Neutral Citation Number: [2023] EWCA Civ 1142

Case No: CA-2023-000707

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPANIES COURT (ChD)
HIS HONOUR JUDGE HODGE KC (Sitting as a Judge of the High Court)
[2023] EWHC 437 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday 9 October 2023

Before :

LORD JUSTICE BEAN
LORD JUSTICE ARNOLD
and
LORD JUSTICE SNOWDEN

- -

Between :

DnaNudge Limited	**Appellant/ Defendant**
- and -	
Ventura Capital GP Limited (acting for and on behalf of Ventura Capital LP Fund IV and Ventura Capital MG1 LP Fund)	**Respondent /Claimant**

- -

Andrew Thornton KC (instructed by **Dorsey & Whitney (Europe) LLP**) for the **Appellant**
Timothy Collingwood KC (instructed by **Fladgate LLP**) for the **Respondent**

Hearing date : 26 July 2023

- -

Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10.30 a.m. on Monday 9 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Snowden :

1. This is an appeal by DnaNudge Limited ("the Company") against a decision of HHJ Hodge KC (sitting as a Judge of the High Court) given on 8 March 2023: [2023] EWHC 437 (Ch) (the "Judge" and the "Judgment"). The Judge determined that the conversion of all the Series A Preferred Shares of £0.001 each ("the Series A Shares") in the Company to Ordinary Shares of £0.001 each ("Ordinary Shares") was void and of no effect because the conversion had not received the consent in writing of the holders of more than 75% in nominal value of the Series A Shares. The case concerns the interpretation of the Articles of Association of the Company (the "Articles").

Background

2. The facts are not in dispute. The Company was incorporated in July 2015. It operates as a medical and health technology company in the business of supplying clinical products for rapid testing for COVID and the provision of genetic services. At the relevant times, the 162,561 issued Ordinary Shares have been held by a number of individuals and entities who include the founders and directors of the Company.

3. Towards the end of 2020 and early 2021, the Company sought to raise significant funding of up to £50 million from external investors. In the first part of 2021, Ventura Capital GP Limited, acting as the general partner for and on behalf of two Cayman Islands exempted limited partnerships (together "Ventura"), invested about £40 million in acquiring a total of 24,026 Series A Shares. Shortly thereafter, Sumitomo Mitsui Trust Bank Limited ("SMTB"), Japan's largest trust company, and part of Japan's second largest banking group, invested some £2 million in acquiring a further 851 Series A Shares. Together, Ventura and SMTB hold all of the 24,877 issued Series A Shares.

4. In connection with Ventura's subscription for Series A Shares, the Company adopted its new Articles on 21 January 2021.

5. Article 3.1(a) provides that, unless the context otherwise requires, the Ordinary Shares and the Series A Shares rank *pari passu* among themselves, but constitute separate classes of shares.

6. A key definition in the Articles is that of "Investor Majority Consent". This is defined to mean the prior written consent of the "Investor Majority", which is in turn defined as the holders of a majority of the Ordinary Shares and the Series A Shares in aggregate as if such Shares constituted one class of share.

7. Article 4 provides that any profits available for distribution that the Company, with Investor Majority Consent, determines to distribute in respect of any financial year will be distributed among the holders of the Series A Shares and the Ordinary Shares *pari passu* as if they constitute one class of shares and *pro rata* to the number of such shares held. By Article 7, the Series A Shares and the Ordinary Shares are also each entitled to attend and vote at Company meetings and have equal voting rights.

8. The Series A Shares enjoy enhanced rights to distributions in certain circumstances. These flow from the terms of Article 5, which is entitled "Distribution Priorities". Article 5.1 provides as follows,

> "On a distribution of assets on a liquidation or a return of capital (other than a conversion, redemption, a reduction of capital or purchase of Shares) the surplus assets of the Company remaining after payment of its liabilities shall be applied (to the extent that the Company is lawfully permitted to do so):
>
> (a) first, in paying to each of the holders of the Series A Shares, in priority to the holders of the Ordinary Shares, an amount per Series A Share held equal to the Preference Amount (provided that if there are insufficient surplus assets to pay the amounts per share equal to the Preference Amount in full, the remaining surplus assets shall be distributed to the holders of Series A Shares pro rata to their respective entitlements under this Article 5.1(b)) [sic];
>
> (b) thereafter, the balance of the surplus assets (if any) shall be distributed among the holders of the Ordinary Shares pro rata to their respective holdings of Ordinary Shares."

It is clear that the reference in Article 5.1(a) to Article 5.1(b) is a typographical error and ought to be a reference to Article 5.1(a) itself.

9. The "Preference Amount" is defined as,

> "an amount per Series A Share equal to the amount paid up or credited as paid up (including premium) for such share together with the Series A Preferred Return (if applicable) as well a sum equal to any Arrears less any amounts or proceeds previously received on such Series A Share (including any dividend(s))."

10. Importantly, the "Series A Preferred Return" is defined as,

> "a per Series A Share amount equal to the amount paid up or credited as paid up (including premium) for such share plus a cumulative 8.0% preferred return compounding annually until and upon liquidation or return of capital, which Series A Preferred Return shall apply and accrue until such time as the Company raises additional equity capital funding of at least £10 million at a pre-money valuation of the Company of at least £900 million, upon which the Series A Preferred Return shall cancel and no longer apply or accrue to the Series A Shares or be payable."

11. By virtue of Article 6, headed "Exit Provisions", the enhanced distribution rights conferred on the Series A Shares also apply in respect of the distribution of surplus assets in the event of a sale by the Company of all or substantially all of its undertaking and assets. By Article 6.1, it is further provided that on any sale of shares in the Company which results in the purchaser and those acting in concert with him acquiring a controlling interest in the Company, the proceeds of sale of those shares should be distributed in the order of priority set out in Article 5, and the directors of the Company

are prohibited from registering any transfer of shares if the proceeds of sale are not so distributed.

12. The Articles which are central to the dispute in this case are Articles 9 and 10. The key provisions of Article 9 are as follows,

> "9. CONVERSION OF SERIES A SHARES
>
> 9.1 Any holder of Series A Shares shall be entitled, by notice in writing to the Company, to require conversion into Ordinary Shares of all of the Series A Shares held by such holder at any time and those Series A Shares shall convert automatically on the date of such notice (the "Conversion Date").
>
> 9.2 All Series A Shares shall automatically convert into Ordinary Shares:
>
> (a) upon notice in writing from an Investor Majority at the date of such notice (the "Conversion Date"); or
>
> (b) immediately upon the occurrence of a Qualifying IPO.
>
> 9.3 In the case of: (i) Articles 9.1 or 9.2(a), not more than ten Business Days after the Conversion Date; or (ii) in the case of Article 9.2(b), at least five Business Days prior to the occurrence of the Qualifying IPO, each holder of the relevant Series A Shares shall deliver the certificate(s) (or an indemnity for lost certificate(s) in a form acceptable to the Board) in respect of the Series A Shares being converted to the Company at its registered office for the time being.
>
> 9.4 Where conversion is mandatory on the occurrence of a Qualifying IPO, that conversion will be effective only immediately prior to and conditional upon such Qualifying IPO (and "Conversion Date" shall be construed accordingly) and, if such Qualifying IPO does not become effective or does not take place, such conversion shall be deemed not to have occurred. In the event of a conversion under Article 9.1, if the Conditions have not been satisfied or waived by the relevant holder by the Conversion Date, such conversion shall be deemed not to have occurred.
>
> 9.5 On the Conversion Date, the relevant Series A Shares shall without further authority than is contained in these Articles stand converted into Ordinary Shares on the basis of one Ordinary Share for each Series A Share held (the "Conversion Ratio"), and the Ordinary Shares resulting from that conversion shall in all other respects rank pari passu with the existing issued Ordinary Shares.

> 9.6 The Company shall on the Conversion Date enter the holder of the converted Series A Shares on the register of members of the Company as the holder of the appropriate number of Ordinary Shares and, subject to the relevant holder delivering its certificate(s) (or an indemnity for lost certificate in a form acceptable to the Board) in respect of the Series A Shares in accordance with this Article, the Company shall, within ten Business Days of the Conversion Date, forward to such holder of Series A Shares by post to his address shown in the register of members, free of charge, a definitive certificate for the appropriate number of fully paid Ordinary Shares."

13. A "Qualifying IPO" is defined as the admission of all or any of the Company's Shares or securities representing those Shares to trading on a number of specified stock exchanges, where the Company's offering price reflects a pre-money valuation of at least £900 million.

14. Article 9.7 provides for an adjustment of the Conversion Ratio in certain circumstances; Article 9.8 empowers the directors to deal with entitlements to fractions of Ordinary Shares on conversion as they see fit; Article 9.9 provides a dispute resolution mechanism in relation to the adjustment of the Conversion Ratio; and Article 9.10 makes provision in relation to rights issues and Series A Shares.

15. Article 10 provides,

> "10. VARIATION OF RIGHTS
>
> 10.1 Whenever the share capital of the Company is divided into different classes of shares, the special rights attached to any such class may only be varied or abrogated (either whilst the Company is a going concern or during or in contemplation of a winding-up) with the consent in writing of the holders of more than 75 per cent in nominal value of the issued shares of that class.
>
> 10.2 The creation of a new class of shares with preferential rights to one or more existing classes of shares shall not constitute a variation of the rights of those existing classes of shares."

16. In addition to the new Articles, all of the holders of the Ordinary Shares and Series A Shares are parties to a Shareholders' Agreement which was originally dated 16 June 2016, but was amended by a Deed of Variation dated 17 December 2020. Clause 3.3 of that amended Shareholders' Agreement provided that if a Qualifying IPO (as defined in the Articles) does not occur by 19 November 2023, Ventura has the right to require the Company to purchase all or any portion of the Series A Shares held by it and SMTB, and the Company is required to purchase such Series A Shares for an aggregate price equal to the Preference Amount per Series A Share (the "Put Option").

17. On 23 May 2022 the Company sent a circular to all its shareholders indicating that it was running very short of cash and setting out a proposal to raise additional working

capital by way of an issue of between £7 million and £25 million of convertible loan notes. The circular summarised some of the risk factors facing the Company. One of these was the Put Option. The circular expressed the view that,

> "In the event that the Company was obliged to repurchase Series A Shares pursuant to an exercise of the Put Option, its business, financial condition, results of operations and prospects may be materially adversely affected."

The circular went on to state, however, that,

> "… an Investor Majority might seek to nullify the Put Option by converting the Series A Shares into Ordinary Shares (pursuant to Article 9.2), ahead of any exercise of the Put Option",

The circular noted that such action would be likely to be challenged by Ventura.

18. Three days later, on 26 May 2022 various Ordinary Shareholders, including the co-founders and directors, purporting to constitute an Investor Majority, signed a letter to the Company giving notice in writing requiring all of the Series A Shares in issue to be converted into Ordinary Shares (with the same nominal value) at the date of the notice (the "Conversion Notice").

19. On 10 June 2022 the Company's solicitors wrote to Ventura and SMTB informing them that the Company had received the Conversion Notice. The letter stated (but without giving further details) that the relevant thresholds to constitute an Investor Majority had been achieved on 7 June 2022, that for the purposes of Article 9 the Conversion Notice had been deemed to be delivered on 7 June 2022, and that this was therefore the Conversion Date for the purposes of Article 9. The letter went on to assert that under Article 9.5 the Series A Shares held by Ventura and SMTB had been converted into Ordinary Shares and that the Company's register of members had been amended accordingly.

20. Ventura's solicitors responded by letter of 13 June 2022, objecting that the purported conversion involved a variation or abrogation of the rights attaching to the Series A Shares and was accordingly invalid by reason of a failure to comply with Article 10.1. The letter indicated that in the absence of agreement, proceedings would be commenced. The Company's solicitors did not accept that compliance with Article 10.1 was required, and maintained in correspondence that the conversion was valid. The Part 8 Claim Form was then issued by Ventura on 28 June 2022.

The Claim

21. In the claim, Ventura sought a declaration that the purported conversion of the Series A Shares held by its two funds and SMTB was void and of no effect by reason of a failure to obtain the written consent of the holders of 75% of the Series A Shares pursuant to Article 10.1. Alternatively, Ventura sought an order (on behalf of itself and SMTB) pursuant to section 633 of the Companies Act 2006 ("Section 633"), which applies where the rights attaching to any class of shares are varied under section 630 of the 2006 Act, disallowing the variation and cancelling the conversion on the grounds

that it was unfairly prejudicial to Ventura and SMTB. Ventura also sought an order for rectification of the Company's register of members reinstating the Series A Shares.

The Judgment

22. The claim was heard by the Judge in January 2023. In his reserved Judgment, the Judge agreed with Ventura that the conversion had been invalid by reason of a failure to obtain the written consent of the Series A Shareholders in accordance with Article 10.1. He also held, however, that if he were wrong on that point, and that the conversion had been carried out in accordance with the Articles, then there was no basis to grant relief cancelling or setting aside the conversion under Section 633.

23. At the start of his analysis on the interpretation issue, the Judge indicated (at [93]) that he had derived considerable assistance from the judgments of this court in Britvic plc v Britvic Pensions Ltd [2021] EWCA Civ 867 ("Britvic"), which he had earlier drawn to the attention of counsel.

24. The Judge also acknowledged that when construing articles of association, which are a publicly registered document, the admissible extrinsic evidence was limited to documents that would be available to a third party from the public file maintained by the Registrar of Companies at Companies House.

25. In that latter regard, the Judge observed at [102] that it would have been apparent to a reader of the Form SH01 filed with the Registrar of Companies following the issue of the Series A Shares that the holders of the Series A Shares,

> "… had paid a substantial premium for the special rights attached to those shares, in preference to the inferior rights enjoyed by the numerically far greater number of [Ordinary Shares] in the Company."

26. The Judge held, at [103], that "on its face and viewed in isolation, the wording of Article 9.2(a) is clear and unambiguous": the [Series A Shares] automatically convert into [Ordinary Shares] upon notice in writing from an Investor Majority.

27. The Judge then held, at [105], that any reasonable reader of the Articles would regard the conversion of the Series A Shares into Ordinary Shares as a variation or abrogation of the special rights attaching to the Series A Shares within the meaning of Article 10.1 because "look[ing] at the reality of the situation", the special rights attaching to those shares were extinguished when they became Ordinary Shares. The Judge rejected arguments advanced on behalf of the Company, (i) that the concept of "conversion" involved an exchange of the existing Series A Shares for new Ordinary Shares rather than a variation or abrogation of rights attaching to any of the Series A Shares, and (ii) that the conversion amounted to "performance" of the rights attaching to the Series A Shares rather than variation or modification of those rights.

28. The Judge then acknowledged, at [106]-[107], that his interpretation created a "clear tension" between Articles 9.2(a) and 10.1, since the former unambiguously provided for the Series A Shares to convert into Ordinary Shares automatically upon the receipt of a notice in writing from an Investor Majority, thereby varying or abrogating the special rights attaching to the Series A Shares; but the latter provided that such special

rights could only be varied or abrogated with the consent in writing of the holders of 75% of the Series A Shares.

29. Referring to a dictum of Nugee LJ in Britvic at [76], the Judge held, however, that this could not have been what the drafter of the Articles meant, "as it makes no rational sense". Hence, the Judge concluded that there must have been a drafting mistake. He explained this view and its consequences in paragraphs [108]-[111] as follows, (I have amended the Judge's text using the terms that I have defined in this judgment),

> "108. …. In my judgment, no reasonable person reading the Company's Articles, with knowledge of the substantial premium paid for such rights, would regard Article 9.2(a) as being capable of enabling a qualifying majority of Ordinary Shareholders to abrogate the special rights enjoyed by Ventura and SMTB, as the holders of the Series A Shares in the Company. Had an officious bystander been asked whether the Series A Shareholders could lose the rights attached to their shares, without their consent, by the simple device of the Ordinary Shareholders converting the Series A Shares to Ordinary Shares, in my judgment the answer would be an unqualified and resounding negative.
>
> 109. In my judgment, the only way to give business efficacy, and integrity, to the Articles as a whole is to construe Article 9.2 (a) as being subject to the comprehensive protection of special class rights contained in Article 10.1, which must also be complied with in order to effect any abrogation of the special rights attached to the Series A Shares. That is the manner in which reasonable business efficacy is to be given to the interrelation between the two provisions. I would therefore insert, by way of implied limitation, at the end of Article 9.2(a), the words "*…subject always to having first obtained the consent required under Article 10.1.*" …
>
> 110. … I am satisfied that this is one of those rare cases where there has been a drafting error. In my judgment, there is a clear mistake on the face of Article 9.2 (a) in failing expressly to provide that it is subject to the consent required by Article 10.1; and it is also clear, from Article 10.1, and the limited admissible extraneous evidence, what correction ought to be made in order to cure that mistake.
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> 111. Considering the relationship between the two Articles, the inconsistency between them, and the absurdity of treating Article 9.2 (a) as a stand-alone provision, unaffected by Article 10.1, I accept Mr. Collingwood's submission that something has clearly gone wrong with the drafting because the two Articles do not work together. The results for which Mr. Thornton contends cannot be reconciled with the Articles as a whole; and the problem is clear: the conflict between Article 9.2 (a) and Article 10.1, and the absurdity of the situation whereby the special rights of the Series A Shareholders can be lost at the whim of an

> Investor Majority simply by the service of a conversion notice from those with an interest in inflicting such loss. It is plain that that is not what was contemplated by the parties. So the problem is clear; and once the problem has been clearly identified, the solution to it is equally clear: Article 9.2 (a) is to be read as subject to Article 10.1, which takes precedence. That is the clear solution, and is clearly what any reasonable person at the time the new articles were adopted would have understood the Shareholders and the Company to have intended."

30. After his Judgment had been circulated in draft, Mr. Thornton KC (for the Company) sent a note to the Judge, questioning and seeking clarification in respect of various aspects of the draft, and referring to a number of authorities that had not previously been cited at the hearing. This caused the Judge to add a lengthy postscript to his Judgment which included the following paragraphs [139]-[142], which the Judge described as being "by way of clarification and elucidation" (again I have amended the Judge's text using the terms defined in this judgment),

> "139. Read literally and in isolation, the wording of Article 9.2 (a) is clear and unambiguous: the Series A Shares automatically convert into Ordinary Shares upon notice in writing from an "Investor Majority". This is not a case where a provision in a contract is unclear because a word has two different meanings. Nor is this a case where the language of the articles, either read on their own, or, at any rate, when read in context, could be seen to give rise to possible rival interpretations. Rather it is a case where, in my judgment, some limitation must be placed upon the apparent width of Article 9.2 (a) because, without such an implied limitation, it makes no sense, when read in conjunction with Article 10.1, construed against the admissible background material.
>
> 140. For the reasons I have given, I am satisfied that the conversion of the Series A Shares into Ordinary Shares constitutes either a "variation" or an "abrogation" of the special rights attached to those shares. I do not consider that it is necessary, or helpful, to seek to differentiate between the two terms because both attract the protection afforded by Article 10.1; although, if required to do so, I would hold that the special rights were "abrogated" rather than "varied" because the conversion of the Series A Shares involved the extinction of the special rights attached to those shares. If I am wrong, however, those rights were "varied" so as to conform to the different rights attaching to the Ordinary Shares in the Company.
>
> 141. On that basis, there is a clear tension between Articles 9.2(a) and 10.1 so it becomes apparent, on examination, that the drafter cannot have meant Article 9.2(a) to be read literally as it makes no rational sense, when construed in light of the protection afforded to the special rights of the Series A Shareholders by Article 10.1. I am satisfied that there is a clear

> mistake in the drafting of the earlier Article (9.2 (a)), and that the solution to that mistake is clear: Article 9.2(a) must be read subject to the consent required in accordance with Article 10.1. In my judgment it matters little what route one takes to arrive at this result: whether by a process of corrective construction, or by the implication of a term (or, more precisely, by implying a limitation upon the apparently unlimited width of the power conferred by Article 9.2(a)). In my judgment, the requirements for both interpretative techniques are satisfied. My judgment is founded upon an application of both of them, in the alternative…
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> 142. I also agree with Mr. Collingwood that the court's finding that there is a variation, or abrogation, of the special rights attached to the preferred shares involves no inconsistency with the conclusion reached by Buckley J in Re Saltdean Estate Co Ltd [1968] 1 WLR 1844, as later approved and applied by the House of Lords in House of Fraser plc v ACGE Investments Ltd [1987] AC 387 and later applied by Patten J in Re Hunting plc [2004] EWHC 2591 (Ch). The further three authorities belatedly cited and relied upon by Mr Thornton concerned the proposed reduction of the company's capital by means of the cancellation of the preferred shares in fulfilment of their priority on a return of capital. At the end of the process, the Series A Shareholders no longer held any shares in the Company. The present case does not concern any repayment of capital at the rate the shareholders concerned had bargained for. Here (as addressed in my draft judgment) the Company did not **give effect** to the Series A Shareholders' special rights; rather, it purported to take them away. It involved the **loss** of the Series A Shareholders' special rights…."
>
> (emphasis in the original)

31. On the Section 633 argument, the Judge first held, at [116], that the provisions of that section were intended to create a comprehensive scheme applicable to all variations of class rights, whether effected pursuant to a provision in a company's articles or under statute outside the articles.

32. The Judge then held, at [118], that to justify an order under Section 633, a variation of class rights had to be both prejudicial to the relevant members, and also unfairly so. On that basis, and on the hypothesis that he was wrong on his determination of the interpretation issue, the Judge held, at [119]-[120], that although the conversion of the Series A Shares was prejudicial to Ventura and SMTB because it resulted in the special rights attaching to their shares being extinguished without their consent or any compensation, it could not be said that this was unfair. The Judge's reason was that on the stated hypothesis as to the true meaning of the Articles, the Series A Shareholders had agreed that their shares would be automatically converted to Ordinary Shares on the giving of a notice in writing to the Company by an Investor Majority, and "There is nothing inherently unfair in holding Ventura and SMTB to their bargain."

The Appeal

33. The arguments on appeal generally followed the arguments that had been advanced before the Judge.

34. For the Company, Mr. Thornton KC submitted that since the Judge had found that the wording of Article 9.2(a) was clear and unambiguous in providing for the automatic conversion of the Series A Shares on the giving of a conversion notice, he ought to have applied ordinary principles of interpretation and simply given effect to this.

35. Mr. Thornton KC submitted that instead the Judge had mistakenly placed weight on the fact that Ventura and SMTB were shown in the Form SH01 to have paid a premium over the nominal value of the Series A Shares in comparison to the Ordinary Shares. He submitted that this misunderstood the nature of the share premium and its (lack of) relation to the respective values of shares in the Company. He contended that this had infected the Judge's view of the commercial deal between the parties, and there was nothing irrational, still less absurd, in a bargain under which the Series A Shares were convertible either by the holders of those shares under Article 9.1, or by the giving of a conversion notice by an Investor Majority under Article 9.2(a).

36. Mr. Thornton KC further submitted that the Judge was wrong to find that there was a "tension" between Article 9.2(a) and Article 10.1. He submitted that there was no tension, because automatic conversion under Article 9.2(a) was something to which the Series A Shares were always subject, so that when the Company gave effect to the conversion under Article 9.5, this was not a "variation or abrogation" of rights which brought Article 10.1 into play, but compliance with, or performance of, such rights. Mr. Thornton KC contended that this was directly analogous to the approach set out in Re Saltdean Estate Co Ltd [1968] 1 WLR 1844 ("Re Saltdean") and the cases that had followed it, namely that the repayment of capital in accordance with the rights attaching to preference shares was a performance of those rights, and was not a variation or abrogation of them.

37. For Ventura, Mr. Collingwood KC essentially submitted that the Judge was right for the reasons that he had given. He submitted that the literal construction of Article 9.2(a) contended for by the Company resulted in the commercial absurdity that the special rights attaching to the Series A Shares could be stripped away by conversion at the whim of the Ordinary Shareholders. He submitted that this would be inconsistent with the protection given to those rights by Article 10.1, and that the Judge was right to recognise that the Articles needed to be read together, with Article 9.2(a) being subject to compliance with Article 10.1.

Relevant principles of interpretation and implication of terms

38. The approach to interpretation of written contracts have been the subject of a number of decisions at the highest level over the last 25 years. There has been general agreement with Lord Hoffmann's statement in Investors Compensation Scheme v West Bromwich Building Society [1998] 1 WLR 896 ("ICS") at 912 that,

> "Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been

> available to the parties in the situation in which they were at the time of the contract."

39. In Arnold v Britton [2015] AC 1619 ("Arnold") at [15], Lord Neuberger endorsed a similar statement by Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101 ("Chartbrook") at [14]. He then explained that in conducting this exercise, the court focusses on the meaning of the relevant words "in their documentary, factual and commercial context", saying that the meaning,

> "… has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

40. The task of giving effect to the natural and ordinary meaning of the words used by the parties, whilst also having regard to commercial common sense, has caused considerable debate in the authorities.

41. In Rainy Sky v Kookmin Bank [2011] 1 WLR 2900 ("Rainy Sky") at [23], Lord Clarke observed that if the parties have used unambiguous language, the court must apply it. However, this does not mean that the process of interpretation starts and ends by a consideration of the literal meaning of the words of the relevant clause in isolation, divorced from the commercial consequences. Rather, it has been stressed on many occasions that the process of interpretation is an iterative one in which potential meanings of the clause in question are tested against the other clauses of the contract and the commercial consequences.

42. That was explained by Lord Neuberger in his dissenting judgment in the Court of Appeal in Re Sigma Finance Corp [2008] EWCA Civ 1303 at [98]-[99],

> "98. … The natural, indeed, I would have thought, the inevitable, point of departure is the language of the provision itself. However, where the interpretation of a word or phrase is in dispute, the resolution of that dispute will normally involve something of an iterative process, namely checking each of the rival meanings against the other provisions of the document and investigating its commercial consequences.
>
> 99. Most words, and *a fortiori*, most phrases, can have more than one meaning, or at least different shades of meaning. This is certainly true, for instance, of the word "possible", which can, for instance, mean physically achievable or legally permissible, to give two relevant examples. However, to consider what words could mean in abstract is not normally a helpful exercise. What one has to do, when assessing each rival interpretation, is to ask whether the words at issue are capable of having the meaning contended for, but even that question cannot be judged free of the documentary and commercial context. The more a particular

> interpretation, which accords well with the words in question judged on their own, produces a commercially improbable result and is hard to reconcile with other provisions in the document, the more ready the court will be to give the words another, perhaps linguistically more strained, interpretation, if that other interpretation complies with the other provisions and commercial reality."

43. The Supreme Court subsequently allowed an appeal, holding that the majority of the Court of Appeal had attached too much weight to what they perceived to be the natural meaning of the words of the clause in issue, and too little weight to the context and the scheme of the security trust deed as a whole: see In re Sigma Finance Corp [2010] 1 All ER 571 ("Sigma") In his judgment in the Supreme Court at [12], Lord Mance expressly endorsed Lord Neuberger's approach, saying,

> "Lord Neuberger was right to observe that the resolution of an issue of interpretation in a case like the present is an iterative process, involving "checking each of the rival meanings against other provisions of the document and investigating its commercial consequences.""

That dictum was also expressly endorsed by Lord Hodge in his judgment in Arnold at [77] and reiterated by him with the approval of the other members of the Supreme Court (including Lord Neuberger) in Wood v Capita Insurance [2017] AC 1173 ("Wood") at [12].

44. The iterative approach of checking the rival meanings of the clause in issue against other provisions of the document and its overall scheme and purpose is also entirely consistent with the natural assumption that an instrument or agreement will have been intended to operate, and hence should if possible be interpreted to operate, in a coherent and rational way: see e.g. C v D [2012] 1 WLR 1962 at [49] per Rix LJ. To similar effect, in Société Générale v Geys [2012] UKSC 63, Lord Hope approved the point made by Steyn J in Pagnan SpA v Tradax [1986] 2 Lloyd's Rep. 646 at 653, stating,

> "…the court's duty, when confronted with two provisions in a contract that seem to be inconsistent with each other, is plain. It must do its best to reconcile them if that can conscientiously and fairly be done."

45. Conducting an iterative process may also assist the court to identify that, when considered in its proper context, the disputed wording genuinely has more than one possible meaning: see e.g. Britvic at [68]-[69] per Nugee LJ. In such a case, the court may give effect to the interpretation which is most consistent with business common sense. That point was made by Lord Neuberger in his judgment in Sigma (above), and was made explicitly in Rainy Sky at [21] and Wood at [11].

46. In a rare case, even where there is no ambiguity in the language, the iterative process may lead the court to conclude that something has gone wrong and that there has been a mistake in the drafting of the document. That may either be because there is an obvious error on the face of the document (as indicated above, Article 5.1(a) in the instant case contains just such a mistake); or because when the other terms of the

contract and the context is taken into account, it becomes apparent that the ordinary and natural meaning of the words used cannot have been what the drafter meant, because the outcome makes no rational sense.

47. In such a case, the court may engage in a process of "corrective construction" of the document. However, in order to do so, it must be clear both (i) that there has been a mistake and (ii) what the correction required to cure the mistake ought to be: see Chartbrook at [22]-[25] and Britvic at [75]-[77].

48. Finally, in Marks & Spencer plc v BNP Paribas Securities Services [2016] AC 742 ("Marks & Spencer"), the Supreme Court affirmed that a term may be implied into a contract if the test set out by Lord Simon in BP Refinery (Westernport) Pty v Shire of Hastings (1978) 52 ALJR 20 is satisfied. Among the requirements, which may overlap, are that the proposed implied term must be necessary to give business efficacy to the contract, it must be clear and obvious, and it must not contradict any express term of the contract. In Marks & Spencer at [21], Lord Neuberger indicated that the implication of a term would only satisfy the "business efficacy" test "if, without the term, the contract would lack commercial or practical coherence".

49. Most of the factors identified by Lord Neuberger in Arnold and the principles outlined in the cases that have followed it are equally applicable to the interpretation of articles of association of a company which have the force of a contract between the members by reason of section 33 of the Companies Act 2006. The exception is Lord Neuberger's factor (iv) - the facts and circumstances known or assumed by the parties at the time that the document was executed - often called the factual background or matrix.

50. The articles of association of a company apply to the potentially fluctuating body of members who acquire shares in a company, some of whom may have no knowledge of the circumstances which applied when the articles were adopted or amended. The articles are also publicly registered at the Companies Registry, where they are available to those who wish to deal with the company, who may also have no specific knowledge of the background to the adoption or alteration of the articles. For these reasons, and in contrast to the approach when interpreting ordinary commercial contracts, the relevant background facts for the purposes of interpretation of articles of association must be very limited: see e.g. Attorney-General of Belize v Belize Telecom [2009] 1 WLR 1988 (PC) ("Belize Telecom") at [35]-[36], and Re Coroin Ltd, McKillen v Misland (Cyprus) Investments Ltd [2011] EWHC 3466 (Ch) at [63].

51. I ventured a summary of the resultant approach in Euro Accessories Limited [2021] EWHC 47 (Ch) at [34] in a passage that was adopted by the Judge and not disputed by the parties on this appeal,

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

52. The same restrictions apply for the same reasons when determining whether a term may be implied into articles of association: see Bratton Seymour Service v Oxborough [1992] BCLC 693 and Belize Telecom.

Analysis

53. As the Judge appreciated, and was not disputed, a reasonable observer of the documents filed at Companies House would discover that following the adoption of the Articles and the issue of the Series A Shares, the holders of the Ordinary Shares held about 87% of the issued shares in the Company, and the holders of the Series A Shares held only about 13% of the issued shares in the Company. It would thus be readily apparent that an Investor Majority could be made up solely of holders of Ordinary Shares.

The share premium

54. As a preliminary point, I agree with Mr. Thornton KC that the Judge was wrong to state (at [102] of his Judgment) that the substantial share premium which Ventura paid over and above the nominal amount of the Series A Shares was a payment "for the special rights attached to those shares, in preference to the inferior rights enjoyed by the numerically far greater number of [Ordinary Shares] in the Company". The Judge was also wrong to place any weight upon that finding in his analysis at [108].

55. No doubt the special distribution rights attaching to the Series A Shares would have been a factor in determining the agreed price which Ventura was prepared to pay to subscribe for the Series A Shares, and in return for which the Company was prepared to issue them. However, it would be wrong to assume that at the time of issue of the Series A Shares, an Ordinary Share which did not have such special rights would only have been worth its nominal value of £0.001, so that the entirety of the share premium paid by Ventura over and above the same nominal value of a Series A Share should be regarded as a payment for such special rights.

56. By the time that the Series A Shares were issued, the Company had been in existence and operating for some time, and it undoubtedly had some real value which would be reflected in the value of its Ordinary Shares. There would thus be no basis upon which a hypothetical objective reader of the Articles at the time of issue of the Series A Shares could conclude that each of the Ordinary Shares in the Company was worth no more than its nominal value.

57. For the reasons that I shall explain later, I do not, however, think that this error undermines the Judge's reasoning to the extent that Mr. Thornton KC suggested. In my judgment, the same result should follow even if no assumption is made about the price paid by Ventura for the special rights attaching to the Series A Shares.

"Automatic" conversion

58. In his arguments on interpretation and implication of terms, Mr. Thornton KC placed considerable reliance upon the contention that Article 9.2 provided for an *automatic* conversion of the Series A Shares to Ordinary Shares upon the giving of a notice in writing from an Investor Majority. He submitted that the Judge had found, at [103], [107] and [139] of his Judgment, that the Article was "clear and unambiguous" and "clear on its face".

59. Mr. Thornton KC contended that given such finding, the Judge was not entitled to read any implied limitation into Article 9.2(a) to the effect that the conversion process envisaged by that Article was not automatic upon the giving of a notice by an Investor Majority, but was subject to compliance with Article 10.1. Specifically, he contended that the conclusion reached by the Judge was inconsistent with the express terms of Article 9.2(a) because it made conversion subject to a condition, and it deprived the word "automatic" of any meaning.

60. I do not accept that submission. When Article 9 is construed as a whole, I do not think that the concept of an "automatic" conversion has the singular meaning which Mr. Thornton KC ascribed to it. The other provisions of Article 9 show that the drafter did not use the word "automatic" in Article 9.2 so as to exclude the possibility that other conditions might have to be satisfied for conversion to occur.

61. The word "automatic" appears in the opening phrase of Article 9.2, which applies equally to both sub-paragraphs (a) and (b) – i.e. (a) service of notice by an Investor Majority and (b) the occurrence of a Qualifying IPO. In relation to (b), a Qualifying IPO, Article 9.4 provides,

> "Where conversion is mandatory on the occurrence of a Qualifying IPO, that conversion will be effective only immediately prior to and conditional upon such Qualifying IPO (and "Conversion Date" shall be construed accordingly) and, if such Qualifying IPO does not become effective or does not take place, such conversion shall be deemed not to have occurred."

That provision appears to attach a specific condition to what Article 9.2 describes as an "automatic" conversion.

62. It seems to me that as a matter of language, the word "automatic" is perfectly apt to describe what is explained in greater detail in Article 9.5, namely that on a Conversion Date, conversion of the Series A Shares shall occur "without further authority than is contained in these Articles". Conversion is "automatic" in the sense of not requiring anything more to be done *after* receipt of the notice from an Investor Majority or the occurrence of the Qualifying IPO *to authorise* the Company to give effect to the conversion.

Coherence and rationality

63. As the authorities to which I have referred show, the Judge was entitled as part of the iterative process of interpretation, to investigate whether the rival meanings of Article 9.2(a) were consistent with the other provisions of the Articles and to ask whether they produced a coherent and commercially sensible scheme for the Articles as a whole. If there were issues in that respect, the Judge was entitled, if it could conscientiously be done, to adopt an interpretation that reconciled any potentially conflicting provisions in the Articles.

64. In that regard, when viewed in the context of the special distribution rights attached to the Series A Shares by Articles 5 and 6, and the protection for those special rights conferred by Article 10.1, I agree with the Judge that the Company's contention as to the meaning of Article 9.2(a) would lead to an incoherent scheme and irrational results.

65. Simply from the face of the Articles, it is apparent that special distribution rights have been carefully designed to apply in a number of specific scenarios identified in Articles 5 and 6, and these rights have been specifically attached to the Series A Shares which have been created as a separate class from the Ordinary Shares. Broadly speaking, these scenarios include a distribution in a liquidation (Article 5) or a distribution following an "Exit" (i.e. a sale by the Company of all or substantially all of its undertaking and assets, or a change of control of the Company) under Article 6. In such situations, subject to a specified value cap , the special rights entitle the holders of the Series A Shares to the Series A Preferred Return (and any Arrears). This amounts to a preferential distribution of the capital (including premium) paid up on the Series A Shares, plus a cumulative 8.0% preferred return on that amount, compounded annually.

66. In addition to ranking *pari passu* with the Ordinary Shares for annual dividends and voting under Articles 4 and 7, those special rights give the Series A Shares some of the commercial characteristics of a preferred debt instrument. As Mr. Thornton KC accepted, depending on the value of the Company at the time at which they applied, such rights could be of benefit to the holders of the Series A Shares. So, for example, the reasonable reader of the Articles would appreciate that if the Company went into liquidation with only a relatively modest surplus available for distribution to shareholders, or if an Exit event as defined in Article 6 occurred at a relatively modest price, the holders of the Series A Shares would be entitled to that surplus up to the value of the Preference Amount in priority to the holders of the Ordinary Shares, who might receive nothing.

67. However, on the Company's argument, Article 9.2(a) would give an Investor Majority comprising only Ordinary Shareholders, an unrestricted power to deprive the holders of the Series A Shares of the particular benefits conferred by those special rights at any time chosen by the Ordinary Shareholders.

68. The Ordinary Shareholders could, according to the Company, have chosen to do so by serving a conversion notice immediately after the Series A Shares were issued. Of itself, that is a bizarre conclusion which makes no commercial sense given the very creation of the Series A Shares as a separate class and the detailed terms of Articles 5 and 6.

69. But, perhaps even more strikingly, as the Judge indicated at [111] of his Judgment, the Company's interpretation of Article 9.2(a) would mean that an Investor Majority made up exclusively of Ordinary Shareholders could choose to deprive the holders of the Series A Shares of their special distribution rights by serving a conversion notice at precisely the time at which those special rights were designed to benefit the holders of the Series A Shares, and specifically in order to confer a corresponding benefit upon the Ordinary Shareholders.

70. So, for example, consider a proposed liquidation or Exit of the type postulated in paragraph [66] above, i.e. at a price which would result in a preferential distribution being made solely to the holders of the Series A Shares, with nothing being available to the holders of the Ordinary Shares. In such a scenario, on the Company's argument, an Investor Majority made up entirely of Ordinary Shareholders would be at liberty to serve a conversion notice under Article 9.2(a), with the result that the holders of the Series A Shares would be deprived of their special rights, and all the Ordinary

Shareholders would instead be able to share in a distribution of the available monies *pro rata* with those who had previously held Series A Shares.

71. Indeed, assuming that the Ordinary Shareholders would act rationally in their own commercial interests, it is difficult to see any reason why they would not serve a conversion notice in such a situation. In other words, the Company's interpretation of Article 9.2(a) could reasonably be foreseen to have the result that the special rights attaching to the Series A Shares would be inevitably extinguished by a conversion notice served by the Ordinary Shareholders in precisely the circumstance in which they were most obviously intended to operate to the benefit of the Series A Shareholders.

72. The irrationality of the Company's interpretation of Article 9.2(a) when viewed in the light of the other Articles does not, however, stop there. Although Mr. Thornton KC submitted that a conversion of the Series A Shares did not amount to a variation or abrogation of rights (a point to which I shall return below), he did accept that the special distribution rights attaching to the Series A Shares constituted class rights which could not be varied or abrogated without the written consent of the holders of 75% of such shares pursuant to Article 10.1.

73. So, for example, if the Company was to propose an amendment to its Articles to reduce the defined amount of the Series A Preferred Return from a cumulative return of 8% to, say, 7%, Mr. Thornton KC accepted that this would be a variation of class rights that would require a special resolution of the Company and a separate class consent of the holders of the Series A Shares pursuant to Article 10.1. The same would follow if, instead of a relatively small adjustment, the Company were to propose a substantial reduction in the Series A Preferred Return to a very small amount, say 0.1%, or even to zero. The same result would also follow if the Company were to propose a resolution to alter the defined circumstances in which that Series A Preferred Return were to be payable – e.g. by deleting the provisions for such payments to be made following an "Exit" under Article 6.

74. However, the consequence of the Company's argument is that if, instead of reducing the amount of the Series A Preferred Return by any such amounts, large or small, or altering the defined circumstances in which the right to a preferred return arose, the special rights attaching to the Series A Shares were to be extinguished altogether as a result of conversion of the Series A Shares to Ordinary Shares under Article 9.2(a), that could be done by an Investor Majority consisting of the Ordinary Shareholders alone, and no class consent of the Series A Shareholders would be required at all. There is no rational or logical justification for such a bizarre regime under which the holders of the Series A Shares would be protected by having to give a class consent to every lesser alteration of their rights, but would have no such protection in the event of a conversion in which their special rights would be entirely extinguished.

75. In passing, I would contrast those nonsensical results of the Company's interpretation of Article 9.2(a) with the entirely logical provisions of Article 9.1. As indicated above, Article 9.1 gives any holder of Series A Shares the right to serve a notice to convert his shares to Ordinary Shares at any time. So, for example, if the Company were to prosper and its value increase, the preferential but limited rights to payment of the Preference Amount under Articles 5 and 6 might be of less interest to the holders of the Series A Shares. In such a situation, holders of Series A Preferred Shares could exercise their rights under Article 9.1 to convert their Series A Shares into Ordinary Shares, thereby

foregoing their preferential rights in favour of an uncapped *pro rata* share (together with the other holders of Ordinary Shares) of the enhanced value of the Company on a liquidation or Exit.

76. The decision whether, and if so, when, to exercise that option under Article 9.1 would, however, be entirely the choice of the individual holders of Series A Shares, based upon their own judgment of the prospects for the Company and where their own commercial interests lay from time to time. The complete freedom given to the holders of Series A Shares to make such a choice stands in stark contrast to the interpretation placed upon Article 9.2(a) by the Company, under which the decision whether the Series A Shareholders should receive the benefits for which they contracted would be in the hands of the Ordinary Shareholders.

77. These incoherent and irrational results are striking, and I agree with the Judge that they demonstrate convincingly that the construction of Article 9.2(a) advanced by the Company is not one that should be attributed to the members of the Company. Something has plainly gone wrong with the drafting.

Resolution of the problem

78. Faced with a conclusion that what is contended to be the natural and ordinary meaning of the words of a contract produces an incoherent or irrational result, the court has a number of interpretative tools at its disposal.

79. As Lord Hoffmann indicated in ICS at p.913, referring to Lord Diplock's dictum in Antaios Compania Naviera v Salen Rederierna [1985] AC 191 at 201, if the court concludes that something has gone wrong with the language, the words "must be made to yield to business commonsense". Or, as Lord Neuberger later put it in his judgment in Sigma at [99], to resolve the problem of a commercially improbable and irreconcilable result, the court can adopt a "linguistically strained" interpretation.

80. That is usually the court's preferred route to solving such a problem. However, it encounters difficulties when the problem is not really the result of the words that have been used, but because there is something missing. It is difficult to "make words yield", or to adopt a "linguistically strained" interpretation, if the relevant words simply are not there. In such a situation, as the Judge appreciated, other interpretative tools may have to be deployed.

81. The Judge's primary method of resolving the issues that he had identified with the Company's interpretation of the Articles was that of corrective construction as explained in Chartbrook and Britvic. The Judge held in paragraphs [110] and [111] that when Article 9.2(a) was viewed in light of the other provisions of the Articles, it could clearly be seen that there had been a drafting mistake, namely that the power of an Investor Majority to serve a notice under Article 9.2(a) had not been made expressly subject to compliance with Article 10.1. The Judge then held that the solution was that Article 9.2(a) had "to be read subject to Article 10.1 which takes precedence".

82. In the alternative, as the Judge indicated at [109] and in his postscript at [141], this was an appropriate case in which to imply a provision into the Articles to the same effect. Although the Judge did not explain in any detail how he regarded the test for implication of terms to have been satisfied, given his conclusion on corrective construction, this

was a logical alternative approach. If it is clear that there has been a drafting mistake in omitting a provision from a contract, without which the contract leads to incoherent and irrational results, and if it is equally clear what that missing term should be, it is not surprising that the test for implication of terms should also be satisfied. Paraphrasing Lord Neuberger in Marks & Spencer, the missing term would be necessary to bring commercial and practical coherence to the contract, and it would fulfil the requirements of clarity and obviousness.

83. As indicated above, Mr. Thornton KC's objections to the Judge's decision in these respects were that the term that the Judge identified in [109] should be added by way of corrective construction or as an implied term was inconsistent with the requirement for "automatic" conversion under Article 9.2(a), and that the concept of conversion simply did not fit within the "variation or abrogation" wording of Article 10.1 in any event.

84. On the first of these points I have already indicated that I do not accept that the use of the word "automatic" in Article 9.2(a) has the singular meaning contended for by the Company. I do not think that a term that requires Article 10.1 to be satisfied before conversion can occur is inconsistent with the wording of Article 9.2(a).

85. On the second of his points, Mr. Thornton KC contended that both as a matter of language and law, the process of conversion could not amount to a "variation or abrogation" of the special rights attaching to the Series A Shares within the meaning of Article 10.1.

86. I would preface my analysis of this submission by noting that the process of "conversion" of the Series A Shares envisaged by Article 9 is not, in fact, one that is prescribed by English company law, and it is not dealt with under the Companies Act 2006.

87. In that respect there was a debate between the parties as to whether the conversion process envisaged by the Articles involved the Series A Shares continuing in existence but being redesignated as Ordinary Shares on the Company's register of members, or whether it involved the cancellation of the Series A Shares with new Ordinary Shares being issued in their place. I consider that the former view is correct, not least because of the provision in Article 9.5 that on conversion "the relevant Series A Shares shall without further authority than is contained in these Articles stand converted into Ordinary Shares". The lack of a requirement for any further authority and in particular the use of the words "*stand* converted" are plainly suggestive of a continuation in issue of existing shares with a new designation, rather than a two-stage mechanism involving the cancellation of those shares and a fresh issue of different shares. For completeness, I should add that the provisions in Article 9.6 for the surrender and issue of new share certificates are entirely neutral, since share certificates are merely evidence of title to issued shares and would be required whatever the nature of the conversion.

88. On that basis, and simply as a matter of the ordinary use of language, I agree with the Judge that the term "abrogation" is entirely apposite to describe the effect of the process by which the special rights forming part of the bundle of rights attaching to all of the Series A Shares entirely cease to apply to the shares when they become Ordinary Shares.

89. Mr. Thornton KC's more forceful argument in this respect was, however, that applying the approach set out in Re Saltdean, as a matter of law the conversion of the Series A Shares simply involved the Company giving effect to a term of the bargain upon which such shares had been issued, and hence this was a performance rather than a variation or abrogation of their rights.

90. In Re Saltdean, a company had issued a class of preference shares which had a right under the articles to participate together with the ordinary shares in any annual dividends, and a preferential right to be repaid the amounts paid up on the preference shares in priority to the ordinary shares if the company were to be wound up. The company had accumulated an excess of capital from its business operations, and proposed a reduction of capital which involved the cancellation of the preference shares and the repayment to the preference shareholders of the amount to which they would have been entitled in priority to the ordinary shareholders if the company had been wound up.

91. The reduction was opposed by the preference shareholders who contended that a class consent was required pursuant to a provision of the company's articles to similar effect as Article 10.1 in the instant case. Buckley J rejected that argument. He explained,

> "First, it is said that the proposed cancellation of the preferred shares will constitute an abrogation of all the rights attached to those shares which cannot validly be effected without an extraordinary resolution of a class meeting of preferred shareholders under article 8 of the company's articles. In my judgment, that article has no application to a cancellation of shares on a reduction of capital which is in accord with the rights attached to the shares of the company. Unless this reduction can be shown to be unfair to the preferred shareholders on other grounds, it is in accordance with the right and liability to prior repayment of capital attached to their shares. The liability to prior repayment on a reduction of capital, corresponding to their right to prior return of capital in a winding up, is a liability of a kind of which Lord Greene M.R., in [Re Chatterley-Whitfield Collieries Limited [1948] 2 All ER 593 at 596], said that anyone has only himself to blame if he does not know it. It is part of the bargain between the shareholders and forms an integral part of the definition or delimitation of the bundle of rights which make up a preferred share. Giving effect to it does not involve the variation or abrogation of any right attached to such a share."

92. In the passage in Re Chatterley-Whitfield Collieries to which Buckley J referred, Lord Greene MR had said,

> "It is a clearly recognised principle that the court, in confirming a reduction by the payment off of capital surplus to a company's needs, will allow, or rather require, that the reduction shall be effected in the first instance by payment off of capital which is entitled to priority in a winding-up. Apart from special cases where by agreement between classes the incidence of reduction is arranged in a different manner, this is and has for years been

> the normal and recognised practice of the courts, accepted by the courts and by business men as the fair and equitable method of carrying out a reduction by payment off of surplus capital. I know of no case where this method has, apart from agreement, been departed from. Every person who acquires shares in a company has only himself to blame if he does not know this, and I have no doubt that it is well recognised by business men."

93. Re Saltdean was applied by the House of Lords in House of Fraser plc v ACGE Investments Ltd [1987] AC 387 ("House of Fraser"). After setting out the passage which I have quoted from Buckley J's judgment, Lord Keith explained,

> "I consider this to be an entirely correct statement of the law. Buckley J. does not address his mind to any special meaning which might fall to be attributed to the words "affect, modify, deal with" in juxtaposition with the word "abrogate". There was no need for him to do so. The proposed reduction of capital involved an extinction of the preferred shares in strict accordance with the contract embodied in the articles of association, to which the holders of the preferred shares were party. One of the rights attached to these shares was the right to a return of capital in priority to other shareholders where any capital was appropriately to be returned as being in excess of the company's needs. That right was not being affected, modified, dealt with or abrogated, but was being given effect to."

94. Mr. Thornton KC argued that in the same way as Buckley J held that the liability of a preference share to being cancelled upon repayment of capital in accordance with the priorities which would apply in a winding up was an element of the bargain between the company and the holders of such shares, so also the risk of conversion of the Series A Shares pursuant to Article 9.2(a) had always been part of the agreement comprised in the Articles. Hence, he argued, the operation of that Article by the Company so as to give effect to the bargain between the Company and its members could not amount to a variation or abrogation of the special rights attaching to the Series A Shares falling within Article 10.1.

95. In his Judgment at [142], the Judge distinguished Re Saltdean and the cases which followed it on the basis that they all involved cancellations of preferred shares and repayment of capital at the rate which would apply in a winding up. He pointed out that the instant case did not involve any return of capital so as to give effect to the special distribution rights which would apply in the event that the Company was wound up, and he took the view that the operation of Article 9.2(a) simply involved such special distribution rights being taken away.

96. I consider that the Judge was entirely correct. The terms of Article 10.1 focus attention on what happens to the special rights attaching to a class of shares. The special rights in this case are the rights of the holders of the Series A Shares to receive a priority payment of the Preference Amount in the circumstances set out in Articles 5 and 6. As the Judge pointed out, those rights to payment are not being performed or given effect to in any way on a conversion of the Series A Shares under Article 9. They simply cease to apply.

97. The distinction between the instant case and Re Saltdean and the other cases which have applied it, is that in all of those other cases, the special rights of the preference shareholders to a preferential repayment of the amount paid up on the preference shares in the event of a winding up were treated as being performed, or given effect to, by the repayment of the same amounts under the terms of the proposed reduction of capital for which the court's approval was sought. When Buckley J held in Saltdean that the relevant variation of rights article had no application to a cancellation of shares on a reduction of capital which was in accord with the rights attached to the shares, it is plain that he identified those rights as the right to prior repayment of capital on a reduction of capital corresponding to the right to prior return of capital in a winding up.

98. That was also Lord Keith's view in House of Fraser, in which he identified the relevant right attaching to the shares as "the right to a return of capital in priority to other shareholders where any capital was appropriately to be returned as being in excess of the company's needs". In other words, the reason why the reductions of capital in Re Saltdean and House of Fraser did not amount to a variation or abrogation of the special rights attaching to the preference shares was that the special rights in question required a priority return of capital in priority to other shareholders, and that is what the company provided.

Disposal

99. For the reasons that I have given, I consider that the Judge was right to reach the conclusion that in order to make rational and coherent sense of the Articles, either Article 9.2(a) must be interpreted as being subject to Article 10.1, or a term must be implied to that effect. Either way, the result is the same: compliance with Article 10.1 is required as a precondition to conversion at the instigation of an Investor Majority. I would therefore dismiss the appeal.

The Respondent's Notice

100. By a Respondent's Notice, Ventura sought to challenge the Judge's conclusion that if he had found that the conversion of the Series A Shares under Article 9.2(a) did not require compliance with Article 10.1, then even though he held that he had jurisdiction to do so, he would not have granted relief under Section 633 because there would be nothing unfair in holding Ventura to what, on that hypothesis, would have been the bargain that it had entered into under the Articles.

101. In response, Mr. Thornton KC contended that the Judge was wrong to hold that Section 633 had any application to a case such as the present under which a variation of class rights took place pursuant to a provision in the articles of association of a company rather than under section 630 of the 2006 Act; but he otherwise supported the Judge's reasoning.

102. After the point was ventilated in argument at the hearing, Mr. Collingwood KC indicated that he did not wish to pursue the Respondent's Notice. In my judgment he was right to do so.

103. I express no view as to whether Section 633 applies in a case such as the present. That argument can await determination in an appeal in which it is determinative. But assuming that Section 633 does apply, it is plain that it does not give the court an

entirely free discretion to determine whether a particular variation of rights was unfairly prejudicial. As Lord Hoffmann observed in O'Neill v Phillips [1999] 1 WLR 1092 at 1098 in relation to the predecessor of the unfair prejudice jurisdiction under section 994 of the Companies Act 2006, the concept of fairness must be applied judicially and its content must be based upon rational principles: the court does not sit under a palm tree.

104. In O'Neill v Philips at 1098-1102, Lord Hoffmann went on to explain that in the corporate context, members of a company agree to be associated on the terms of the articles of association and sometimes on the terms of collateral shareholder agreements. He also explained that members of a company are ordinarily not entitled to complain of unfairness unless there has been some breach of those terms, or unless the circumstances surrounding their association are such as to bring equitable considerations into play which operate as a constraint upon the exercise of strict legal powers. So-called "quasi-partnership" companies formed or continued upon the basis of personal relationships are an obvious example.

105. Those observations are of relevance to the application of Section 633 in the instant case. The Series A Shareholders and the Ordinary Shareholders formed a commercial association at arm's length, and the evidence in support of the Claim did not identify any other factors beyond the negotiated terms of the Articles that might bring equitable considerations into play. As such, and again in agreement with the Judge, I do not see how it could be said, on the assumed hypothesis that the Company was correct as to the true meaning of the Articles, that the Ordinary Shareholders and the Company were acting unfairly when they simply gave effect to the agreed terms of Articles 9.2(a) and 9.5.

Lord Justice Arnold:

106. I agree.

Lord Justice Bean

107. I also agree.