impression which had been given previously by the Family and the Foundation was that Dr Neupert was able to communicate their wishes to QIPCO in relation to Elanus*" (underlining added). In other words, it was being suggested that the family and the Foundation made the relevant representations of Dr Neupert's authority, and that those representations were in respect of the wishes of the Family and the Foundation. In his oral closing submissions, Mr Stewart advanced this point by saying that the "holding out" by the Family and the Foundation should be attributed to Elanus on the basis of the *Duomatic* principle. However:

    i) The *Duomatic* principle could not apply to constitute any such "holding out" by the Foundation (still less by the family) as conduct attributed to Elanus, by parity of reasoning to my conclusions in relation to the application of the *Duomatic* principle in the context of attribution above.

    ii) In any event, the allegation (as explained in Qipco's written opening) was that Dr Neupert was held out as authorised to communicate the *Family and Foundation's* wishes. That would not be sufficient to constitute a holding out of Dr Neupert as authorised to convey the position of *Elanus*, even if it were otherwise effective.

    iii) Moreover, on the facts, neither the Family nor the Foundation held out Dr Neupert as authorised to act on behalf of Elanus (as opposed, at least potentially, to acting on behalf of the Family or the Foundation), as further explained below.

250. In respect of the suggestion that there was any holding out of Dr Neupert as authorised to act on behalf of Elanus, the emphasis appeared to be placed by Qipco on the events relating to the sale of the Maharaja Paintings, in which he undoubtedly had some involvement. However, that involvement did not amount to a sufficient holding out for Qipco's purposes:

    i) The initial exchanges by email (starting 28 December 2014) were between Pinsent Masons and Dr Neupert, and the draft SPA was first sent to Dr Neupert, but as is apparent from those exchanges Pinsent Masons knew that Dr Neupert did not act for Elanus, or for Saffery, but that they were separate. Indeed, when Dr Neupert sent the draft SPA to Saffery on 18 January 2015, copied to Mr Hart and Ms Rogers of Pinsent Masons, he made clear that he was writing to them on behalf of the Foundation, as the shareholder in Elanus, and asked that the directors of Elanus be instructed to execute the agreement. Pinsent Masons would

have been unsurprised by this – they knew that Dr Neupert could not himself bind Elanus, and that he was acting on behalf of the Foundation, as shareholder, giving instructions to the directors of the company.

ii) The Elanus directors were not merely rubber-stamping. On receipt of the draft SPA, they did not immediately execute it. Rather, as Pinsent Masons were aware, they considered its terms, sought Guernsey law advice from Babbé LLP on behalf of Elanus, provided substantive comments on the document and negotiated with Pinsent Masons (e.g. in relation to the extent of Elanus's exposure under the indemnity in clause 7.2 of the SPA).

iii) The discussions (many of which were conducted by email with Pinsent Masons in copy when they were not themselves the addressee) included the proposal whereby the proceeds of sale would be paid to Dr Neupert to hold in escrow. The Elanus directors were initially unhappy with the proposal, but ultimately agreed to it on the basis that Dr Neupert was formally engaged as escrow agent on behalf of Elanus. Pinsent Masons were aware that Dr Neupert did not speak for Elanus, but rather was at least to this extent at odds with Elanus until the matter was resolved. When it was, he was formally appointed by Elanus for a discrete and specific purpose (as escrow agent for this transaction).

iv) Related to this, reliance was also placed on the fact that the SPA for the sale of the Maharaja Paintings, having identified the bank account details to which the payment would be made, described it as "*the client account of the Sellers' lawyer, Neupert Vuille Partners*", the "Seller" of course being Elanus. However, that account was used for a single specific purpose, namely because Dr Neupert was acting as escrow agent to receive the purchase price. This reference did not constitute any holding out of Dr Neupert as acting on behalf of Elanus other than in that particular role.

v) The Elanus directors would not agree that Elanus should enter into the transaction until they had received a formal signed letter of recommendation from the Foundation that Elanus should do so. Again, Pinsent Masons were copied on email exchanges relating to this.

vi) On the day the terms of the SPA were approved by Elanus, 3 February 2015, Ms Rogers emailed Dr Neupert stating:

> "I now attach the amended version of the SPA for the Maharajas incorporating all the changes requested by Elanus. Elanus have now approved the form of SPA. Please continue to liaise with Josie [of Saffery] in order to progress the other documents Elanus requires in order to sign this document."

She was clearly treating Elanus and Dr Neupert as separate (as they were). The references to Elanus were clearly references to "Elanus by its directors", and there was no suggestion that Ms Rogers was relying on Dr Neupert to speak for or to bind Elanus.

251. There was, therefore, no basis upon which it could be said that Dr Neupert was held out (by Elanus, the Foundation or the family) as having authority to act on behalf of Elanus in relation to the Maharaja Paintings sale (save, insofar as it could be so described, in the limited role of escrow agent for that particular transaction), still less authority in any more general sense such that he could be understood as having been given a general authority to act on behalf of Elanus. On the contrary, the exchanges that took place in relation to the sale of the Maharaja Paintings made it clear that Dr Neupert could not, himself, bind Elanus. Everyone involved worked on the basis that it was only the directors of Elanus that could do that.

252. There was, similarly, nothing else in the history of the communications and other interactions between Qipco/Pinsent Masons and Elanus to suggest that Dr Neupert had authority from Elanus. For example, in communications prior to the incorporation of Elanus, he could not have been speaking for Elanus; and once incorporated, the entry into of the Loan Agreement was undertaken by the Elanus directors, who played an active role in matters leading up to its execution. More generally, those representing Qipco (in particular Pinsent Masons) knew that the individuals at Saffery took their role as directors seriously, and insisted upon formality and an appropriate documentary record wherever possible, such that no assumption of any informal delegation of authority to Dr Neupert would or could have been made by them, and they would not have proceeded (and did not proceed) on the basis that Elanus could be bound to any significant decision without the involvement and approval of its directors. There was no holding out by, or on behalf of, Elanus of Dr Neupert that he had authority to bind Elanus in any respect or to communicate matters which would have any form of contractually binding effect.

253. Qipco suggested that the present case was "strikingly similar" to the facts in ***Ciban*** (which I have referred to above in relation to the *Duomatic* principle) where an agent had acted with the ostensible authority of the beneficial owner to bind the company. However, I have already explained why the *Duomatic* principle does not apply in the particular circumstances of this case and, in any event, there was no holding out (e.g. by the Foundation or HBS) to Qipco of Dr Neupert as authorised on behalf of Elanus. Moreover, the facts here are very different to those in ***Ciban***, where the corporate structure had been set up by a beneficial owner specifically to hide his ownership and control of the company, and where he controlled the company through a particular individual who turned out to betray him. Here, on the other hand, the structure comprising Elanus and the Foundation was not secret from Qipco, and Qipco's representatives not only knew about it but had been responsible for the suggestion that part of it was set up (namely, Elanus). The facts of this case are quite different from those in ***Ciban***.

254. Second, even if he was so held out and assuming Qipco understood him as speaking on behalf of Elanus in sending the 6 February letter, that would only establish a statement on behalf of Elanus that there was a wish to sell. It would not, itself, establish an actual wish to sell, whether held by Elanus or by anyone else. As I have recorded elsewhere, the parties were agreed that the "trigger" under Paragraph 10 was the existence of a wish to sell, not any notification sent

by or on behalf of Elanus, and Mr Stewart confirmed that was his position in his oral submissions addressing ostensible authority. Even if, therefore, Elanus sent a notice saying it had a wish to sell, that notice has no contractual effect as regards Paragraph 10.1.1 of the Loan Agreement. A representation in such terms might, in the right circumstances, be capable of giving rise to an estoppel, preventing Elanus from resiling from it. However, no such case was run by Qipco, so I say no more about that possibility (though, in the circumstances that arose it is difficult to see how such a case could have succeeded). The representation by Elanus that it had a wish to sell, therefore, would be at best a form of evidence that it had such a wish.[18] However, I have already considered the 6 February letter above as part of my consideration both of whether HBS had a wish to sell and whether any such wish should be attributed to the Foundation and/or to Elanus, and notwithstanding the existence of the letter have concluded there was no such wish (and no such attribution).

255. Third, by the time it came to serve the April Notice, and *a fortiori* the July Notice, Qipco (through Mr Hart[19]) was on notice that Dr Neupert had not had the authority of Elanus to send the 6 February letter:

i) On 4 March 2020, at his meeting with Ms Vizia and Ms Brehaut, Mr Hart learned that the Elanus directors knew nothing of the 6 February 2020 letter. That at least should have put him on inquiry as to whether or not it had been sent with the authority of Elanus.

ii) Mr Hart was then told on 1 April 2020, in an email from Dr Neupert, that the family had not formally instructed the directors of Elanus to go ahead with the sale, and again on 8 April that the Foundation had decided not to formally ask the Elanus directors to trigger the pre-emption right. Although neither of those emails expressly said that Dr Neupert had not originally been authorised by Elanus to send 6 February letter, these communications again should have put Mr Hart on notice as to whether he had been, in particular in light of what Mr Hart had been told on 4 March.

iii) Mr Hart knew that the Elanus directors had not been involved in the 6 February letter, and was being told by Dr Neupert that it was the Elanus directors that would have to trigger the pre-emption right, but that they had not been asked to do so. It ought therefore to have been apparent to him that it was at least Dr Neupert's view (at least by 8 April) that he did not have (and had not had) authority from Elanus "to trigger the pre-emption right" (as Dr Neupert put it). It would have been reasonable, at that stage, to make an inquiry to check whether the 6 February letter had in fact been sent with the authority of Elanus.

[18] Mr Stewart recognised this in his oral closing submission when asked how the ostensible authority argument assisted given the agreed position that what mattered was "the wish", rather than the giving of notice of the wish – he said that "*it has to be that the letter is evidence of the wish existing.*"
[19] Mr Stewart accepted in his oral closing submissions that Mr Hart's knowledge and understanding was relevant to this question.

iv) On 5 May 2020, Dr Neupert made it clear in a formal letter to Mr Hart that he did not have authority on behalf of Elanus in sending the 6 February letter (or otherwise).

v) This was followed on 18 June 2020 by the letter from Farrer & Co, on behalf of Elanus, stating that Elanus did not wish, and had never wished, to sell the diamond, and that Dr Neupert had no authority to represent Elanus.

256. A party cannot rely on the ostensible or apparent authority of an agent if it failed to make the inquiries that a reasonable person would have made in all the circumstances to verify that the agent had that authority: ***East Asia Co Ltd v PT Satria Tirtatama Energindo*** [2020] 2 All ER 294; [2019] UKPC 30 at paragraphs 92 to 93; ***Philipp v Barclays Bank UK Plc*** [2024] AC 346; [2023] UKSC 25, Lord Leggatt at paragraphs 86 to 89. As set out above, that was the position before the April Notice was sent on 17 April 2020. Moreover, by the time of the July Notice, it had been made unequivocally clear that Dr Neupert did not have the authority of Elanus. As a result, when Qipco came to send each of those notices, it could not do so relying on the 6 February letter as having been sent by Dr Neupert with the ostensible authority of Elanus.

257. Lastly, the suggestion in Qipco's written opening that HBS had ostensible authority (on behalf of "*the Family, the Foundation and Elanus*"), which point was not developed in Qipco's written or oral closing, does not take things any further. It is correct that, as a matter of the law of Liechtenstein, HBS was able to bind the Foundation vis-à-vis bona fide third parties as a result of his sole signature rights. However, that gave him no authority to act on behalf of Elanus. Moreover, HBS never made any representation to Qipco of any "wish" to sell.

258. For all of the above reasons, Qipco is not able to rely on its ostensible authority argument in support of its case that it was able to exercise a pre-emption right by service of its April or its July Notice.

Ratification

259. The final way in which Qipco argued that the Paragraph 10 pre-emption right was triggered was based on a ratification argument. Qipco's written closing submission explained it in this way:

> "Elanus (in the sense of its directors) ratified the wish which had arisen on its behalf, even if attempts were later made to withdraw it. Saffery said nothing to suggest that it would not follow the decision which had been made to sell. The technicality that the February Letter had not been written with the agreement of Elanus' directors was presented by them as just that. Their silence otherwise suggested that they would indeed follow whatever instructions they were given in this regard."

260. In opening, Qipco also relied upon the email Saffery had sent to Dr Neupert on 25 March 2020 as demonstrating an adoption of the decision to follow the Paragraph 10 process.

261. As Qipco made clear in its closing submissions (written and oral) what it contended had been ratified was the "wish". This argument, therefore, proceeded on the basis that there had been a wish (starting with HBS) that qualified under Paragraph 10 of the Loan Agreement, but that it could not be attributed to Elanus. It is therefore dependent upon HBS having had the relevant wish in the first place which, as I have determined above, he did not. The ratification argument therefore fails on that basis.

262. This argument faces two additional problems. First, ratification can only occur where the principal unequivocally communicates or manifests that it is treating the act of the purported agent as its own: see Bowstead paragraphs 2-074, 2-077 and 2-078. There was no such unequivocal communication or manifestation by the directors of Elanus in this case. The 25 March 2020 letter did not treat the "wish" as a wish of Elanus. It "*noted and acknowledged*" (based on what had been said in Dr Neupert's email to which this was a response) that the *shareholder* desired to sell the diamond, noted that due process needed to be considered and followed, and emphasised that "*any instructions, concerning the sale or chosen valuation providers, must be considered and approved by the Directors of Elanus, as the controllers of the Company – this is very important.*" It also required a shareholder recommendation letter from the Foundation. This made it clear that Elanus was not simply adopting a "wish to sell" the diamond. On the contrary, it made it clear the Elanus directors would first need to consider and approve any proposal to sell, and they would need a recommendation letter from the Foundation.

263. The fact that the directors did not positively say that they would or might not adopt the "wish to sell" (if one had been formed), if they were provided with the information and documentation they required, did not manifest an adoption of it. Whilst it might be possible to imply ratification from mere acquiescence or inactivity in appropriate circumstances, here that is not the case. The stance that the Elanus directors took made it clear that they were going to take an active role in considering the matter and, in particular, that they were not willing to embrace the "wish to sell" without the formal letter from the Foundation. The fact that they wanted that formal letter is not a mere technicality that can be disregarded in this context; it was the Elanus directors' way of ensuring that they were getting the correct instructions from the correct entity before committing Elanus. Even if it is likely that the directors would have followed the Foundation's instructions in due course, that does not mean that they were prepared to ratify what had already been done without those formal instructions.

264. Second, ratification is only possible if the principal has, at the time of the ratification, "*full knowledge of all the material circumstances in which the act was done*": Bowstead paragraph 2-071. However, when the Elanus directors sent their 25 March email to Dr Neupert, they were under the impression that the family wished to sell the diamond (reflecting what they had been told in Dr Neupert's email to them of 18 March), which was not the case. The only member of the family whose view had driven the 6 February letter was HBS, and there had been no consultation about it with the other family members nor any process undertaken that involved the Foundation. This was obviously

material for the directors of Elanus to know when considering whether to adopt on behalf of Elanus any "wish" that had been expressed to sell the diamond.

265. For each of those reasons, therefore, the ratification argument does not assist Qipco.

Conclusion on the allegation that Elanus had a wish to sell the diamond within the meaning of Paragraph 10

266. As a result of the above, none of the ways in which Qipco contended that Elanus had a wish to sell the diamond within the meaning of Paragraph 10 of the Loan Agreement succeeds. There was, therefore, no trigger for the pre-emption mechanism and Qipco's claim fails.

267. Given that, questions about the withdrawal of the wish and the validity of the April Notice do not arise. However, I will set out my conclusions in relation to them below.

Withdrawal of any "wish"

268. I have already determined that, as a matter of construction of Paragraph 10 of the Loan Agreement, in order for the pre-emption right to be exercised by Qipco by service of a written notice, Elanus's wish to sell needed to remain at the time of service of that notice by Qipco or, to put it another way, the wish could be "withdrawn" before the service of Qipco's notice.

269. If, contrary to my determination about the existence of the "wish", there was in fact initially a qualifying "wish" held by Elanus, that would give rise to the question whether it was still in existence at the time of the April and/or July Notices.

270. By the time of the April Notice, Qipco / Mr Hart had received: i) Dr Neupert's 31 March 2020 email, in which he had stated that the family had decided to "*put an eventual sale of the Idol's Eye on hold…*" due to the market conditions, ii) Dr Neupert's 1 April 2020 email stating that the family did not want to sell the diamond anymore due to *force majeure*, and iii) Dr Neupert's 8 April 2020 email, saying the Foundation had decided not to formally ask the Elanus directors to trigger the pre-emption right proceedings. The message sent by these emails was that, to the extent that there had previously been a wish to sell the diamond at the present time on the family/Foundation side, it no longer existed. Indeed, Mr Hart seems to have so understood that was what he was being told, because his response to the first of those emails was that the contract wording "*does not permit for the notice to be retracted*".

271. Moreover, it is clear on the evidence that, even if there had been (contrary to my findings) a "wish" on the part of HBS to sell the diamond which could be attributed to Elanus, there was by the time of the April Notice no longer any such wish. Once Sheikha Sara had discovered the fact that there was a proposal to sell the diamond, and she had in turn informed Sheikha Amna, it is clear that they were both upset at the situation – Sheikha Amna because she did not want it sold at all, and Sheikha Sara mainly because of the steps HBS had taken

without any consultation with the rest of the family. They both made their feelings very clear to HBS. Sheikha Sara's evidence, which I accept, was that the family then discussed the position and it was clear that, as a family, they did not want to sell the diamond (which led to Dr Neupert's communications referred to above). After that, even if HBS had continued to harbour his own thoughts about a possible sale (for example, in his voice note to his sister on 20 April 2020 suggesting that $10 m was perhaps not such a bad price, though that was clearly his attempt to find a solution to what had, by then, become a contentious situation vis-à-vis HBA), given his family's known opposition to a sale, a) he no longer (even if he ever had) had any intention to bring such a sale about, such that he no longer "wished" to sell within the meaning of Paragraph 10, and b) even if that was wrong, no such wish could have been attributed to Elanus given what would then on that hypothesis be an open disagreement between family members about what to do.

272. Accordingly, even if (contrary to my findings) there had been an initial wish to sell the diamond held by Elanus, by the time of the April Notice it no longer existed and/or had been withdrawn.

273. The position is *a fortiori* in relation to the July Notice. By the time that notice was sent, the following additional communications had taken place: i) Dr Neupert had sent his 5 May 2020 letter to Mr Hart saying (among other things) that "*Elanus has had and has no wish to sell*" the diamond and stated (referring to his 6 February letter) that "*the invitation to treat is revoked*"; ii) Farrer & Co had sent its letter on 18 June 2020, on behalf of Elanus, stating that Elanus did not wish to sell the diamond. There can be no doubt that, by the time of the July Notice, if there ever had been a qualifying "wish to sell", it no longer existed, and Qipco knew that.

274. I should also note Qipco's reliance in relation to this issue on evidence given by Mr Travis that, in July 2023, HBS told him he would not be prepared to sell the diamond for less than $35m, and would be happy to sell it to anyone except HBA (because HBA had disrespected him and his family by starting these proceedings). That is irrelevant to this point. First, the question is whether the wish to sell existed at the time the purported notice(s) were served by Qipco, not some 3 years later. Second, what HBS is said to have told Mr Travis does not describe a "wish to sell" within Paragraph 10.

The April Notice

275. Elanus also contended that the April Notice was not effective to exercise any right of pre-emption which Qipco may have had. It said that, in order to exercise its right under Paragraph 10, Qipco had to communicate that it was exercising its right to buy the diamond, but that was not what the April Notice said. Rather, the notice sought only to "preserve", not exercise, the right, and expressly stated that Qipco would not decide whether to exercise its right to purchase until after the auction estimates had been obtained.

276. Qipco contended that the April Notice was valid, stating that such a notice is the mechanism by which Qipco "*shall be entitled to purchase*" the diamond and all

that the notice needs to say is that it is such a notice. It said the notice did not have to state that Qipco would purchase the diamond come what may.

277. The relevant part of Paragraph 10.1 states:

> "…the Borrower shall be entitled to purchase the Asset by giving written notice to the Lender within 6 months of being made aware of the occurrence of any of the events listed at paragraphs 10.1.1 to 10.1.3 above."

278. Qipco also relied on Paragraph 10.3, which it said in its closing submissions illustrated a distinction "*between the "entitlement" which Qipco has if it gives such a notice and its "exercise" of that right*":

> "10.3 The Lender agrees that should the Borrower exercise its right to purchase the Asset that it will execute any documents reasonably required by the Borrower…"

279. It is clear from the words of Paragraph 10.1 that the written notice referred to is the means by which Qipco is to exercise its entitlement to purchase the diamond. It is not a notice simply to establish its entitlement to purchase which Qipco is then at liberty to exercise at some later (unidentified) point in time. The words of Paragraph 10.3 do not create two separate stages; Paragraph 10.3, in saying "*should the Borrower exercise its right to purchase …"*, is referring to the process identified in Paragraph 10.1 (of the giving of notice).

280. That is not only the clear meaning of the words on their face, but is also the only sensible construction. If (as Qipco suggests) the notice under Paragraph 10.1 (which needs to be served within 6 months of Qipco's awareness of the relevant matter(s)) is simply one that establishes or preserves the entitlement to purchase the diamond, there is then no time limit on when Qipco needs to exercise that right. The parties cannot have intended Qipco to be able to sit on its entitlement indefinitely. Nor is there any reason to think that the parties intended Elanus to have to commit itself to the process of obtaining valuations and then selling at the price that was reached by that process, but that Qipco would not be committed to buying at that price but could wait and see, which would be the effect of Qipco's construction.

281. The notice, therefore, must be one that communicates to Elanus that Qipco is exercising its entitlement to purchase the diamond. If it does not do that, it is not a valid notice.

282. The April Notice did not state that Qipco was exercising its entitlement to purchase the diamond, or that it intended to purchase it. Rather, it was served on the express basis of seeking to preserve Qipco's option to decide to purchase the diamond or not. It not only stated in express terms that it was served "*in order to preserve*" the entitlement to purchase the diamond, but also that Qipco would confirm whether or not it wished to exercise its entitlement to purchase after the valuation process had been undertaken. It went on to reinforce the fact that it was not committing to any purchase by saying that until a sale and purchase agreement had been completed (which would follow if Qipco chose to

exercise its right), "*Qipco is not bound to purchase*" the diamond, and that the April notice was sent on a "*subject to contract basis*". It ended by saying that once a purchase price had been determined, Qipco "*may then elect whether to exercise its entitlement to purchase*." The April Notice therefore was clearly not seeking to exercise any right to purchase the diamond and it was expressly saying that Qipco was not committing to any purchase on the terms or at the price that the Paragraph 10 machinery would impose. As a result, it was not a valid notice under Paragraph 10.

283. I reach that conclusion without any reference to the terms of the July Notice, but note that when that was sent it was in obviously different terms, expressly stating that Qipco gave notice of its "*right, entitlement and intention*" to purchase the diamond under Paragraph 10.1, and stated that once the valuations process was complete and the price determined, the sale would be concluded on the basis of the draft SPA at Appendix 2 to the Loan Agreement.

Conclusion on the liability issues

284. To summarise the determinations I have made and the conclusions I have reached above:

i) Elanus did not have a "wish to sell" the diamond within the meaning of Paragraph 10.1 of the Loan Agreement. HBS did not have such a "wish to sell" (and nor did any other member of the family), and even if he did that wish cannot be attributed to Elanus. The other routes by which Qipco sought to fix Elanus with a "wish to sell" – ostensible authority and ratification – also fail for the reasons set out above.

ii) Even if Elanus had had a wish to sell, that wish no longer existed and/or had been withdrawn by the time that Qipco sought to exercise its right to purchase by service of the July Notice, or even by the time of the April Notice (which I have held in any event was not valid).

285. Qipco's claim therefore fails.

286. In the circumstances, there is no need to address the issues that arose between the parties in relation to remedy, but given the evidence that I heard at trial, I do address a small number of points below.

The estimates obtained by Qipco

287. There was an issue between the parties as to whether either the February Estimate (attached to the April Notice) or the April Estimate (attached to the July Notice) was a compliant valuation for the purposes of Paragraph 10 of the Loan Agreement. The parties agreed that estimates obtained under the Paragraph 10 process had to be the "*honest and genuine*" view of the auction houses concerned (which the parties referred to as the "Honesty Term"). Elanus also contended that the estimates so obtained had to be "*independent market valuation*s*"* (the "Independence Term"), which Qipco argued was not the case.

288. Elanus contended that the February Estimate was not the honest and genuine opinion of Mr Kadakia (as it had been backdated), and so did not satisfy the Honesty Term, and did not admit that the April Estimate satisfied the Independence Term.

289. In my view, the debate about the February Estimate was an arid one. Not only have I determined that the April Notice was invalid, but in any event Qipco came to rely upon the April Estimate. There was no requirement (under Paragraph 10 of the Loan Agreement) to serve a valuation with the notice exercising the right to purchase the diamond, so that even if Qipco was able to and did rely on the April Notice, there would be nothing to stop it relying on the April Estimate if the February Estimate was non-compliant. Given that the issue about the February Estimate would therefore be irrelevant even if I had found for Qipco on the liability issues, and also taking into account that it would require consideration of whether it constituted the honest and genuine opinion of someone who did not give evidence (Mr Kadakia), I do not deal with the point any further.

290. As to the argument about whether the "Independence Term" either could be discerned on a true construction of the Loan Agreement or ought to be implied, in my view it could not and ought not to be. In summary:

i) It is clear from the evidence that auction estimates are not given in a vacuum, and often take into account the perspective of the party asking for it (generally the seller). It was clear from the expert evidence in diamond valuation that the giving of auction estimates in relation to an item like the diamond is far from an exact science. Also, Mr Travis explained in his evidence that it is perfectly normal for there to be interaction between clients and the auction house about the estimate being given, in part because setting the estimate is generally part of the auction house's pitch to the client to place the sale with them, as well as being a published estimate at the auction, and also because (in the UK) the reserve price at auction cannot be above the lower estimate. So the giving of estimates can involve some interaction with the clients about the estimate.

ii) Moreover, it is unlikely the parties would have envisaged or anticipated true independence in the estimates. The individuals most involved (HBA on one side and, on the other, originally Sheikh Saoud and latterly HBS and Sheikha Sara) were regularly involved in auctions and had relationships with the major auction houses, so true independence in terms of an estimate was unlikely ever to be possible. In addition, it is difficult to see how, against the background of the parties' relationships with the major auction houses and the accepted interactive process of obtaining estimates, any independence requirement could have been policed or assessed.

iii) There is nothing to suggest that both sides, when they made the agreement, were not aware of how estimates were given and discussed, and that true independence would not be realistic. That is, no doubt, why they agreed to have a mechanism which worked on the average of two

estimates, such that each would be able to pick an auction house they thought might favour them and then the average would be taken, rather than a mechanism where, for example, they would have to find or nominate a single "independent" auction house.

iv) No concept of "independence" was used in Paragraph 10, in distinction to other places in the agreement where it was expressly used. For example, Paragraph 3.1 provided that the Condition Report was to be "*carried out by an independent expert instructed by the Borrower*"; and Paragraph 4.2 provided that Qipco was to obtain an "*independent insurance valuation*" every three years. That suggests if the parties had intended a concept of independence to form part of the Paragraph 10 mechanism, it would have expressly appeared there.

291. Elanus did not contend that the April Estimate breached the Honesty Term. As a result, if any point had arisen which depended on it, Qipco would have been entitled to rely on its April Estimate of $7m - $10m.

Relief

292. The parties both contended that, if i) I had held that there was a relevant wish (which was not or could not be withdrawn), ii) the right to purchase had been effectively exercised by Qipco, and iii) either the February or April Estimate was valid, then the appropriate relief was specific performance, rather than damages. However, they did not agree on what order for specific performance should be made.

293. Qipco contended that there was necessarily an implied term in Paragraph 10 to the effect that, where a party failed to provide a valuation, the price is either the one mid-estimate valuation provided or $10m (whichever was higher). Qipco therefore contended, as its primary case, for specific performance of the obligation to sell (on the terms set out at Appendix 2 to the Loan Agreement) at that price.

294. Elanus contended in its opening that the right order would be one requiring Elanus to obtain, now, a valuation pursuant to Paragraph 10, following which the price could be determined and the sale completed. In its written closing submissions this took the form of a suggestion there should be an order requiring both Qipco and Elanus to obtain a valuation, and then for the remaining steps of Paragraph 10 to be completed.

295. It is fair to say that this part of the case received relatively little oral argument from the parties, and the argument that there was became rather squeezed at the end of the hearing. If I had determined the case in favour of Qipco, it seems to me it would have been necessary to have at least some short further argument exploring the respective cases on specific performance. This is particularly so because:

i) Whether under Paragraph 10 there is an obligation for each party to choose an auction house to obtain an estimate, or rather an entitlement so to choose which might be forfeited leading to the use of one estimate

only, I can see the force of Mr Stewart's submission made orally in closing that it would be necessary for the estimates to be provided within a reasonable period of time of the purchase notice, and that there would be an implied term at least to that effect. Otherwise it would be possible for a party not wanting to go through with the transaction to delay matters indefinitely by not choosing an auction house to provide an estimate. However, in his submissions, Mr Nadin (who dealt with this part of the argument for Elanus) submitted that no such implied term had been pleaded or set out in the written opening or closing submissions, such that Elanus had not had a proper opportunity to consider and address it, and Qipco should not be permitted to rely on it. Mr Stewart did not reply to that point (which may have been driven in part by the lack of time for his reply submissions at the end of the hearing).

ii) There was also no real focus from the parties in their submissions on what the requirement for the valuations being "*no more than 6 months old*" was within Paragraph 10.1(b), in particular whether that meant that each valuation should be no more than 6 months old when provided to the other party, or by the time that the sale was completed. Nor, if the latter, how the April Estimate should then be dealt with.

iii) The precise terms of the orders for specific performance that each party had in mind had not been identified or discussed in detail in their submissions.

296. In those circumstances, if my conclusions on the other issues in the case had given rise to these issues, I would have sought further submissions and argument before concluding that any form of specific performance was appropriate and, if so, what its terms might be. However, given the conclusions I have reached, none of these points in the event arise.

Conclusion

297. For the reasons I have set out in this judgment, Qipco's claim fails and will be dismissed.