Neutral Citation Number: [2024] EWCA Civ 862

Case No: CA-2023-001398

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS (ENGLAND AND WALES)
BUSINESS LIST
MR ASHLEY GREENBANK (SITTING AS A JUDGE OF THE HIGH COURT)
[2023] EWHC 1203 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 26 July 2024

Before :

LADY JUSTICE ASPLIN
LORD JUSTICE SNOWDEN
and
SIR CHRISTOPHER FLOYD

- -

Between :

CARLOS ORTIZ-PATINO	**Appellant**
- and -	
MGI GOLF & LEISURE OPPORTUNITIES FUND LIMITED	**Respondent**

- -
- -

Gary Blaker KC and **Oberon Kwok** (instructed by **Penningtons Manches Cooper LLP**) for the **Appellant**
Peter Knox KC and **Daniel Goldblatt** (instructed by **RHF Solicitors LLP**) for the **Respondent**

Hearing dates : 18-19 June 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 26 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Christopher Floyd:

Introduction

1. This appeal concerns the interpretation of a profit-sharing agreement. The claimant/appellant's father, the late Mr Jaime Ortiz-Patino ("JOP"), entered into such an agreement with the defendant/respondent in October 2012 ("the PSA") at the same time as selling to it his shares in two Swiss companies, Soto Properties SA ("Soto") and Campo Alto SA ("Campo"). Soto and Campo owned or controlled Spanish companies which in turn owned real estate assets in Spain and trade marks. The real estate included the well-known Valderrama golf course in Spain, and the trade marks related to the golf course business. The course hosted the 32nd Ryder Cup tournament in 1997.

2. The PSA provided for JOP (or the appellant and his children in the event of JOP's death) to be paid a profit share calculated by reference to the consideration received in the event of a future sale by the respondent of the real estate assets, as defined in the PSA. In November 2015 the respondent sold on the shares in Soto to a third party purchaser, Zagaleta International United Kingdom Inc ("Zagaleta"). The central question on this appeal is whether the profit share is triggered, on a proper construction of the PSA, by the onward sale of the shares in Soto or only by the sale of the real estate assets themselves.

3. By his order dated 27 June 2023, Mr Ashley Greenbank, sitting as a deputy High Court judge, dismissed the appellant's claim for a share of the profit made on the onward sale of the shares in Soto to Zagaleta. In case the matter went further, however, he went on to hear argument and make certain findings as to the amount recoverable under the PSA on the hypothesis that he was wrong about the construction of the PSA. The appellant appeals the judge's order dismissing the claim, and, in the event that the appeal is successful, challenges two deductions made by the judge in assessing the quantum of the putative claim. By a respondent's notice, the respondent contends that the judge should have allowed certain claims to be set off or allowed additional deductions.

Background

4. The judge made very extensive findings about the background to the sale of the shares in Soto and the PSA which can be found in his judgment at [2023] EWHC 1203 (Ch). Not all of this background is still material. For present purposes the following summary should be sufficient for an understanding of the issues that arise on appeal.

5. From about the middle of 2010, JOP was the sole owner of the entire issued share capital of Soto and Campo. Soto was the holding company of the Spanish companies Valderrama SA ("Valsa") and Valderrama Estates SA ("Vesa").

6. Soto held A, C and D shares in Valsa representing approximately 94% of the share capital. The B shares in Valsa, representing approximately 6% of the shares, were owned by certain members of the golf club Real Club Valderrama ("RCV") which operated on the Valderrama golf course. Valsa owned the land comprising the Valderrama golf course, certain other plots of land close to the course, and some trade marks relating to the Valderrama golf course. RCV operated on the Valderrama golf

course with the benefit of a lease granted to it by Valsa, as well as a licence under the trade marks for the duration of the lease. The rent paid to Valsa under the lease was €800,000 per year, index-linked from 2010.

7. The arrangements between Valsa and RCV included an agreement not to transfer the title to the golf course to a third party during the term of the lease without first offering RCV the opportunity to purchase the title on the same terms. A similar agreement related to the trade marks owned by Valsa.

8. Soto also held the entire issued share capital in Vesa. Vesa owned various plots of land close to the Valderrama golf course and certain other trade marks.

9. Campo owned the entire issued share capital of Valderrama 07 SL ("VO7"). V07 owned land at Castellar de la Frontera, a few kilometres away from the Valderrama golf course. JOP at one time had a plan to build his own golf course on the land at Castellar de la Frontera.

10. The judge referred to the group of companies comprising Soto, Campo, Valsa, Vesa and V07 as "the Valderrama Companies" and I will adopt the same nomenclature.

11. The judge found that by the end of 2009 JOP's financial position and that of the Valderrama Companies was "particularly acute". Both JOP and the Valderrama Companies had taken on significant indebtedness. JOP accordingly took steps to realise the value of his assets in order to reduce the level of his own indebtedness and the level of indebtedness in the Valderrama Companies. Negotiations for the sale of Soto began with The Stripe Group Limited ("TSG"). TSG undertook extensive due diligence research on Soto, its subsidiaries and their assets including obtaining reports from DLA Piper UK LLP ("DLA") and KPMG. The DLA report identified the preferential rights of the holders of the B shares in Valsa and the preferential acquisition rights of RCV to acquire the golf course ("the preferential rights").

12. On 21 September 2010 JOP entered into a sale and purchase agreement with TSG for the sale of the shares in Soto ("the 2010 SPA"). There were, however, delays in the completion of the 2010 SPA. The aim was for the purchase funds to be raised by TSG through an investment fund managed by them. The investment memorandum assumed that returns would be generated for investors through the development of land (not including the golf course) for luxury apartments and villas, from the exploitation of the trade marks and, at the end of the term of the fund (which was expected to last five years), by the sale of Soto. TSG had difficulties raising the funds to complete the deal and completion was delayed on several occasions between December 2010 and October 2011.

13. Throughout this period, JOP's financial position continued to deteriorate. He defaulted on a loan from Banco Banif SA ("Banif"), leaving him, as the judge found, in a "perilous financial position". In May 2012, JOP told Banif that he wanted the loan to be repaid from the sale of the Valderrama Companies. Banif did not take further action whilst it waited for JOP to negotiate a sale of the companies.

14. Also in 2012, Mr Moxon, who subsequently became a director of the respondent, had been approached with a proposal for a listing on the Channel Islands Stock Exchange ("CISX") to raise money from investors to make investments in golf-related assets. At

this stage, the proposal was that the fund would acquire shares in Soto from TSG once TSG had completed the transaction with JOP. For this purpose, Mr Moxon incorporated the respondent on 13 March 2012. Mr Moxon was one of the two founder directors of the respondent. He began work on preparing listing particulars for a proposed listing of shares in the respondent on CISX, proposing a similar venture for investors to that proposed by TSG.

15. In view of the difficulties which TSG was experiencing in raising funds to buy the Soto shares, the respondent stepped in and proceeded to negotiate arrangements directly with JOP under which it would acquire the shares in both Soto and Campo, as well as the settlement of JOP's debt to Banif. The transfer of the shares was to be pursuant to a "novation" of and amendment to the 2010 SPA with TSG. The judge found that these arrangements were being controlled by Banif as JOP's main creditor. The arrangements were put in place at some speed. The respondent relied on the due diligence which had been conducted by TSG in relation to the 2010 SPA rather than choosing to conduct significant due diligence of their own.

16. The resultant agreement for the sale and purchase of the shares in Soto and Campo ("the 2012 SPA") was signed on 18 October 2012. Clause 1.2(a) of the 2012 SPA set out the consideration for the sale. It had two components: (i) the net amount of the debt owed to Banif and (ii) any amount payable to JOP under the PSA. The first amount was identified by the term "the Net Banif debt" and the second amount, identified by the term "Profit Share Consideration", was "any amounts due to the Seller under the" PSA. There were complex arrangements as to how the debts of the Valderrama companies were to be re-structured which the judge describes in detail in paragraphs 72 and following of the judgment.

17. The PSA provides for the respondent to make payments to JOP on the occurrence of certain events. I can now set out the important provisions of the PSA which are the focus of debate on this appeal. Clause 3 provides (among other things) for payments to be made by the respondent to JOP following the sale of any "Real Estate Asset" (as defined) owned by Valsa or Vesa:

> 3.1 The Purchaser agrees, as soon as possible following the Effective Date, that it will use its reasonable endeavours to identify third party buyers for any and all of the real estate assets owned by Valsa or Vesa ("Real Estate Assets") at the best saleable price.
>
> 3.2 If, after the Effective Date, any Real Estate Asset is sold to a third party unconnected to the Purchaser on an arms' length basis, the Purchaser shall pay the Net Profit attributable to any such sold Real Estate Asset in the following proportions:
>
> > 3.2.1 a sum in cash equal to 91% of the Net Profit to the Purchaser; and
> >
> > 3.2.2 subject to the right of set-off contained in clause 6.2, a sum in cash equal to 9% of the Net Profit to JOP.

3.3 For the purposes of clause 3.2, the "Net Profit" attributable to a sold Real Estate Asset shall be calculated by deducting from the price paid for the relevant Real Estate Asset by the third party the following items:

3.3.1 bank facilities or other financing secured on, or utilised in relation to, such Real Estate Asset whether such security is by way of mortgage, charge or similar security;

3.3.2 any sales commission relating to the relevant Real Estate Asset;

3.3.3 any taxes relating to or arising from the sale of the relevant Real Estate Asset or relating to or arising from the distribution of the Net Profit to the Purchaser;

3.3.4 any legal, accounting or other professional fees incurred in connection with the relevant Real Estate Asset;

3.3.5 any direct costs associated with the development or enhancement of the relevant Real Estate Asset, including but not limited to any infrastructure costs.

3.4 The Net Profit calculated pursuant to clause 3.3 shall be paid by Purchaser in cash by telegraphic transfer of funds to accounts nominated by each of the Purchaser and JOP within 30 days of Valsa or Vesa receiving in clear funds the full purchase price relating to the sale of each relevant Real Estate Asset from the relevant third party buyer.

3.5 Save as set out in in clause 3.6, the obligations under this clause 3 are not transferrable.

3.6 The obligation to pay 9% of the Net Profit to JOP pursuant to this clause 3 is transferable on JOP's death to:

3.6.1 JOP's son - Carlos Ortiz-Patino ("COP"); and/or

3.6.2 any of COP's children ("JOP Grandchildren" and each a "JOP Grandchild")

provided that the Purchaser's right of set off pursuant to clauses 6 and 8 shall apply notwithstanding any transfer pursuant to this clause.

3.7 No amounts shall be payable in accordance with this clause 3 in the event that the Purchaser reorganises the Purchaser Group, so that any Real Estate Asset is transferred within the Purchaser Group or to any company in any way connected or associated to the Purchaser. If, however, following any such reorganisation any Real Estate Asset is subsequently transferred to a third party buyer, the provisions of this clause

> shall apply and JOP (or any of his assignees as the case may be) shall be entitled to any amounts payable in accordance with this clause 3.7. For the purposes of this clause, transfers of any Real Estates Asset shall include any asset transfers as well as any share transfers of the company owing [owning] any such Real Estate Asset.
>
> 3.8 JOP shall be punctually notified in writing of any Real Estate Assets transfer and he shall be duly informed of the details of each specific transaction.

18. Clause 4 makes similar provision for profit sharing in the event of a sale of the trade marks owned by Valsa, Vesa or V07:

> 4.1 If, after the Effective Date, Valsa, Vesa or Valderrama 07 receives any payment in relation to:
>
> 4.1.1 the sale of any Valderrama Trade Mark to a third party unconnected to the Purchaser on an arms' length basis; or
>
> 4.1.2 any licence fee relating to the use of any Valderrama Trade Mark by a third party unconnected to the Purchaser on an arms' length basis,
>
> ("Trade Mark Fee"),
>
> the Purchaser shall pay the Net Profit attributable to the Trade Mark Fee in the following proportions:
>
> 4.1.2.1 a sum in cash equal to 91% of the Net Profit to the Purchaser; and
>
> 4.1.2.2 subject to the right of set-off contained in clause 6.2, a sum in cash equal to 9% of the Net Profit to JOP.
>
> 4.2 For the purposes of clause 4.1, the "Net Profit" attributable to a Trade Mark Fee pursuant to:
>
> 4.2.1 clause 4.1.1 shall be calculated by deducting from the price paid by the third party purchaser any amounts attributable to the relevant Valderrama Trade Mark purchased by the third party including, without limitation, the following:
>
> 4.2.1.1 any agency, consultancy and other professional fees and disbursements;
>
> 4.2.1.2 any on-line and hard copy advertising and/or sponsorship costs;

4.2.1.3 any on-going maintenance fees, including but not limited to renewal fees and oppositions filed against later conflicting applications; and

4.2.1.4 any brand development fees;

4.2.2 clause 4.1.2 shall be calculated by deducting from the annual royalty fee payable by the third party purchaser, to the extent they are not already covered in any licence agreement entered into between the third party and Valsa or Vesa (as relevant), any amounts attributable to the relevant Valderrama Trade Mark licensed to the third party including, without limitation, the following:

4.2.2.1 any agency, consultancy and other professional fees and disbursements;

4.2.2.2 any on-line and hard copy advertising and/or sponsorship costs;

4.2.2.3 any on-going maintenance fees, including but not limited to renewal fees and oppositions filed against later conflicting applications; and

4.2.2.4 any brand development fees.

4.3 The Net Profit calculated pursuant to clause 4.2 shall be paid by Valsa or Vesa (as appropriate) (and the Purchaser shall procure that such payments are made) in cash by telegraphic transfer of funds to accounts nominated by each of the Purchaser and JOP within:

4.3.1 in the case of any Trade Mark Fee payable pursuant to clause 4.1.1 within 30 days of Valsa or Vesa (as appropriate) receiving in clear funds the full purchase price relating to the relevant Valderrama Trade Mark;

4.3.2 in the case of any Trade Mark Fee payable pursuant to clause 4.1.2, within 30 days of Valsa or Vesa (as appropriate) receiving in clear funds the payment of the royalty fee by the third party pursuant to any licence agreement.

4.4 The obligation to pay a sum equal to 9% of the Net Profit to JOP pursuant to this clause 4:

4.4.1 shall terminate on 30 June 2050; and

4.4.2 save as set out in in clause 4.5, is not transferrable.

4.5 The obligation to pay 9% of the Net Profit to JOP pursuant to this clause 4 is transferable:

> 4.5.1 by JOP to COP; and / or
>
> 4.5.2 to any JOP Grandchild. Any JOP Grandchild may further assign the right to receive amounts payable under this clause to any of their children
>
> provided that the Purchaser's right of set off pursuant to clauses 6 and 8 shall apply notwithstanding any transfer pursuant to this clause.
>
> 4.6 No amounts shall be payable in accordance with this clause 4 in the event that the Purchaser reorganises the Purchaser Group, so that any Valderrama Trade Mark is transferred within the Purchaser Group or to any company in any way connected or associated to the Purchaser. If, however, following any such reorganisation any Valderrama Trade Mark is subsequently transferred to a third party buyer, the provisions of this clause shall apply and JOP (or any of his assignees as the case may be) shall be entitled to any amounts payable in accordance with this clause. For the purposes of this clause 4.6, transfers of any Valderrama Trade Mark shall include any asset transfers as well as any share transfers of the company owing [owning] any such Valderrama Trade Mark.

19. Clause 5 contains provisions which apply on a sale of shares in Campo or V07, or on a sale of the land at Castellar de la Frontera. It provides:

> 5.1 Subject to clauses 5.5 and 5.6, if, after the date of this agreement, the Purchaser:
>
> 5.1.1 sells all of its shares in Campo ("Campo Alto Shares"); or
>
> 5.1.2 (through Campo) sells all of its shares in Valderrama 07 ("Valderrama 07 Shares"); or
>
> 5.1.3 (through Valderrama 07) sells the Castellar development as an asset sale ("Castellar Development");
>
> to a third party unconnected in any way to the Purchaser for an amount equal to or greater than €16,000,000 (net of all fees, costs and expenses associated with the sale and any development costs associated to Valderrama 07 and/or the Castellar Development), the Purchaser shall procure that the net sale proceeds after such deductions are apportioned as follows:
>
> 5.1.4 the first €16,000,000 shall be paid to the Purchaser. The Purchaser shall ensure that such sale proceeds paid to it are applied in discharging the mortgage over the Castellar property owned by Valderrama 07; and

5.1.5 secondly, the net sale proceeds after the payment pursuant to clause 5.1.4 above shall be applied in settlement of any unpaid outstanding invoices due to Lenz & Staehelin as set out in a settlement agreement entered into between JOP and Lenz & Staehelin on 18 October 2012, and JOP hereby irrevocably instructs the Purchaser to inform Lenz & Staehelin of such sale and to make such payment to Lenz & Staehelin; and

5.1.6 thirdly, subject to the right of set-off contained in clause 6.2, the balance of the net sale proceeds after the payments made pursuant to clauses 5.1.4 above and 5.1.5 above shall be paid to JOP.

5.2 The right of JOP to receive any amounts payable under this clause 5 is transferable:

5.2.1 by JOP to COP; and / or

5.2.2 to any JOP Grandchild. Any JOP Grandchild may further assign the right to receive amounts payable under this clause to any of their children provided that the Purchaser's right of set off pursuant to clauses 6 and 8 shall apply notwithstanding any transfer pursuant to this clause.

5.3 No amounts shall be payable in accordance with this clause 5 in the event that the Purchaser reorganises the Purchaser Group, so that either of the Campo Alto Shares, Valderrama 07 Shares or the Castellar Development are transferred within the Purchaser Group or to any company in any way connected or associated to the Purchaser. If, however, following any such reorganisation the Campo Alto Shares, Valderrama 07 Shares or the Castellar Development are subsequently transferred to a third party buyer, the provisions of this clause shall apply and JOP (or any of his assignees as the case may be) shall be entitled to any amounts payable in accordance with this clause. For the purposes of this clause 5.3, transfers of the Castellar Development shall include any asset transfers as well as any share transfers of the company owning the Castellar Development.

5.4 For the avoidance of doubt, no amounts shall be payable in accordance with this clause 5 in the event of a transfer of: (i) the Campo Alto Shares; (ii) the Valderrama 07 Shares; or (iii) the Castellar Development (whether by way of an asset transfer or share transfer), within the Purchaser Group.

5.5 If:

5.5.1 the Purchaser receives an offer from a third party to purchase either the Campo Alto Shares, the Valderrama 07 Shares or the Castellar Development ("Third Party Offer"); and

5.5.2 the Third Party Offer is for an amount equal to or less than €30,000,000 (net of all fees, costs and expenses associated with the sale and any development costs associated to Valderrama 07),

the Purchaser shall notify JOP of the Third Party Offer and JOP shall have 10 days from receipt of notification of the Third Party Offer to make an offer to the Purchaser on equivalent or better terms than the Third Party Offer ("Matching Offer"). If a Matching Offer is not made in 10 days or JOP informs the Purchaser of its intention not to make a Matching Offer, the Purchaser shall, subject to clause 5.7 be able to accept the Third Party Offer.

5.6 In the event a Matching Offer is made, the Purchaser shall:

5.6.1 be obliged to accept the Matching Offer and decline the terms of the Third Party Offer; and

5.6.2 procure that the net sale proceeds after all deductions have been applied are apportioned as follows:

5.6.2.1 the first €16,000,000 shall be paid to the Purchaser. The Purchaser shall ensure that such sale proceeds paid to it are applied in discharging the mortgage over the Castellar property owned by Valderrama 07; and

5.6.2.2 subject to the right of set-off contained in clause 6.2, any amounts in excess of €16,000,000 shall be paid to JOP it being acknowledged by the Parties that JOP shall retain any amounts payable to the Purchaser in excess of €16,000,000 in satisfaction of the Purchaser's obligation under clause 5.1.5.

5.7 If a Third Party Offer is made for an amount equal to or greater than the aggregate of:

5.7.1 €16,000,000; and

5.7.2 any amounts drawn down by JOP under the Credit Facility and the Putter Loan; and

5.7.3 all fees, costs and expenses associated with the sale and any development costs associated to Valderrama 07 and/or the Castellar Development, and JOP does not make a Matching Offer pursuant to clause 5.5, the Purchaser shall be under an obligation to accept such Third Party Offer and procure that payments of the net sale proceeds are made in accordance with clause 5.6.2.

5.8 If either: (i) the Campo Alto Shares or, (ii) the Valderrama 07 Shares or (iii) the Castellar Development are not sold to a third

> party buyer by 30 June 2013, the Purchaser shall increase the amount of the facility under the Putter Loan to cover any additional deferred taxes payable by JOP as the owner of Putter SRL.
>
> 5.9 JOP shall be entitled to identify third party buyers for the Campo Alto Shares, the Valderrama 07 Shares or the Castellar Development, as well as to take any measures and steps in order to obtain the best saleable price.

20. The "Putter Loan" referred to in clause 5 and elsewhere in the PSA was a loan facility which the respondent undertook (in clause 6 of the PSA) to provide to JOP. The terms of the Putter Loan were set out in a separate document.

21. JOP died on 3 January 2013. JOP's rights under the 2012 SPA and the PSA passed to the appellant.

22. The respondent continued with its preparations to list its shares on CISX, including the preparation of a draft prospectus. The prospectus described the strategy for the exploitation of the assets of Soto and Campo, including the maximisation of revenue from the Valderrama golf course, the exploitation of the trade marks, the residential development of plots adjacent to the course and the disposal of the Castellar land. The judge found that the exit strategy in relation to the golf course was to sell it at the end of the life of the fund, and probably through a sale of the shares in Soto. There was no intention to sell the golf course during the life of the fund.

23. As the judge explains at paragraphs 122 to 128 of the judgment, the plan for listing on the CISX rapidly ran into difficulties for reasons which it is not now necessary to go into. From late 2013 the respondent's strategy changed to one of seeking buyers for the companies, and a number of offers were made in the months following. On 20 August 2015 the respondent received an indicative offer from Zagaleta, which it accepted, and which led to the agreement with Zagaleta to sell the shares in Soto and Campo ("the 2015 SPA"). The 2015 SPA completed in December 2015 or early January 2016.

24. The present claim was commenced on 22 December 2020. It is expressed as a claim for a 9% share of the net profit made by the respondent by the sale of the real estate assets owned by Valsa and Vesa as well as a claim for a 9% share of the profit made by the respondent by the sale of the trade marks owned by Valsa and Vesa. The respondent was alleged to be in breach of clauses 3.2.2 and 4.1.2.2 of the PSA respectively (paragraphs 55 and 58 of the Amended Particulars of Claim).

The judgment on the issue of construction

25. The judge dealt with, and ultimately rejected, these claims at paragraphs 178 to 221 of the judgment. He held that clause 3.2.2 provides for a payment to JOP following the sale of the underlying real estate assets of Valsa or Vesa. It did not apply to a sale of the shares in a holding company, whether that be Soto or Valsa or Vesa, holding the real estate assets. He held that similar considerations applied in the case of clause 4.1.2.2 of the PSA, which dealt with trade marks and he reached the same conclusion.

Neither side suggested on this appeal that a different conclusion would apply as between the two clauses, so it is not necessary to say much more about clause 4.

26. In summary, the judge's reasoning was as follows. First, he considered the natural and ordinary meaning of the words used in clause 3.2. He recognised that it might be possible to construe the words of clause 3.2 as extending to an indirect sale of the real estate assets through a sale of the shares in one of the companies, but could not accept that the effect of the clause, in its contractual context, was to treat an indirect sale of this kind as a triggering event.

27. The judge also considered the factual and commercial context. At the time of the contract it was the respondent's intention to list its shares on the CISX. The draft prospectus disclosed the intention that the fund would last for approximately five years in the course of which the golf course would be retained by the respondent, whilst the respondent developed the various plots of land which Valsa and Vesa owned next to or near the golf course into residential villas and apartments. This development would yield returns for investors. The land at Castellar would be land-banked and sold in three or four years. JOP and his advisors would have been well aware of these proposals. Clause 3.2 therefore allowed JOP to participate in the profits from this venture. JOP was given separate rights in relation to the exploitation of the trade marks (clause 4) and the land at Castellar (clause 5), in the latter case whether that profit was realised on the sale of one of the companies or the land itself. Whilst this did not give JOP an effective right to participate in a sale of the golf course itself (because of the preferential rights), the golf course was a very different asset. It was not going to be sold during the life of the fund, and its value was unlikely to increase significantly over that period.

28. The judge thought that the unsatisfactory nature of the deal for JOP was explicable in the light of his perilous financial position. He concluded at [215]:

> "Even if this was a "bad deal" for JOP as some of the Claimant's witnesses suggested, it is not the role of this court to save commercial men and women from the consequences of the deals that they have done. Unless there is some mitigating factor — for example, a mistake or duress, none of which is pleaded in this case — the function of this court is to give effect to the contracts that they have made. JOP was a businessman. He was advised by a plethora of professional advisers. In my view, on this point, the terms of the contract are unambiguous and the court's job is to apply them."

The arguments on appeal

29. Mr Gary Blaker KC, who appeared with Mr Oberon Kwok for the appellant, advanced five reasons why the judge's conclusion that the profit share only applied to a sale of underlying assets was wrong. These were (1) that the judge's interpretation was commercially unrealistic and absurd; (2) that the appellant's interpretation was the natural and ordinary meaning; (3) that the judge failed, possibly because of a delay in giving his judgment, to give sufficient weight to key facts relating to the interpretation of the PSA; (4) that the judge erred in his interpretation of the last sentence of clause 3.7; and (5) that even if a sale of shares in Soto was unforeseen at

the date of the PSA, the parties would have intended for the PSA to apply to such a sale.

30. The thrust of Mr Blaker's first point was that the judge's interpretation made it too easy for the respondent to "circumvent" the PSA by selling the assets at holding company level, either at the level of Valsa and Vesa or at the level of Soto. This meant in practice that the PSA had no value for JOP or his heirs. Additionally, the respondent was obliged by clause 3.1 to find buyers for "any and all" of the real estate assets. The most valuable real estate asset was the golf course, and the parties knew that the only way of selling the golf course, in the light of the preferential rights, was through a sale of Soto, which would not trigger those rights. The parties also knew that owning the real estate assets through a Swiss holding company was necessary to retain tax advantages.

31. Mr Blaker argued further that the judge had been wrong to say that the unsatisfactory commercial consequences for JOP were explicable on the basis that JOP was in a weak bargaining position arising out of his perilous financial position. This was a *non-sequitur* and impermissibly strayed into the individual party's subjective motivation for entering a contract.

32. The thrust of Mr Blaker's second reason was that the judge's interpretation was a technical or literal one and not the meaning which a reasonable business person would understand from the words used. A reasonable business person would understand Zagaleta to have purchased the real estate assets owned by Valsa and Vesa, even though, as a technical matter, Zagaleta had only purchased the shares in Soto. Once one adopts a less pedantic approach, the provisions in clause 3.3 for calculating the Net Profit from the sale can apply to the sale of the holding company. He submitted that it was telling that the judge found a "perfectly workable formula" when calculating the Net Proft on the basis of the appellant's construction. Finally, Mr Blaker submitted that the appellant's construction was the only one which gave a natural and ordinary meaning to "any and all" in clause 3.1.

33. The third reason advanced by Mr Blaker was founded on the delay between the conclusion of the trial and the date of the delivery of the judgment. He submitted that this delay justified a closer scrutiny of how the judge handled the factual evidence as part of the process of construction than might otherwise be the case.

34. Next, his fourth reason, Mr Blaker contended that the judge had arrived at an incorrect interpretation of the final sentence of clause 3.7. The judge had been wrong to regard the expanded approach to be given to "transfers of Real Estate Assets" by clause 3.7 to be limited to that sub-clause and as not applying to clause 3 as a whole. Further, even if the judge was right, for the reasons he gave, to hold that the expanded definition only applied to situations within clause 3.7, it was anomalous that such a definition *only* applied to situations within clause 3.7.

35. Finally, Mr Blaker relied on the principle stated by Lord Neuberger in *Arnold v Britton* at [22] that where the parties encounter an event unforeseen at the date of the contract, the court may adopt a construction which conforms with what the parties would have intended in that eventuality if they had thought of it. The only proper inference was that the parties would have intended that JOP should be entitled to share in the profits of the sale of the shares in Soto.

36. Mr Peter Knox KC, who appeared for the respondent with Mr Daniel Goldblatt, supported the conclusion and the reasoning of the judge. He also contended that JOP's position could in any event have been protected, at least to some extent, by an implied term that the Respondent could not avoid payment of the profit share by artificially "dressing up" what in reality had been negotiated as a sale of individual properties to a single buyer as a sale of Vesa or Valsa, but there was no such suggestion of artificiality here.

Discussion

37. I should say at the outset that I am not persuaded that the judge's conclusion is vitiated or incorrect for any of the reasons advanced by the appellant. By placing commercial common sense at the forefront of his argument, the appellant, as it seems to me, relegates the language used by the parties in their agreement to far too subservient a role in the process of construction. It is obviously wrong in principle to start with a preconceived view as to the commercial benefits to be derived by a party from an agreement and then to shoe-horn the language of the agreement to conform with that view. In *Arnold v Britton* [2015] AC 1619, a case in which he described the commercial consequences for the leaseholders as "alarming", Lord Neuberger emphasised that "save perhaps in a very unusual case" the ascertainment of what the parties meant through the eyes of a reasonable reader "is most obviously to be gleaned from the language of the provision". He went on to say

> "Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again, save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision"

38. At [20] in the same case, Lord Neuberger re-emphasised that, whilst commercial common sense is a very important factor to take into account when interpreting a contract, the court should be very slow to reject the natural meaning simply because it appears to be a very imprudent term for one of the parties to have agreed:

> "The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it to assist an unwise party or to penalise an astute party."

39. Rather than starting by analysing the commercial consequences for JOP of the construction at which the judge arrived, and asking whether this permitted the respondent to "circumvent" a putative obligation to be paid by the respondent in the event of a sale of the shares of Soto, I prefer to start with the language of the PSA

chosen by the parties to define the event upon which an obligation to pay a profit share is said to arise.

40. As a matter of ordinary language, clause 3.2 appears to be imposing on the respondent an obligation to pay a profit share in the sum of 9% of the Net Profit (as later defined) in the event that any Real Estate Asset is sold to a third party on an arm's length basis. Clause 3.2 refers to the "Net Profit attributable to the sale of any such sold Real Estate Asset". "Real Estate Asset" is defined in clause 3.1 as "any and all of the real estate assets owned by Valsa and Vesa". This is very precise language, indicating that the assets concerned consist of real property owned by Valsa or Vesa. It is language which is not at all apt to cover the sale of shares in a holding company such as Valsa or Vesa, or a group holding company such as Soto.

41. Clause 3.3 concerns how the Net Profit attributable to the sale of a Real Estate Asset is to be calculated. The starting point is the "price paid for the Real Estate Asset". As the judge said, "the provisions of the clause are littered with references to the underlying assets". This again is inappropriate language if what the parties contemplated included a sale of the shares in Valsa, Vesa or Soto.

42. The argument that the drafter of the contract was using the language in a loose or expanded sense to cover sales of the shares of Valsa, Vesa or Soto in my view faces a number of obstacles which the judge was correct to recognise. First, the drafter has demonstrated in no uncertain terms that he or she was well aware of the difference between a sale of shares in a holding company and the sale of an underlying real property asset. This is made crystal clear in clause 5, where the triggering event for a payment to JOP is expressly by reference to the sale by the respondent of all of its shares in Campo, all of its shares in V07, or the Castellar development "as an asset sale". The contrast with the triggering event in clause 3.2, which is, and is only, an asset sale is stark. The contrast makes it implausible that the drafter was relying on some loose or expanded meaning of Real Estate Assets in Clause 3.2 to achieve the same effect.

43. Mr Knox drew attention to the different rights afforded to JOP under clause 3 (relating to the Real Estate Assets owned by Valsa and Vesa) and clause 5 (relating to land at Castellar de la Frontera). Under the latter clause, JOP has the right to make a matching offer, as well as the right to identify purchasers and "to take any measures and steps in order to obtain the best saleable price". I agree that this emphasises the care which the agreement has taken in differentiating between the different profit events. It is not at all surprising, therefore, to find that clauses 3 and 5 are different and that clause 3 is not triggered by a sale of shares.

44. Secondly, the sale of an asset, such as land or trademarks, is different in quality from a sale of the shares in the company which owns them. If the asset sold is the only asset of the company, then the value of the shares may be the same as the value of the underlying asset, but equally it may not be. If it had been intended that the profit share should be triggered by the sale of shares, one would have expected the agreement to explain whether the starting point for the profit share was the sum received for the shares or the value of the underlying assets. These are not necessarily the same in this case. In the case of Valsa, for example, in addition to owning land, it received rent from the lease of the golf course. Moreover the respondent was free to run the companies as it chose, so it does not follow that the assets of the companies would

remain the same. Further, if the sale of shares is to be a triggering event, how is the triggering event to be defined? Clause 5 refers to all of the shares in Campo or V07. But what is to happen on a sale of an interest in Soto falling short of all its shares? Mr Blaker suggested that this would trigger a *pro rata* profit share, and one can see that a profit might be realised in this way. That would, however, be a different arrangement from clause 5. One would have expected clause 3 to deal with this if clause 3.2 was meant to cover share sales in addition to asset sales. I agree with the judge when he said at [193]:

> "The clause does not expressly refer to the possibility of an indirect sale of the assets (through a sale of one of the holding companies) and no attempt is made to deal with some of the matters that would be required to be addressed if it were to do so. For example, no adjustment is made for other assets and liabilities that may be present in any of the companies. The wider interpretation requires the court to read in other provisions (for example, in relation to the apportionment of the consideration for a sale of shares) which are simply not there. This is a professionally written contract. If the wider construction for which Mr Blaker KC argues had been intended, I would have expected such provision to have been made. I can only conclude that clause 3.2.2 was not intended to apply to an indirect sale."

45. Thirdly, there is clause 3.7. Clause 3.7 does two things. The first is to allow the respondent to undertake an intra-group reorganisation of the Valderrama Companies involving transfers of the Real Estate Assets without triggering clause 3.2. The second is to allow for the continued operation of clause 3, including clause 3.2, if there is a sale following such a reorganisation, irrespective of which company in the group then owns the assets. The final sentence of the clause provided that "For the purposes of this clause, transfers of any Real Estate Assets shall include any asset transfers as well as any share transfers of the company [owning] any such Real Estate Asset."

46. The appellant relied on the final sentence of clause 3.7 to suggest that the expanded meaning given to "transfer of any Real Estate Asset" to include share transfers as well as the assets themselves applied to the whole of clause 3 and therefore to clause 3.2, and not just to clause 3.7 alone. For reasons which the judge explains at paragraphs 204 to 207 of the judgment, this was not a correct reading of clause 3.7. In short the insertion of a reference to a numbered clause in the penultimate sentence was an error. In the penultimate sentence it made no sense to refer to "an amount payable in accordance with this clause 3.7", because clause 3.7 does not provide for payment of any amount. The number plainly should have appeared in the final sentence, which should have read "For the purposes of this clause 3.7…" Clauses in very similar terms elsewhere in the agreement, namely clauses 4.6 and 5.3, had the numerical reference in the correct place. The final sentence of clause 3.7 was accordingly limited in its application to clause 3.7.

47. Once the infelicity in the drafting of clause 3.7 is ironed out, it provides an even more proximate indication that clause 3.2 is not referring to a sale of the shares in any holding company, but is referring to an asset sale alone. Mr Blaker challenged the

judge's correction of the final sentence of clause 3.7, but I was not persuaded by his argument. Something has obviously gone wrong with the cross-referencing of clauses in clause 3.7. In the penultimate sentence the intention must be to refer to clause 3 as a whole not just to clause 3.7, because there is no amount "payable in accordance with this clause 3.7". In the final sentence, it would be odd to find a provision which governed the whole of clause 3 including clause 3.2 tucked away at the end of a sub-clause dealing with reorganisation. The correction is easily found by looking at the comparable provisions in clauses 4.6 and 5.3, which must, on any view, have been intended to be to the same effect, and in which the cross-referencing makes sense and is the other way around.

48. Clause 3.7 is therefore to be read as supplying a definition of the transfer of a Real Estate Asset so as to include share transfers of the company owning the asset, but only for the purpose of clause 3.7. It is true that clause 3.7 uses the words "transfer" and "transferred" rather than the word "sold" used in clause 3.2. The more general wording of clause 3.7 is explicable by the fact that it is directed to internal transfers as well as transfers to third parties. What is clear is that the drafter has only applied the expanded definition to transfers within clause 3.7. A sale, which will also involve a transfer, within clause 3.2 is not subject to a correspondingly expanded definition.

49. Mr Blaker went on to make another point on clause 3.7. He argued that, even on the judge's construction of the effect of the final sentence of clause 3.7, it was anomalous that the parties could have intended to ensure that a payment obligation arose when there was a parcelling of Real Estate Assets into a new company by means of an intra-group reorganisation, and then a sale, but had not ensured that a payment arose when there was a sale of the existing parcelling of the assets in the existing companies, i.e. Soto.

50. I was not persuaded by this argument. Subject to the obvious correction of the cross-references, it is difficult to see how the drafter could have made it any clearer that the expanded definition in the final sentence of clause 3.7 was not to apply to clause 3.2. The final sentence of clause 3.7 is, as Mr Knox submitted, no more than a limited exception to the principle that the triggering event for a payment is the sale of an asset and not the sale of shares. It arises only in the event that an asset or assets is parcelled into another company, perhaps a special purpose vehicle, and then sold on. The reasonable business person would not see this limited exception as having the radical effect on the trigger event for clause 3.2 for which the appellant contends. To allow the final sentence of clause 3.7 to have this effect sounds like allowing the tail to wag the dog.

51. Mr Blaker had two answers to the significance of the Net Profit provisions of clause 3.3, which, as the judge said, did not naturally apply to a sale of shares. His first point was that the final sentence of clause 3.7, when understood as providing for a payment in accordance with clause 3 in the circumstances of a re-organisation, must be contemplating the application of those provisions appropriately adapted to deal with a sale of shares. I think that is a fair point, but, in my judgment, it goes no further than that. The provisions of clause 3.3 do not need adaptation when applying them to a sale of a Real Estate Asset under clause 3.2. The reasonable reader will see that the provisions of clause 3.3 are those which one would expect to see for a sale of a Real Estate Asset rather than a sale of shares, and would be seen as supporting the narrow and not the expanded view of clause 3.2.

52. Mr Blaker's second point about the Net Profit provisions was that the judge had had no difficulty in applying them on the assumption that he was wrong about the construction of clause 3.2. That is not a good point. The judge, at several points in his judgment, noted the difficulties associated with the application of clause 3.3 to a share sale rather than an asset sale, in particular the absence of any provision for apportionment. To say that he found no difficulty is wide of the mark.

53. A further point in support of the judge's interpretation arises from clause 3.4 which contemplates that the Net Profit is to be paid by the respondent to JOP within 30 days of the full purchase price being received by Valsa or Vesa. Receipt of a purchase price by Valsa or Vesa is, of course, what would naturally be expected to happen following a sale of a Real Estate Asset owned by Valsa or Vesa. It is not what would happen if there was a sale of the shares in Soto. It is true that clause 3.4 would also have to be adapted appropriately for a share sale which followed a re-organisation under clause 3.7, but clause 3.4 is still valid support for the conclusion that clause 3.2 is only referring to a sale of Real Estate Assets owned by Valsa or Vesa and not referring to a sale of shares.

54. Mr Blaker argued that the obligation imposed by clause 3.1 for the respondent to use its reasonable endeavours to identify third party buyers for "*any and all* of the real estate assets owned by Valsa or Vesa ("Real Estate Assets") at the best possible price" supported the appellant's interpretation. The parties must have contemplated, indeed they knew, that the only way that "all" the Real Estate Assets could be sold was through a sale of the shares in Soto. That was because a sale of the golf course as an asset sale could not have been achieved in view of the preferential rights.

55. This was Mr Blaker's most promising argument, but in the end I was not persuaded by it. At the date of the PSA the parties were focussed on retaining the golf course and developing and selling plots of land adjacent to it. There was no plan to sell the golf course during the life of the fund. As the judge said, the golf course was a very different asset from the land for which immediate buyers were to be sought. Against that background, the obligation to use reasonable endeavours to identify buyers for any and all of the Real Estate Assets does not bring to mind an immediate sale of "all" the assets together. Rather it brings to mind an obligation attaching to the individual Real Estate Assets. The parties would have contemplated a sale of the golf course at the end of five years, but, as Mr Knox submitted, clause 3.1 does not oblige the respondent to sell the course, merely to use reasonable endeavours to find a buyer. If it was impracticable to sell it at that stage, there would be no breach of clause 3.1

56. The use of the phrase "any and all" in clause 3.1 does not therefore mean that clause 3.2 must be read as applying to a sale of the shares in Soto. Nor does it mean that clause 3.1 should be read as imposing an obligation to use reasonable endeavours to identify a buyer for the shares in Soto.

57. The judge also gave weight to the fact that the PSA was a professionally drafted agreement observing that JOP was a businessman and advised by a plethora of professional advisers. Mr Blaker did not suggest that he was wrong to do so. Although there are some technical drafting errors in the PSA, it is a sophisticated document drafted by lawyers. I agree that this is a factor of some weight in the present case.

58. I therefore reject the appellant's contention that the natural and ordinary meaning of the language of clause 3.2 is that a sale of the shares in a holding company such as Valsa, Vesa or Soto will trigger a profit share. I can now address Mr Blaker's argument that the judge's interpretation of clause 3.2 results in an arrangement which is so commercially unrealistic and absurd that the judge should have rejected it in favour of the appellant's interpretation.

59. Mr Blaker's complaint about the commercial consequences of the judge's interpretation was that it gave the respondent an easy way of "circumventing" the obligation to pay a profit share. This is a rather contentious way of putting things, because it assumes that it was intended by the parties that a profit share would become payable in the event of a sale of the whole group, by means of a sale of the shares in Soto, as opposed to only becoming payable on the sale of Real Estate Assets owned by Valsa and Vesa. For my part, when the matter is considered against the admissible factual background, I do not think it is absurd or unrealistic for an agreement to have been reached which provided for a profit share only on the sale of Real Estate Assets. That, after all, was what was under immediate consideration in the prospectus. If that venture had gone forward JOP would have received a profit share on the sale of lots adjoining the golf course. The fact that the venture did not proceed in that way does not mean that it was absurd or unrealistic to think that it might.

60. It is true that the deal which the parties reached, on the judge's interpretation, is not as favourable to JOP as one in which the known route to realising a profit from the golf course land was also deemed to be a triggering event for the profit share. I cannot, however, regard the fact that it is not so treated as commercially unrealistic or absurd. JOP was in a weak bargaining position, with Banif calling the shots in the negotiation. The 2012 SPA had advantages for JOP in that it dealt with his liability to his creditor, Banif, on whose loan he had defaulted. If the respondent was not prepared to pay more in the way of primary consideration, some deal, even a bad deal, would no doubt have been regarded as better than no deal on the profit share aspect. Mr Blaker suggested that this was impermissibly to stray into the domain of the parties' subjective intentions, but I do not agree. JOP's financial peril must have been obvious not only to him but to the respondent, given the close involvement of Banif in the negotiations towards the agreements. It formed part of the admissible factual matrix reasonably available to the parties against which the contract is to be construed. It would not be commercially realistic to ignore it.

61. I therefore reject the suggestion that in arriving at his conclusion in the interpretative process, the judge should have adopted the appellant's construction on the basis that the natural meaning gave rise to commercially unreal or absurd results.

62. Mr Blaker also argued that the delay between the conclusion of the trial and the date of the delivery of the judgment, some six months or so, justified this court in engaging in closer scrutiny of how the judge handled the factual evidence as part of the process of construction than might otherwise be the case. Mr Blaker relied on nine points based on Mr Moxon's evidence and a further three points arising from the evidence to which he said the judge did not accord sufficient weight and which cast light on the natural and ordinary meaning of the PSA.

63. It is not necessary for me to decide whether a closer degree of scrutiny would be justified in this case, as I am satisfied that there is nothing in any of the points raised. I would say, however, in fairness to the judge, that the case raised many more points than the issue of construction with which I am dealing, most of which were complex. The judgment extends to nearly 100 pages. The judge had the advantage of a transcript of the evidence from which to refresh his memory if needed. In those circumstances, I regard the suggestion that, over the period it took him to prepare the judgment, he had lost sight of any material aspect of the evidence, as unreal. Nevertheless I will deal briefly with the points raised.

64. The first eight points seek to derive from the evidence of Mr Moxon additional material relevant to construction. They are irrelevant for either or both of two reasons. To the extent that they relate to Mr Moxon's subjective understanding of the meaning of the SPA, they are irrelevant and inadmissible. To the extent that they might be said to establish facts which are part of the factual matrix, they do not seem to me to be inconsistent with the factual matrix found by the judge. Mr Blaker identifies four further aspects of the evidence to which he says the judge accorded insufficient weight:

    i) The DLA due diligence report. This noted a Spanish legal opinion that the preferential rights would not be engaged by a sale of Soto. The judge was fully aware that the preferential rights were not engaged by a sale of Soto: see e.g. paragraph 212 of the judgment. I do not see how the judge can be criticised here.

    ii) A KPMG due diligence report noted the tax advantages of using Swiss Holding Companies. Unless the companies were sold at holding company level, the buyer would lose those tax advantages. I cannot see that this adds anything of weight, and the judge was alive to the point.

    iii) It is said that the respondent used language in the replies to requests for information which accepted that a sale of the shares in Valsa or Vesa could be a sale of real estate assets. The judge referred to this point at paragraph 183(v) of the judgment. I do not consider the language used by the respondent to be an acceptance that a sale of Real Estate Assets in clause 3.2 of the SPA could be effected by a sale of the shares in Soto. It is implicit that the judge took a similar view.

65. Mr Blaker's final argument was that, if the judge was correct and the intention to sell Soto only arose after the date of the SPA and that this was not foreseen at the time of the PSA, then he erred by not considering properly what the parties would have intended in that eventuality. He relied on paragraph 22 of the speech of Lord Neuberger in *Arnold v Britton* where he said:

> "… in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging by the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is *Aberdeen City Council v Stewart Milne Group Ltd* 2012 SC (UKSC) 240, where the court concluded that "any … approach" other than

> that which was adopted "would defeat the parties' clear objectives", but the conclusion was based on what the parties "had in mind when they entered into" the contract."

66. In the same case, at [71] Lord Hodge referred to the cited *Aberdeen* case and said that it was the correct approach there as "the internal context of the contract pointed towards the correct conclusion".

67. In my judgment, the present case is not of the kind referred to by Lords Neuberger and Hodge in the passages referred to. At least in general terms, the possibility of a sale of shares in a company which directly or indirectly owns a relevant asset instead of a sale of the asset itself was plainly something to which, as the language of the contract shows, the parties *had* addressed their minds: see clause 3.7 final sentence, clause 4.6 final sentence and clause 5. In the present case, the internal context of the contract points away from rather than towards a re-writing of clause 3.2 to create a triggering event upon a sale of shares in a holding company. Furthermore, at the time of entering into the PSA the parties also entered into the 2012 SPA. That itself was a sale and purchase of the holding company of a group in which group members held underlying assets. I find it difficult to suppose, reading the two documents together, that the parties had not contemplated in general terms that there could be a further onward sale of the shares in Soto and Campo. Indeed, in respect of Campo, clause 5 treats such a sale as a triggering event. It cannot be said that the parties must have intended the same to apply to a sale of shares in Soto, Valsa and Vesa when they appear to have chosen not to do so.

68. For the reasons I have given I would therefore uphold the judge's interpretation of the PSA. I have reached this conclusion without having to speculate, as Mr Knox invited us to, about whether there is an implied term which could have protected JOP in the event of some artificial manipulation of a transaction so as to avoid a payment of a profit share. As the further grounds of appeal are dependent on the appellant's success on the question of interpretation, that is sufficient to lead to the dismissal of the appeal and the issues raised by the respondent's notice do not then arise.

Lord Justice Snowden:

69. I agree.

Lady Justice Asplin:

70. I also agree.