

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

CLAIM NO. BVIHC (COM) 2021/0015

IN THE MATTER OF THE BUSINESS COMPANIES ACT 2004

BETWEEN:-

**(1) ACE LEAD PROFITS LTD
(2) SHAO BAIQING**

Claimants

-v-

HOLLYSYS AUTOMATION TECHNOLOGIES LTD

Defendant

Appearances:

Mr. Ben Valentin QC, with him Mr. Bhavesh Patel of Travers Thorp Alberga for the Claimants
Mr. Michael Todd QC and Mr. Andrew Blake, with them Ms. Eleanor Morgan and Ms. Sophie Christodoulou of Mourant Ozannes

2021 July 12-16, 19-21
September 22

JUDGMENT

- [1] **JACK, J [Ag.]**: By a claim form issued on 1st February 2021 and an amended statement of claim dated 9th March 2021 the claimants seek orders pursuant to sections 184B and 12(5) of the **Business Companies Act 2004**¹ directing the defendant (“Hollysys”) to reverse amendments to its memorandum and articles of association made on 7th January 2021, alternatively such of the amendments as restricted the rights or powers of the shareholders to amend the memorandum or articles, and consequential relief.

¹ No 16 of 2004, Laws of the Territory of the Virgin Islands.

- [2] Hollysys is a technology company based in the People's Republic of China ("PRC"). It is listed on the NASDAQ stock exchange. The second claimant ("Mr. Shao") was its chief executive officer and chairman until he was ousted in a boardroom coup on 6th July 2020. Mr. Shao currently controls the first claimant ("Ace Lead"). There is an issue, which is not before me in this action, as to whether his control of Ace Lead is legitimate or not. It is said that Ace Lead is in fact the vehicle used by a retirement trust for the benefit of Hollysys employees and that Mr. Shao should not be involving it in the current action. That question is the subject of litigation in Hong Kong. The parties in the current action are content that I should treat Ace Lead as properly before the Court.
- [3] Ace Lead holds 4,144,223 ordinary shares in Hollysys, about 6.85 per cent of the issued shares. Mr. Shao owns 165,000 ordinary shares, about 0.27 per cent. Together these made the pair the third largest shareholder in Hollysys.
- [4] On 7th December 2020 Mr. Shao, Ace Lead and another company, CPE Funds Management Ltd ("CPE") (together "the consortium") made what was expressed as a non-binding offer ("the proposal") to buy all the shares of Hollysys not already owned by the consortium at a price of \$15.47 per share. This was a premium of 24 per cent to the closing price of the shares on 4th December 2020. The offer price was apparently determined by CPE without input from Mr. Shao.²
- [5] Hollysys immediately sought advice on US law from the well-known firm of Latham & Watkins LLP ("L&W") and on BVI law from Maples & Calder ("Maples"). Maples discovered that they were conflicted, so Walkers were instructed in their place. Walkers have offices in Hong Kong and Road Town. Deutsche Bank were instructed to advise on the price offered.
- [6] On 7th January 2021, the board of Hollysys rejected the Proposal. At the same board meeting Hollysys adopted a number of amendments to Hollysys' memorandum and articles. These are the amendments which are the subject of this action.

² Mr. Shao's evidence in cross-examination, transcript, day 2, p 60.

- [7] On Friday 29th January 2021 the consortium made a revised, this time binding, offer (“the revised proposal”) to purchase the outstanding shares at \$17.10 per share. This was a premium of 37 per cent to the price on 4th December 2020. Hollysys’ board has not yet decided whether to accept or reject this revised proposal.
- [8] The current proceedings were issued on Monday 1st February 2021 and have been tried as an expedited matter. Although the trial concluded on 21st July, counsel did not urge that judgment be rushed so as to be handed down before the end of term.

The Business Companies Act

- [9] Section 12 of the **Business Companies Act** provides:

“(1) Subject to subsection (2) and section 14, the members of a company may, by resolution, amend the memorandum or articles of the company.

(2) Subject to subsection (3), the memorandum of a company may include one or more of the following provisions:

- (a) that specified provisions of the memorandum or articles may not be amended;
- (b) that a resolution passed by a specified majority of members, greater than 50%, is required to amend the memorandum or articles or specified provisions of the memorandum or articles; and
- (c) that the memorandum or articles, or specified provisions of the memorandum or articles, may be amended only if certain specified conditions are met.

(3) Subsection (2) does not apply to any provision in the memorandum of a company that is not a restricted purposes company that restricts the purposes of that company.

(4) Subject to subsection (5), the memorandum of a company may authorise the directors, by resolution, to amend the memorandum or articles of the company.

(5) Notwithstanding any provision in the memorandum or articles to the contrary, the directors of a company shall not have the power to amend the memorandum or articles

- (a) to restrict the rights or powers of the members to amend the memorandum or articles,
- (b) to change the percentage of members required to pass a resolution to amend the memorandum or articles, or
- (c) in circumstances where the memorandum or articles cannot be amended by the members,

and any resolution of the directors of a company is void and of no effect to the extent that it contravenes this subsection.”

The claimants put emphasis on section 12(5)(a).

[10] Section 184B of the Act provides:

“(1) If a company or a director of a company engages in, proposes to engage in or has engaged in conduct that contravenes this Act or the memorandum or articles of the company, the Court may, on the application of a member or a director of the company, make an order directing the company or director to comply with, or restraining the company or director from engaging in conduct that contravenes, this Act or the memorandum or articles.

(2) If the Court makes an order under subsection (1), it may also grant such consequential relief as it thinks fit.

(3) The Court may, at any time before the final determination of an application under subsection (1), make as an interim order, any order that it could make as a final order under that subsection.”

[11] In addition, reliance was placed on the following:

“120(1) Subject to this section, a director of a company, in exercising his powers or performing his duties, shall act honestly and in good faith and in what the director believes to be in the best interests of the company.

...

121 A director shall exercise his powers as a director for a proper purpose and shall not act, or agree to the company acting, in a manner that contravenes this Act or the memorandum or articles of the company.”

The law on directors’ improper purposes

[12] As to sections 120 and 121, all counsel were happy for me to rely on the summary of the law I gave in **IsZo Capital LP v Nam Tai Property Inc.**³ That was a case in which the directors had authorised the issue of further shares in the company under a PIPE, a “private

³ [2021] ECSCJ No 478, BVIHC (COM) 2020/0165) (3rd March 2021).

investment in public equity”, which had the effect of diluting the voting strength of the dissident shareholders.

[13] I said there at para [68] that the issues were two:

“What was the purpose for which the board of directors approved the PIPE? IsZo says the purpose was to give Kaisa *de facto* control of Nam Tai and defeat the requisition. Nam Tai says the purpose was saving the company from a liquidity crisis.

Did the directors act in the best interests of Nam Tai? Nam Tai say they acted in order to save the company for the benefit of all shareholders. IsZo say the directors wrongfully ignored material factors, prejudicing non-Kaisa shareholders.”

[14] The law I took largely from the submissions of Lord Grabiner QC and his juniors, Miss Rosalind Nicholson and Mr. Henry Hoskings (I have inserted Roman numbering):

“(i) The relevant legal principles are neither complex nor substantially in dispute. In determining whether a power is exercised for a proper purpose, the approach in this jurisdiction is to:

- (a) Identify the power whose exercise is in question: **Independent Asset Management Company Ltd v Swiss Forfaiting Ltd**⁴ and **Antow Holdings Limited v Best Nation Investments**,⁵
- (b) Identify the proper purpose for which that power was conferred upon the directors;
- (c) Identify the purpose for which the power was in fact exercised; and
- (d) Decide whether that purpose was a proper purpose.

(ii) ...[T]he power whose exercise is in question is the power to allot shares, conferred on the Board by Article 2 of Nam Tai’s Articles. The proper purpose (or at least a proper purpose) for which that power is conferred is the raising of capital, and it is common ground that the allotment of shares for the purposes of raising capital is a paradigmatic case of the proper exercise of that power.

(iii) Accordingly, the only question before the Court is the purpose for which the power was in fact exercised.

⁴ [2017] ECSCJ No 271, BVIHMAP2016/0034 (determined 24th November 2017).

⁵ [2018] ECSCJ No. 253, BVIHMAP2017/0010 (determined 21st September 2018)

[(iv) I add that In **Swiss Forfeiting**, Webster JA held at para [44] that 'once a court determines that the dominant purpose for the directors' decision is an improper purpose it does not matter what were the motives of the directors, however altruistic.'

(v) In **Antow**, Pereira CJ held at paras [23]-[25] that 'a section 120(1) enquiry is largely, though by no means entirely, a subjective one... [D]irectors must exercise their discretion *bona fide* in what they consider — not what a court may consider — is in the interest of the company, and not for any collateral purpose. Nonetheless a section 120(1) enquiry has an objective overlay as *bona fides* cannot be the sole test, "otherwise you might have a lunatic conducting the affairs of the company and paying away its money with both hands in a manner perfectly *bona fide* yet perfectly irrational"⁶. The courts will look for independent, objective evidence to test the director's claim to be acting *bona fide*.'

(vi) At para [45] as part of her analysis of section 120(1), she said with reference to **Charterbridge Corp Ltd v Lloyds Bank Ltd**:⁷ 'I reiterate that a court will look for objective independent evidence to determine whether there was an honest belief on the part of a director... A court will not accept in any unquestioning way a director's assertion that he acted *bona fide* when the facts might appear to suggest otherwise.'

(vii) Answering that question self-evidently requires an examination of the facts of this particular case. The facts of other cases do not help, and IsZo's attempts to rely on the facts of those other cases... are a distraction from the key question, i.e., what was the purpose of the Board in entering into the PIPE?

(viii) That question is to be answered by reference to the following three principles, all of which are drawn from the leading cases of **Howard Smith v Ampol**⁸ and **Eclairs Group Ltd v JKN Oil & Gas plc**...⁹

(ix) First, the question as to which purpose(s) actually motivated the directors in question is determined by reference to their subjective motivations. See, for example, **Eclairs**:

'15. ...The important point for present purposes is that the proper purpose rule is not concerned with excess of power by doing an act which is beyond the scope of the instrument creating it as a matter of construction or implication. It is concerned with abuse of power, by doing acts which are within

⁶ Hutton v West Corp Railway (1883) 23 ChD 654 at p 671.

⁷ [1970] Ch 62.

⁸ [1974] AC 821 at p 835.

⁹ [2015] UKSC 71, [2016] 3 All ER 641.

its scope but done for an improper reason. It follows that the test is necessarily subjective. “Where the question is one of abuse of powers,” said Viscount Finlay in **Hindle v John Cotton Ltd**,¹⁰ “the state of mind of those who acted, and the motive on which they acted, are all important”.

[(x) I add for convenience, though not set out in Lord Goff QC’s skeleton, the next paragraph of **Eclairs**:

‘16. A company director differs from an express trustee in having no title to the company’s assets. But he is unquestionably a fiduciary and has always been treated as a trustee for the company of his powers. Their exercise is limited to the purpose for which they were conferred. One of the commonest applications of the principle in company law is to prevent the use of the directors’ powers for the purpose of influencing the outcome of a general meeting. This is not only an abuse of a power for a collateral purpose. It also offends the constitutional distribution of powers between the different organs of the company, because it involves the use of the board’s powers to control or influence a decision which the company’s constitution assigns to the general body of shareholders. Thus in **Fraser v Whalley**,¹¹ the directors of a statutory railway company were restrained from exercising a power to issue shares for the purpose of defeating a shareholders’ resolution for their removal. In **Cannon v Trask**,¹² which concerned the directors’ powers to fix a time for the general meeting, Sir James Bacon VC held that it was improper to fix a general meeting at a time when hostile shareholders were known to be unable to attend. In **Anglo-Universal Bank v Baraggon**,¹³ Sir George Jessel MR held that if it had been proved that the power to make calls was being exercised for the purpose of disqualifying hostile shareholders at a general meeting, that would be an improper exercise of the directors’ powers. In **Hogg v Cramphorn Ltd**,¹⁴ Buckley J held that the directors’ powers to issue shares could not properly be exercised for the purpose of defeating an unwelcome takeover bid, even if the board was genuinely convinced, as the current management of a company commonly is, that the continuance of its own stewardship was in the company’s interest. The company’s interest was an

¹⁰ (1919) 56 Sc LR 625 at p 630.

¹¹ (1864) 2 H&M 10.

¹² (1875) LR 20 Eq 669.

¹³ (1881) 45 LT 362.

¹⁴ [1967] 1 Ch 254.

additional and not an alternative test for the propriety of a board resolution.']

(xi) Secondly, it necessarily follows that the relevant enquiry is into the subjective motivations of the directors, not the effect of the impugned action. That is the case even if the directors in question turned their minds to the effect of their actions and even if the directors desired that effect.

[(xii) I should, however, add this comment, which was not disputed in argument. The subjective motivation of a director is a matter of fact. In determining that factual question, it is relevant to consider the effect of the decision and the extent to which the director was aware of the effect of the decision. The only means by which the averment of a witness of his own subjective intention can be tested is by examining the surrounding facts, including the actual and foreseeable results of the witness's decision, and considering what can be inferred of the subjective intention of the witness therefrom.]

(xiii) This principle was endorsed by the Privy Council in **Howard Smith**:¹⁵

'The main stream of authority, in their Lordships' opinion, supports this approach... In the High Court [of Australia] case of **Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL**,¹⁶ an issue of shares was made to a large oil company in order, as was found, to secure the financial stability of the company. This was upheld as being within the power although it had the effect of defeating the attempt of the plaintiff to secure control by buying up the company's shares. The joint judgment of Barwick CJ, McTiernan J and Kitto J contains this passage:¹⁷

"The principle is that although primarily the power is given to enable capital to be raised when required for the purposes of the company, there may be occasions when the directors may fairly and properly issue shares for other reasons, so long as those reasons relate to a purpose of benefiting the company as a whole, as distinguished from a purpose, for example, of maintaining control of the company in the hands of the directors themselves or their friends. An inquiry as to whether additional capital was presently required is often most relevant to the ultimate question upon which the validity or invalidity of the issue depends; but

¹⁵ At p 836.

¹⁶ (1968) 121 CLR 483.

¹⁷ At p 493.

that ultimate question must always be whether in truth the issue was made honestly in the interests of the company. Directors in whom are vested the right and the duty of deciding where the company's interests lie and how they are to be served may be concerned with a wide range of practical considerations, and their judgment, if exercised in good faith and not for irrelevant purposes, is not open to review in the courts. Thus in the present case it is not a matter for judicial concern, if it be the fact, that the allotment to Burmah would frustrate the ambitions of someone who was buying up shares as opportunity offered with a view to obtaining increased influence on the control of the company, or even that the directors realised that the allotment would have that result and found it agreeable to their personal wishes..."

...

(xiv) This principle was reiterated by the Supreme Court in **Eclairs**:

"20. A director may be perfectly conscious of the collateral advantages of the course of action that he proposes, while appreciating that they are not legitimate reasons for adopting it. He may even enthusiastically welcome them. It does not follow without more that the pursuit of those advantages was his purpose in supporting the decision."

(xv) The orthodoxy of this principle is reflected in **Gower**,¹⁸ which explains that 'it is not the incidental, or even inevitable, delivery of these ends which is outlawed; many perfectly proper actions by directors will deliver such results. Rather, it is this being the motivation for the exercise of the power, where that motivation has been deemed improper.'

(xvi) Thirdly, in determining the purpose for which the power was exercised the Court must give credit to the *bona fide* opinion of the directors. In particular, it cannot be suggested that the opinion of the directors was wrong or not reasonably held, or that the directors should have followed an alternative course.

(xvii) That principle is similarly well established. As the Privy Council explained in **Howard Smith**:¹⁹

'Having ascertained, on a fair view, the nature of this power, and having defined as can best be done in the light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is

¹⁸ Gower's Modern Principles of Company Law (10th Ed by Paul Davies, 2016) at para 16.28.

¹⁹ At p 835.

challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion whether that purpose was proper or not. In doing so it will necessarily give credit to the *bona fide* opinion of the directors, if such is found to exist, and will respect their judgment as to matters of management; having done this, the ultimate conclusion has to be as to the side of a fairly broad line on which the case falls.

“The application of the general equitable principle to the acts of directors managing the affairs of a company cannot be as nice as it is in the case of a trustee exercising a special power of appointment.”²⁰

(xviii) A good illustration of the application of this principle can be found in **Harlowe’s Nominees**. As noted above, that was a case in which an issue of shares, which had the effect of defeating the plaintiff’s attempt to secure control of the company, was found to be made for a proper purpose because it was made to secure the financial stability of the company. The High Court of Australia refused to set aside that finding, in part because the trial judge had made the following finding:

‘I am sufficiently convinced of their [the directors’] credibility to hold that they at least did not make a placement with Burmah to thwart or prevent any possible influence or control of any shareholder of the Woodside Co. I also hold that although I believe the directors’ opinion of the needs of the company was imprecise, probably intuitive and maybe erroneous, yet each one of them addressed his mind to the relevant problem and exercised the power to issue shares, *bona fide*, in order to raise money for the company’s future requirements which they believed would exist. I am of the view that this was generally [*sic*; the High Court of Australia thought this was a typographical error for ‘genuinely’] held by each of them and their desire was to give financial stability to the company in its future programme.’

[15] I then added:

“[71] (xix) To this citation of authority, I would add the observations of Mr. Murray Rosen QC, sitting as a deputy High Court judge, in **Re Last Lion Holdings Ltd**.²¹

‘135. Although the point is not decisive on the facts of the present case, I accept the Defendants’ submission that having

²⁰ Mills v Mills (1938) 60 CLR 150 at pp 185-186 (Dixon J).

²¹ Also known as Otello Corp ASA v Moore Frères & Co LLC [2018] EWHC 2347 (Ch).

regard to the Supreme Court, and the first instance decision of Mann J in **Eclairs Group** the 'but for' test must involve examination of what caused the majority of the board to vote as they did, but not that it established any subsidiary 'majority rule' test to the effect that unless a majority of the board *shared* the improper purpose, it cannot be treated as causative of their decision.

136. The question, to quote Lord Sumption again, is whether the board's power '...would still have been exercised for [proper] reasons even in the absence of improper ones.' If one director acts for an improper purpose and leads the others to vote with him in breach of their duties, especially their duty to act independently, he will have caused the power to be exercised for an improper purpose under the 'but for' test even if not under such a 'sharing majority rule' test. As it was put in **Colin Gwyer**:²²

"... In relation to a board of directors comprising several persons, the fact that one director acted in breach of fiduciary duty when exercising his vote on a resolution should not invalidate the resolution **if the other directors acted in accordance with their duties.**" [Mr. Rosen QC's emphasis]

137. It would be bizarre to uphold a decision in which a majority of directors went along with the director acting for an improper purpose, without exercising any independent judgment — or indeed in my judgment, because they had been deceived or were careless. Whether or not they can be said to have 'shared' the improper purpose in those circumstances is an unnecessary (and possibly confusing) additional formulation.'

[72] (xx) This last observation was made in the context of the UK Supreme Court's 'but for' test, which was not adopted by Pereira CJ in **Antow** and does not represent BVI law. However, in my judgment Mr. Rosen QC's point is not dependent on the validity or otherwise of the 'but for' test. If a majority of a board were following the instructions of a single director without exercising independent judgment, then the motivation of the single director should be imputed to the other directors."

²² Colin Gwyer & Associates Ltd v London Wharf (Limehouse) Ltd; Eaton Bray Ltd v Palmer [2002] EWHC 2748 (Ch), [2003] BCC 885.

The appropriate approach to evidence

- [16] All counsel were content that when considering the witness evidence in the case, I should apply the approach which I set out in my **Nam Tai** judgment:

“[75] I shall discuss the individual witnesses shortly. However, I first remind myself of the limitations of the assessment of the demeanour of witnesses. As Leggatt LJ (as he then was) said in **R (SS (Sri Lanka)) v Secretary of State for the Home Department**:²³

‘36. ...[I]t has increasingly been recognised that it is usually unreliable and often dangerous to draw a conclusion from a witness’s demeanour as to the likelihood that the witness is telling the truth. The reasons for this were explained by MacKenna J in words which Lord Devlin later adopted in their entirety and Lord Bingham quoted with approval:²⁴

“I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges, to discern from a witness’s demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help.”

37. The reasons for distrusting reliance on demeanour are magnified where the witness is of a different nationality from the judge and is either speaking English as a foreign language or is giving evidence through an interpreter. Scrutton LJ once said that he had “never yet seen a witness giving evidence through an interpreter as to whom I could decide whether he was telling the truth or not.”²⁵ In his seminal essay on “The Judge as Juror” Lord Bingham observed:

“If a Turk shows signs of anger when accused of lying, is that to be interpreted as the bluster of a man caught out in deceit or the reaction of an honest man to an insult? If a Greek, similarly challenged, becomes rhetorical and voluble and offers to swear the truth of what he has said on the lives of his children, what (if any) significance should be attached to that? If a Japanese witness, accused of forging a document, becomes sullen, resentful and

²³ [2018] EWCA Civ 1391.

²⁴ “Discretion” (1973) 9 Irish Jurist (New Series) 1 at p 10, quoted in Devlin, *The Judge* (Oxford, 1979) at p 63 and Bingham, “The Judge as Juror: The Judicial Determination of Factual Issues” (1985) 38 *Current Legal Problems* 1 (reprinted in Bingham, *The Business of Judging* (Oxford, 2000) at p 9).

²⁵ *Compania Naviera Martiartu v Royal Exchange Assurance Corp* (1922) 13 LI L Rep 83 at p 97.

hostile, does this suggest that he has done so or that he has not? I can only ask these questions. I cannot answer them. And if the answer is given that it all depends on the impression made by the particular witness in the particular case that is in my view no answer. The enigma usually remains. *To rely on demeanour is in most cases to attach importance to deviations from a norm when there is in truth no norm.* (Leggatt LJ's emphasis)²⁶

[76] This warning echoes the earlier observation of the judge, sitting at first instance, in **Gestmin SGPS SA v Crédit Suisse (UK) Ltd**,²⁶ where he said:

'[T]he best approach for a judge to adopt in the trial of a commercial case is... to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose — though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.'

[77] Now this is not a binding rule. On the contrary, as the English Court of Appeal held in **Kogan v Martin**:²⁷

'We start by recalling that the judge read Leggatt J's statements in **Gestmin v Credit Suisse** and **Blue v Ashley**²⁸ as an "admonition" against placing any reliance at all on the recollections of witnesses. We consider that to have been a serious error in the present case for a number of reasons... **Gestmin** is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed... But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon *all* of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence.'

²⁶ [2013] EWHC 3560 (Comm) at para [22].

²⁷ [2019] EWCA Civ 1645, [2020] FSR 3 at para [88].

²⁸ [2017] EWHC 1928 (Comm) at paras [65]-[69].

[78] An oft-cited summary of the appropriate approach (albeit in the context of fraud rather than improper motive) is that of Robert Goff LJ in **Armagas Ltd v Mundogas SA (The Ocean Frost)**:²⁹

‘Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses’ motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth.’”

[17] I proceeded to remind myself that I needed to take a holistic view of the evidence. I give myself the same reminder in this case.

Adverse inferences from the non-production of documents

[18] I turn to the question of what adverse inferences I can properly draw from an alleged failure on the part of Hollsys to produce documents at trial. This comprises two separate issues: first, the guidance given to the Board by L&W to keep the production of documents regarding the proposal and the Board’s reaction to it to a minimum, and second, the assertion that many contemporaneous documents, including notes of consultations, are internal documents of either L&W or Walkers and were thus not disclosable by Hollsys.

[19] As to the first issue, on 15th December 2020, L&W gave the following advice to the Board:

“Each member of the Board and management should adhere to the following guidelines with respect to communications with other parties:

Discoverable Documents

- Given the enhanced risk of litigation, all written communications, including all e-mail communications and instant messages (e.g. WeChat messages), should be evaluated against the risks of eventually becoming public.
- All communications with the Board and its advisors and their respective advisors, are potentially disclosable in litigation. Think about who is copied before sending.

²⁹ [1985] 1 Lloyd’s Rep 1 at p 57.

Do not copy the Board or any member of the Board and/or its advisors or any third party unless it is absolutely necessary to do so.

- All written communications in any medium directly or indirectly concerning the transaction may be the subject of disclosure, even if they are not communications with the Company or the Board.
- WeChat messages, WhatsApp messages, text messages and audio recordings, as well as calendar appointments and notes of meetings/calls are all forms of documents that may have to be disclosed; for those meeting mobile applications, please make sure the recording function is turned OFF unless otherwise agreed to by all parties in the meeting.
- We are not advising that no written records or communications should be kept. Good corporate governance requires suitable record-keeping in this type of transaction. For example, documents which demonstrate a particular course of action or chronology can be very helpful to demonstrate that the Board has acted appropriately.
- Please note that the Board may later choose to voluntarily disclose certain documents which are potentially helpful to the litigation notwithstanding that they may have no obligation to do so...
- Unless a document is legally privileged, and the grounds on which the Company can assert privilege against its shareholders are narrow ones, there is a potential that it will be disclosed. All potentially privileged documents (e.g. communications to and from legal advisors and their agents) should be marked 'Privileged and Confidential'...

[20] These guidelines in my judgment are fairly standard, indeed almost boilerplate, when litigation is in contemplation. There is a real danger that ill-considered messages, shot from the hip by a director or senior management, will be misconstrued. It is only sensible for a legal advisor to advise that care be taken in the creation of documents, when litigation is looming. I draw no inferences from the giving of this advice.

[21] The position in relation to the second issue is more complicated. Lawyers advising a company on litigation brought by the company's own shareholders face an ethical problem. On the one hand, the lawyers are taking instructions from the directors; yet, on the other hand, their client is not the board of directors, but rather the company itself, in other words the corporate body of shareholders. Lawyers must not prefer the interests of the directors to those of the shareholders.

- [22] Particular concern exists if law firms create a contemporaneous record which they do not keep as a document created for a client. Documents created for a client would be within the client's possession power or control and thus disclosable. Internal records of a law firm would not be. Now it is likely that a party, like Ace Lead, involved in litigation such as the present could issue a witness summons against the company's legal advisors in the BVI to produce documents: see CPR 33.2(1)(b). Similarly, letters rogatory issued to the High Court in Hong Kong seeking similar relief by way of the local equivalent of a *subpoena duces tecum* against Walkers Hong Kong or 28 USC § 1782 proceedings in the United States against L&W might produce the documents. Legal professional privilege could probably not be asserted against such measures, because "if people [such as shareholders] had a common interest in property, an opinion having regard to that property, paid for out of the common fund, i.e. company's money or trust fund, was the common property of the shareholder cestuis que trust."³⁰
- [23] As I discussed in **IsZo v Nam Tai**,³¹ it may in appropriate cases be right to draw adverse inferences from a deliberate refusal to create documents. "Whether it is appropriate to draw an inference at all and, if so, the precise nature and extent of such an inference will depend on the particular circumstances of each case": **Shawe-Lincoln v Neelakandan**.³² Such an assessment will always be extremely fact-sensitive: see **Matthews & Malek on Disclosure**.³³
- [24] In the current case, Hollysys has disclosed an internal note of the key board meeting of 7th January 2021 prepared by Walkers Hong Kong, but the claimants say in opening:

"126. ...[T]here are some obvious gaps in the documentary record of events in December 2020 and January 2021... By way of example only, [Hollysys has] disclosed no or virtually no documents relating to:

- (1) the engagement and instruction of Walkers in early December 2020;
- (2) the instruction of Deutsche Bank in early December 2020;

³⁰ Woodhouse & Co Ltd v Woodhouse (1914) 30 TLR 559, cited in CAS (Nominees) Ltd v Nottingham Forest plc [2002] BCC 145 at para [11].

³¹ At paras [178] to [181].

³² [2012] EWHC 1150 (QB) at para 82 (Lloyd-Jones J).

³³ 5th Ed (2016) at para 17.38.

- (3) the advice given to the Company by [L&W] and/or Walkers in relation to the difficulties with Plan A (i.e. reliance on the Rights Plan) under BVI law in December 2020, and the Company's reaction on receiving that advice;
- (4) the circumstances in which it was decided that [L&W] should draft the 2021 Amendments in late December 2020, and the terms of those instructions;
- (5) the reasons why the 7 January 2021 Board meeting, and therefore the adoption of the 2021 Amendments, were regarded as time-sensitive;
- (6) how long the 7 January 2021 Board meeting actually lasted and why no Chinese translator was arranged;
- (7) the management share plan; and
- (8) the Company's consideration of the Revised Proposal.

[25] What inferences I can and should draw is something I need to consider when looking at the evidence overall.

The undisputed facts

[26] I turn then to the facts. Hollysys' business dates from 1993, but the current company was only incorporated here in the BVI on 6th February 2006. It adopted its current name on 17th July 2009. The exact date on which Hollysys was floated on the stock market is not in evidence, but it must have been about this time. On 8th September 2010, various amendments were made to the memorandum and articles of association. Of particular importance was the adoption of a "rights plan". This was a poison pill, which kicked in in the event of a hostile takeover bid. The rights plan had a ten year life span, after which it lapsed.

[27] Mr. Shao had been with Hollysys from an early stage. (It is not necessary for me to determine whether he was properly described as a "founder" of the company.) In 2013 he was promoted from vice-president to chief executive officer. In 2016 he additionally became chairman of the board.

[28] In early 2019 Mr. Shao sought to issue further shares in Hollysys ("the secondary offering"). The plan for the secondary offering was not a success and was abandoned after a road show to potential investors. Hollysys already had a substantial amount of cash on its balance sheet and Mr. Shao was unable to explain to the market why the secondary offering was necessary. Subsequently in the second quarter of 2020 there was further unhappiness

among some board members with Mr. Shao's actions in relation to a business called Ningbo Hollysys Intelligent Co Ltd ("Ningbo"). Ningbo's business had originally been wholly owned by Hollysys, but as a result of a corporate restructuring, Hollysys only owned 40 per cent of the equity. The majority of the board of Hollysys which removed Mr. Shao thought he was acting in the interests of Ningbo to the detriment of Hollysys. I do not need to make any determination as to the extent to which these causes of discontent were justified.

- [29] In early 2020, whilst still chairman, Mr. Shao started the process of having a corporate review of Hollysys' governance arrangements. Much of the administrative side of organising this was done by Xia Chuan, also known as Arden Xia ("Mr. Xia"). He was the director of investor relations, although he was not in fact on the board of directors. Mr. Xia obtained a quote for the governance review from L&W, who had not previously advised or acted for Hollysys. The partner with responsibility for the matter at L&W was Christopher Drewry ("Mr. Drewry"). All three men gave evidence at trial.
- [30] L&W produced its governance review in April 2020. It is common ground that Mr. Shao did not treat consideration of the review as an urgent matter. The review was never placed before the board for consideration. Later in December 2020 and January 2021, when amendments proposed by L&W were considered by the board, various changes which had not featured in the April 2020 review were adopted. A key argument made by the claimants is that this shows an improper purpose. I shall examine the differences in due course.
- [31] Part of the April review was the question of renewal of the rights plan, which was due to expire in September that year. Mr. Shao was keen to have the rights plan updated.³⁴ In July 2020, after Mr. Shao's ouster, L&W were instructed to continue work on the rights plan. Deutsche Bank were brought in to advise on the financial aspects of the rights plan. In September, the board approved a revised version of the original 2010 rights plan. The new poison pill kicked in when a hostile bidder acquired more than 15 per cent of the stock.
- [32] It is and was unclear whether the new 2020 rights plan would actually be effective in the event of a hostile takeover bid. L&W and Maples gave contemporaneous "health warnings"

³⁴ Cross-examination of Mr. Shao, transcript, day 2, p 105.

in respect of it. One issue was the risk of negative investor reaction to it; another the need to carry out a “fiduciary duties analysis... if at any point the Board seeks to implement or exercise any rights under the proposed [rights plan].” The powerpoint presentation to the September board meeting highlighted:³⁵ “Potential shareholder challenges to both the adoption and implementation of the rights plan [and] [m]inority shareholder challenges available as a remedy under BVI law.” The validity of the 2020 rights plan or of any decision to implement it is not a matter before me for determination. The doubts as to the practical effectiveness of the rights plan do, however, form a part of the factual background to the events of December 2020 and January 2021. The claimants rely on the existence of these doubts as evidence to show that the Hollysys board needed a fall-back plan in the event that the poison pill was ineffective.

[33] Following Mr. Shao’s ouster, there were board changes. Sung Chit Nim, also known as Colin Sung, (“Mr. Sung”) became the chief executive officer. He had been an independent director of Hollysys since 2008 and had had a number of senior executive posts in other companies unrelated to Hollysys. Qiao Li (“Madame Qiao”) became chairlady. She had been the chair earlier in 2007-2010. She returned to Hollysys as an executive director in 2017. On 1st September 2020 Teh Kok Peng (“Dr. Teh”) and Tan Khiaw Ngoh (“Ms. Tan”) were appointed as independent directors to replace another independent director, Jerry Zhang. They had not previously had involvement with Hollysys. Jianyun Chai (“Prof. Chai”) had been an executive director since 2008 and continued in that rôle.

[34] After the hostile bid was made on 7th December 2020, Mr. Xia, on Mr. Sung’s instructions, made contact with Mr. Drewry in order that L&W and Maples could advise on the proposal. On 9th December, Grace Shi, an investor relations specialist who reported to Mr. Xia, sent an email to Mr. Drewry stating that they viewed the proposal “as a hostile offer” and that the price was inadequate. Hollysys’ public announcement in response to the proposal was (on Mr. Drewry’s advice) much more neutral: it merely said that the proposal was “unsolicited”. His advice (given through L&W’s Hong Kong office) was that the board needed to consider

³⁵ Bundle 4E/503.

the proposal seriously and should bring in BVI counsel to advise on the BVI company issues and a financial advisor to consider the commercial issues arising from the proposal.

- [35] Maples discovered that they were conflicted and on 10th December 2020 Walkers were instructed in their place. The instructions to Walkers were given to Ms. Jo Lit (“Ms. Lit”) of Walkers’ Hong Kong office. Walkers’ Hong Kong office dealt with the corporate side of the advice, whilst the Tortola office, led by Miss Rosalind Nicholson, gave litigation advice. The initial quotation for legal work given by Ms. Lit did not include any work on amendments to the memorandum and articles. There is no documentary evidence of Walkers being formally instructed to do any work on the amendments.
- [36] Subsequently Deutsche Bank was brought in again to advise on the financial aspects of the proposal.
- [37] On 17th December 2020, Mr. Sung for a short time instructed Collas Crill, a BVI law firm, to advise on the subscription plan. The instruction of this firm did not feature largely at trial.
- [38] As soon as the proposal was made public, various large shareholders made contact with Mr. Xia. All considered that the proposal undervalued Hollysys (“way too low” was one comment). A point made by some was that, because Hollysys had so much cash on its books, the value of the business itself was very much undervalued by the offer.
- [39] On 14th December 2020 Mr. Shao’s dismissal as chairman of Ningbo was made public. The claimants say his dismissal was a response to the making of the proposal by the consortium, of which he was a part. Hollysys says he had been dismissed before the proposal was made at a shareholders’ meeting of Ningbo held on 30th November 2020. The lag in announcing the dismissal was caused, it says, by administrative delays in affixing the chops to the shareholder resolution dismissing him. I do not need to determine this issue, which in my judgment is not relevant to the questions before me. (It would in any event be difficult to do so in any convincing way without sight of the metadata for the internal document directing the affixing of the chops to the shareholder resolution. The metadata would show if the instruction pre- or post-dated 7th December 2020.) It is common ground that there was no

love lost between Mr. Shao and Madame Qiao either before or after the making of the proposal (although Madame Qiao denied that she was pursuing any sort of personal vendetta against Mr. Shao in his removal from Ningbo). The making of the proposal had no impact on that position.

The witnesses and their credibility

- [40] I heard evidence from Mr. Shao, as the sole witness for the claimants. For Hollysys, I heard evidence from the two lawyers who led the team advising the board, Mr. Drewry and Ms. Lit. As lay witnesses for Hollysys, I heard from Mr. Sung, Madame Qiao, Mr. Xia, Dr. Teh and Ms. Tan.
- [41] I did not hear evidence from Prof. Chai. An application was made for his witness statement to be adduced as hearsay evidence. This was not opposed by the claimants, but Mr. Valentin QC submitted that very little weight should be given to his evidence. The background to the application is this. At the pre-trial review I was told that various witnesses would be giving evidence from the PRC. This caused me some concern, since I knew from other cases that witnesses from the PRC usually travel to Hong Kong or Macau to give evidence. This is because the People's Republic takes the view that the giving of evidence under oath (with the consequential penalty for perjury) is the exercise of a sovereign power by a foreign state which, by virtue of being done in the territory of the PRC, was a breach of Chinese sovereignty. I therefore had the position checked with the Foreign Office (technically the Foreign, Commonwealth and Development Office).
- [42] The Foreign Office confirmed that the PRC required an application to be made to it for permission for witnesses to give evidence for foreign courts from its territory. Such applications had to be made through diplomatic channels. The Foreign Office was happy to communicate such a request to the diplomatic authorities in the PRC, however, the process was not fast. It was apparent from the correspondence that this process could not be completed in time for the trial.
- [43] Prof. Chai was in principle willing to travel to Hong Kong to give evidence. However, due to Covid, the PRC was restrictive of international movement. In particular, the university at

which he taught had forbidden staff from leaving, because of the potential difficulties in their returning if they went to Covid hot spots (as Hong Kong was at the time). In these circumstances, in my judgment it would be wrong to attach no weight at all to his evidence on the basis that he could not be cross-examined on his witness statement.

[44] In fact, his evidence is very similar to that given by the other two independent directors, Dr. Teh and Ms. Tan. No attack was made on their credibility by Mr. Valentin QC. I find that they were witnesses of truth. In these circumstances, it is appropriate in my judgment to treat all three independent directors as corroborating each other.

[45] As to Mr. Shao, Hollysys make various comments on his involvement in the company prior to his dismissal. They also submit:³⁶

“There is an innate hypocrisy [on his part] in: (a) issuing the Revised Proposal at a time when, as Mr. Shao admits, he was intent on issuing proceedings; b) issuing those proceedings, which allege conscious impropriety on the part of the board and, apparently, improper behaviour on the part of its legal advisors; (c) relentlessly briefing against the board by issuing misleading press statements; but (d) nevertheless suggesting that the board is bound to consider the Revised Proposal within the same time frame as the first Proposal.”

[46] I agree with the claimants’ submission that these matters are not relevant to the issues I have to determine. At most, it may show that he made an unjustified assumption. I treat Mr. Shao as a witness of truth.

[47] Mr. Valentin QC accepted that Mr. Drewry and Ms. Lit were witnesses of truth, but he criticised Mr. Drewry for showing “a marked tendency to argue the Company’s case in various respects.”³⁷ This is in my judgment somewhat unfair: he was merely responding to questions. I found both Mr. Drewry and Ms. Lit to be impressive witnesses.

[48] Mr. Xia was accepted to be a witness of truth.

³⁶ Defendant’s closing submissions para 209.

³⁷ Claimants’ closing submissions para 5.

- [49] The claimants attacked the credibility of Mr. Sung and Madame Qiao. Since this forms part of the overall assessment of the evidence in the case, I shall defer giving my assessment of their veracity.

The amendments to the M&A

- [50] What Mr. Drewry says about the genesis of the amendments to the M&A in his witness statement is this:

“30. Alongside the work L&W and Walkers were doing for the Company advising on its response to the Proposal, the Company asked both firms to begin to implement recommendations from the [April] Corporate Governance Review (as well as any new recommendations that would reflect modern market practice and be in the Company’s interests) to improve the Company’s constitutional documents. To this end, I sent the Corporate Governance Review report to Walkers on 10 December 2020, the same day that they were engaged by the Company. The Company had been aware since the Corporate Governance Review that its constitutional documents could be improved in this regard and now the Proposal had brought the relevance of this into sharp focus.

31. L&W worked closely with Walkers to draft full text revisions to the Company’s [M&A] (the M&A Amendments) and provided the Company with a comparison document showing the proposed changes. L&W ‘held the pen’ on the M&A Amendments, in part because Walkers had only recently been engaged, but the two firms closely collaborated on the M&A Amendments, including on several telephone calls, and L&W sent a full mark-up of the draft M&A Amendments to Walkers on 28 December 2020 for their comments.

32. The M&A Amendments are not preclusive of a takeover proposal in any manner. They require, for instance, additional disclosure to be provided to the Company and the wider shareholder base by a shareholder calling a special meeting, as well as a 90-day notice period before a member can table a resolution before an annual general meeting. They do not prevent a takeover proposal being made or such a meeting being called, a proposal being considered, or a proposal being accepted. It is my strong opinion that this additional disclosure and notice will help shareholders make an informed decision about any proposal, by ensuring they know of the identity and interests of any members in a bidding consortium and of any potential conflicts of interest the member or consortium might have with the Company, the reasons for the proposal, and the qualifications and experience of any proposed directors.

33. These additional disclosure obligations were especially relevant here, as the Board had already considered the Company to be undervalued. In this case, the Consortium benefitted from the greater knowledge that it had from the Company’s

former CEO. It was therefore incumbent upon the Board to ensure that the wider shareholder base would have as much information at its disposal as possible, so that it could make an informed decision regarding the Proposal and maximize the value of their investment.

34. Provisions for these disclosure obligations are US market-standard and found in the constitutional documents of the vast majority of US-listed companies. In fact, the Corporate Governance Review, citing information from the independent data service provider SharkRepellent, noted that these type of advance notice provisions are included in 96% of the constitutional documents of the Russell 3,000 Index, which tracks the performance of the 3,000 largest U.S.-traded stocks. They are regularly complied with by shareholders calling special meetings and are not seen as any kind of impediment to a takeover bid; as evidenced by the fact that they are rarely challenged by corporate governance groups in the United States.

35. The M&A Amendments that were drafted and subsequently advised to the Board were not identical to the suggested improvements recommended in the Corporate Governance Review in April 2020 because the Corporate Governance Review was conducted from a theoretical and US-listed company perspective only, without input from a BVI law perspective. Further, in the intervening nine months, the L&W and Walkers teams had worked closely together on another corporate governance review and had mutually developed language for BVI constitutional documents that reflected standard market practice for US-listed companies. In addition to the amendments imposing additional disclosure obligations at special meetings, Walkers contributed further amendments to the Company's constitutional documents as part of the M&A Amendments. These amendments included: reducing the number of the Company's Board members to five (reflecting the long term reality of the Board's composition); clarifying certain clauses relating to the ability of the Company's Board to control the number of authorised shares and to designate those shares. I was not closely involved with these elements of the M&A Amendments, which were led by Walkers."

[51] Ms. Lit confirmed the way in which the amendments came to be drafted. She confirmed that Walkers and L&W, when drafting the proposed amendments to the M&A, had effectively reused amendments which they had recently drafted for another joint client.

[52] During December 2020 L&W and Walkers worked on an amendment which would have given shares to management with greatly enhanced voting rights ("the subscription agreement"). The claimants say that this was the board's "Plan B". Plan A, they assert, was the poison pill created by the rights plan. In the light of the doubts expressed about the validity of the rights plan, the board needed a "Plan B" to defeat the consortium and the

subscription agreement was that plan. In fact, Miss Nicholson gave strong advice against adopting the subscription agreement in two lengthy emails, the first sent 17th/18th December 2020 and second on 30th December 2020. Shortly before the board meeting on 7th January, Mr. Sung decided not to proceed with that aspect of the proposed amendments. The voting rights plan was never put to the board for consideration.

Plan C: the amendments

- [53] The claimants' case is that once the subscription agreement was abandoned there was a pressing need for a "Plan C". In their closing, the claimants put their case on Plan C as follows:

"82. Both Plan A and Plan B being therefore regarded by all as inadequate and/or inadvisable (to put it mildly), and this advice having been communicated to the Company, all that remained as a means of defeating the Consortium's Proposal (and the anticipated response to its rejection, which the Company had been intent on announcing from the moment the Proposal had been received) was Plan C: the 2021 Amendments."

- [54] In their opening, the claimants had put their case on the purpose behind the amendments to the M&A as follows:

"75. In light of the available evidence, it is the Claimants' case that the urgency in adopting the 2021 Amendments on 7 January 2021 is most likely to be explained as follows:

(1) The Company was determined to reject the Proposal from the moment it had been received on 7 December 2020.

(2) There was serious concern (on the part of the Company and its lawyers) that rejection of the Proposal would lead to shareholder challenge.

(3) Serious problems were identified in December 2020 with both Plan A (reliance on the Rights Plan) and a possible Plan B (the issue of preferred shares to directors/senior management, without seeking the consent of 75% of the existing shareholders), as a means of thwarting the Proposal, and the anticipated subsequent challenge to the Board's rejection of it.

(4) The development of the Company's Plan C, the 2021 Amendments, was the best way of preventing (or at the very least, making it as difficult as

possible) the shareholders from calling a meeting to scrutinise and challenge the Board's rejection of the Proposal, making changes to the composition of the Board, or making amendments to the Articles subsequently to reverse the 2021 Amendments.

(5) The need was therefore for Plan C to be in place, and the 2021 Amendments to have been adopted and effective, from the moment that the Board rejected the Proposal: i.e. as part and parcel of the rejection of the Proposal, at the two-part Board meeting on 7 January 2021.

76. That this is the most likely explanation of events is further supported, the Claimants contend, by consideration of the 2021 Amendments themselves, and the explanations given by the Company for their adoption on 7 January 2021."

[55] The claimants' primary case on Plan C is that adopting the amendments was a breach of the directors' fiduciary duties, because the amendments were adopted for an improper purpose. Their secondary case is an attack on the individual articles and whether they were lawful. It is convenient to consider this secondary case first.

The new article 3

[56] The claimants' opening put its case on the new article 3, the "blank cheque" provision, as follows:

"81. As the Board Presentation [on 7th January 2021] stated:

(1) Article 3 was amended so that, in summary:

'• All unissued shares shall be under the control of the directors in their absolute discretion; • Directors may authorize the division of unissued shares into any number of classes and may determine by a resolution of directors the variations in the relative rights, restrictions, preferences, privileges and payment obligations as between the different classes; • Directors may issue after their authorised shares series of preferred shares in their absolute discretion.'

(2) The two considerations said to be relevant to these changes were:

'• Additional provisions specifying directors' right to issue new class of shares and determine the variations between different classes allow the Company to respond more quickly to capital market change and to utilize more efficiently the financial resources at its hand; • These provisions do not prevent shareholders from

approving new class of shares and therefore are generally viewed as not materially adverse to shareholders interests.'

82. Article 3 was extensively amended. The genesis of these amendments seems to have been Plan B — i.e. the Company's idea, on which it had sought advice from Maples, Walkers, Collas Crill and [L&W], of issuing preferred shares to senior management in order 'to defeat an unsolicited takeover bid'. The amendments had first appeared in [L&W's] first draft of 28 December 2020, at a time when there was an open question as to whether to adopt Plan B and whether Articles 3.3 and 3.4 should be made expressly subject to Article 3.5 (which referred to the need for 75% shareholder support). Following clear advice that Plan B was a high risk strategy..., the decision was made not to proceed with a Subscription Agreement; however, it seems that the amendments to Article 3 remained largely in the form proposed in [L&W's] first draft, save that the specific cross-reference to Article 3.5 was dropped from the final version (presumably on the advice of Walkers), in favour of a more general formulation 'Subject to these Articles'.

83. The Latham Report [in April] had not proposed (new) Articles 3.2, 3.3 and 3.4. It had proposed instead an amendment to what is now Article 3.1 (then Article 5), to introduce a so-called 'Blank check preferred shares' provision, aimed at removing the need to confer with shareholders, and making the issue of preferred shares subject only to 'the Act and the rules of the Stock Exchanges'. The justification given in the Latham Report was that:

'Generally, a blank cheque preferred shares provision in other BVI public companies' articles of association takes into account the rules of stock exchanges and requires such issue to be made without concern or prejudice to the existing members' rights in order to maximize the Board's ability to deter hostile takeovers.'

84. The position therefore appears to be that:

(1) The innocuous justification given in the Board Presentation for the more extensive changes to Article 3 was 'to allow the Company to respond more quickly to capital market change and to utilize more efficiently the financial resources at its hand' (an explanation that is so bland that its precise meaning is not easy to discern), whereas the justification given in the Latham Report was that the purpose of giving the Board a 'blank cheque' was 'to maximize the Board's ability to deter hostile takeovers'.

(2) If the Company were to issue preferred shares to senior management, for example, that would inevitably impact adversely the position of other shareholders (as Ms. Nicholson had previously advised), so it is quite difficult to see how [L&W] (with Walkers' tacit support) felt able to advise the Board in the Presentation:

'These provisions do not prevent shareholders from approving new class of shares and therefore are generally viewed as not materially adverse to shareholders interests.'

(The shareholders could only do so if they were able to meet in a timely manner, which other of the 2021 Amendments were aimed at preventing.)

(3) Whereas the change proposed in the Latham Report (and specifically the ‘subject to the rules of Stock Exchanges’ wording) was said (in April 2020) to be justified in part by reference to the position in the articles of other BVI public companies (although the basis for [L&W’s] sweeping opinion on that point is unclear), there is nothing in the Board Presentation to suggest that the amendments to Article 3 represented market practice or a necessary updating exercise, and the Board could not, therefore, have genuinely believed that this was their purpose.

(4) Neither Mr. Drewry, nor Ms. Lit, nor the Walkers’ Internal Memorandum of the Board meeting on 7 January 2021 address the amendments to Article 3, or suggest, therefore, the reasons for them, why they were urgently required, or that there was any discussion at all of them at the meeting.

85. The Company contends that there is no cause for the Claimants to complain about the amendments at Article 3, because the Company already had the power to issue shares with particular rights and restrictions, and this is in any event expressly permitted by [sections] 36 and 45 of the 2004 Act. Depending on how this submission is developed at trial, it may be relevant for the Court to consider that:

(a) section 36 of the 2004 Act is the general provision about the ‘types of shares’ that a company may issue,

(b) section 45 of the 2004 Act provides that the power to issue shares ‘on such terms as the director may determine’ is subject to ‘this Act and to the memorandum and articles’ (so that it still remains necessary to consider where an amendment to add these provisions is made in accordance with the duties under sections 120 and 121, and also not in contravention of section 12(5) of the Act), and

(c) the mischief in the addition of Articles 3.3 and 3.4, specifically, is that they expressly permitted the Board (for the first time) to divide unissued shares into classes and to designate the classes with whatever rights the Board may determine, and to issue a new series of preferred shares in its absolute discretion, without the need to consult the members (i.e. these facilitated the issuance of preferred shares to senior management, a step which both Walkers and [L&W] advised Mr. Sung in December 2020 would give rise to a high risk of shareholder challenge). In this sense, their only possible function was to increase Board power at the expense of the voting power of shareholders, and they could only have been aimed at (and, if valid, would achieve) thwarting the Proposal, and restricting the rights or powers of shareholders to amend the Articles.

[57] Hollysys' opening puts its case on article 3 as follows:

"88. The amendments are substantially contained in articles 3.1 to 3.4:

(a) Article 3.1 repeats, almost identically, the former article 5. It provides that shares may be issued with such preferred, deferred or other special rights or restrictions as the directors may determine.

(b) Article 3.2 reflects the former article 4 and provides some further detail. In substance, it provides that unissued shares are at the disposal of the directors.

(c) Article 3.3 provides that the board may divide the existing unissued shares into different classes with preferred and other rights. This clarifies, and does not substantively change, the position under former article 5.

(d) Article 3.4 provides that the board may issue series of preferred shares and stipulates that, where it does so, the board must determine the terms and rights attaching to that series. This provides further detail, but does not substantively change, the position under former article 5.

89. The amendments to article 3 were therefore clarificatory or a 'tidying-up exercise' (as in **Re Charterhouse Capital Ltd**³⁸).

90. The board made no substantive changes:

(a) Prior to 2021, the board had broad powers to make changes to the Company's capital structure. The Company had had preferred shares in its capital prior to August 2010...

(b) Those powers are retained following the 2021 Amendments: the changes are points of clarification or further detail.

91. In approving the amendments to article 3, the board was advised that:

(a) additional provisions specifying the directors' right to issue new classes of shares and determine the variations between classes allow the Company to respond more quickly to capital market change and to utilise more efficiently the financial resources at its hand; and

(b) these provisions do not prevent shareholders from approving new classes of shares and are therefore generally viewed as not materially adverse to shareholders' interests."

³⁸ Also called *Arbuthnott v Bonnyman* [2015] EWCA Civ 536, [2015] 2 BCLC 627 at paras [66] and [98].

[58] I agree with the claimants' submission that it would be illegitimate for the directors to introduce the new article 3, if there were breaches of sections 120 and 121 or of section 12(5) of the Act. However, I do not accept the submission that the "only possible function [of the amendments to article 3] was to increase Board power at the expense of the voting power of shareholders, and they could only have been aimed at (and, if valid, would achieve) thwarting the Proposal, and restricting the rights or powers of shareholders to amend the Articles."

[59] I accept Mr. Todd QC's oral submission that it is necessary to distinguish between the effect of an amendment and the exercise by the board of a power given by an amendment. If the amendments themselves defeated the proposal, then the amendments might directly offend sections 120, 121 and 12(5). However, the amendments here do not have that effect. Section 12(5) is not engaged at all, because no restrictions are placed on making amendments to the M&A. As to sections 120 and 121, it would generally only be at some later date, when the board decided to issue new classes of share that the question as to a breach of sections 120 and 121 would arise.

[60] I shall come back to the question whether there was a sinister Plan C, of which the article 3 amendments were a part. On their face, however, and treating them on their own terms the amendments to article 3 were, just as in **Charterhouse**, on their face merely a tidying-up exercise, which in large part reproduced the "blank cheque" provisions which had always been in the articles. In my judgment the amendments *on their face* are unobjectionable.

The new article 4

[61] The claimants' case on article 4 is this:

"86. Article 7 of the previous Articles provided: 'The directors may redeem any share issued by the Company at a premium.'

87. Article 4 in the 2021 Amendments, amended existing Article 7, by adding various substantially new provisions, which the Board Presentation addressed only briefly

in these terms: 'Redemption of Shares • Clarifies procedures for shares redemption, including

- (a) how to determine the redemption price,
- (b) the date fixed for redemption, and
- (c) the process and requirements of such redemption.'

88. In fact, the clarifications applied to only one very specific situation — where the redemption concerned shares held by a registered or beneficial shareholder who is a judgment debtor of the Company (i.e. new Article 4.2, which is concerned only with the redemption of shares of judgment debtors). In relation to that category of shareholder, Article 4.2 removes the requirement that redemption take place only with the consent of the shareholder.

89. That requirement appears in section 59 of the 2004 Act. Section 59(1) of the 2004 Act provides:

'Subject to section 57, a company may purchase, redeem or otherwise acquire its own shares in accordance with either (a) sections 60, 61 and 62; or (b) such other provisions for the purchase, redemption or acquisition of its own shares as may be specified in its memorandum or articles.'

Section 59(2) provides that:

'Sections 60, 61 and 62 do not apply to a company to the extent that they are negated, modified or inconsistent with provisions for the purchase, redemption or acquisition of its own shares specified in the company's memorandum or articles.'

Section 59(3) provides:

'Where a company may purchase, redeem or otherwise acquire its own shares otherwise than in accordance with sections 60, 61 and 62, it may not purchase, redeem or otherwise acquire the shares without the consent of the member whose shares are to be purchased, redeemed or otherwise acquired, unless the company is permitted by the memorandum or articles to purchase, redeem or otherwise acquire the shares without that consent.'

90. The effect of the amendments in Article 4.2 is therefore that:

- (1) The statutory process in sections 60-61 remains negated, and is negated for the first time in respect of section 62.
- (2) The Articles included no substitute process to replace the disappplied sections 60- 62, save in the case of registered or beneficial shareholders against whom the Company has an enforceable judgment.
- (3) The process in relation to judgment debtors expressly introduces (for the first time) the possibility of redemption of shares, without the consent of the relevant member, contrary to section 59(3), which permits redemption

without consent only if the Articles permit it (i.e. because the shareholders have agreed to it).

(4) In not conveying any explanation of this point to the Board, the description of the amendment to Article 4 that was given in the Board Presentation was misleading.

91. The amendments to Article 4 were not addressed in any way in the Latham Report. There is no explanation from the Company as to why the amendments had suddenly become necessary (still less time sensitive) in late December 2020.

92. Neither Mr. Drewry, nor Ms. Lit, nor the Walkers' Internal Memorandum of the Board meeting on 7 January 2021 addresses the amendments to Article 4, nor suggests, therefore, that there was any discussion of them at the meeting. Since (as Mr. Sung says) the time-sensitive nature of the meeting did not permit a line-by-line review of the 2021 Amendments, the explanation in the Board Presentation was fleeting, the Board was not provided with a tracked version showing the amendments, and the entire process was conducted in English (not Mandarin), it is difficult to see how the Board could have concluded that the amendments to Article 4 were in the interests of the Company, including its shareholders, or that it was appropriate for these amendments to be made without first seeking shareholder approval. Similarly, there is nothing in the Board Presentation to suggest that the amendments to Article 4 represented market practice or a necessary updating exercise, and the Board could not, therefore, have genuinely believed that this was their purpose.

93. The Company contends that there is no cause for complaint about Article 4, as amended, because it 'clarifies the process of redeeming shares', redemptions were already permissible under the Company's unamended Articles, and they are expressly permitted by s.59 of the 2004 Act. Depending on how this submission is developed at trial, it may be relevant to consider that:

(a) the changes to the provision were plainly more radical than simply clarificatory (see above),

(b) section 59 does not permit the Company (or at least not without first putting the amendment to the shareholders for their approval, by the requisite majority) to add a provision to the effect that redemption may take place involuntarily, without shareholder consent; and

(c) the mischief in the amendments to Article 4 is that, again, they increase Board power at the expense of the shareholder rights, and (absent any explanation of their purpose) it is to be inferred that they were aimed at (and, if valid would achieve) thwarting the Proposal and restricting the rights or powers of shareholders to amend the Articles.

[62] Hollysys' answer is:

"92. The additions to article 4 were as follows:

(a) Article 4.1 provides that shares may be issued on terms that they are redeemable or liable to be redeemed and that sections 60-62 of the Act do not apply. This restates and clarifies the old articles 6 and 7 (and sections 60 and 61 were already disapplied by the old article 18).

(b) Article 4.2 provides that the Company may redeem shares in the name of any person against whom the Company has a judgment:

(i) The shares are to be redeemed at full market value and the redemption price is to be offset against the judgment debt.

(ii) An express power to redeem the shares of defaulting judgment debtors (at full market value) cannot be seen as controversial.

93. Like article 3, the amendments to article 4 were largely clarificatory. There were no material changes. In particular, article 4 did not introduce a general power to redeem.

[63] I agree with Hollysys that the changes were largely clarificatory. The only change of substance was in relation to the redemption of the shares of a shareholder who was a judgment debtor to the company. Mr. Shao was not a judgment debtor to Hollysys, so I cannot see that that amendment was directed at him or indeed how it could stymie the proposal. Nor were the other two members of the consortium judgment debtors. On their face these amendments were simply a tidying up exercise. As before, I shall come back to consider whether these amendments were part of an illegitimate Plan C.

The new article 7

[64] On the amendments to article 7, the claimants argue:

"94. Articles 7.3-7.5, as amended, made new provision permitting the Board to amend the Memorandum to increase or reduce the number of authorized Shares, and permitting the shareholders to divide or combine classes or series of Shares, but, where any difficulty arose in regard to any consolidation or division by the members, 'the Company by a resolution of directors may settle the same as it thinks expedient.'

95. In the Board Presentation, the amendments in Articles 7.3-7.4 were summarised and described as clarificatory, but no mention was made of the Board's broad power to settle difficulties 'as it thinks expedient'.

96. The amendments to Article 7 were not addressed in any way in the Latham Report.

97. The same points made at para. 91 above in relation to Article 4 apply, *mutatis mutandis*, to Article 7.

98. The Company contends that there is no cause for complaint about Article 7, as amended, because

- (i) it 'replicates a pre-existing provision permitting redemptions and purchases of the Company's own shares' and
- (ii) it contains provisions allowing the Board 'to increase the Company's authorised capital, and to resolve difficulties in respect of the division or combination of a class or series of shares.

The first point is subject to the same comments made in relation to Article 4 above. The second point is simply a description of Articles 7.3-7.5. Neither point grapples with the mischief in the amendments to Article 7, which is (so far as concerns Articles 7.1 and 7.2), the same as in relation to Article 4 (see para. 92 above), and (so far as concerns Articles 7.3-7.5) that it permits the Board to issue new authorised shares (without shareholder consent), and thereby to dilute the rights of existing shareholders, whilst conferring a broad discretion on the Board to trump the rights of members with respect to any difficulty with the division or combination of a class or series of shares. These amendments would therefore also increase Board power at the expense of the shareholder rights, and absent any explanation for them, it is to be inferred that they were aimed at (and, if valid, would achieve) thwarting the Proposal and restricting the rights or powers of shareholders to amend the Articles.

[65] Hollysys says:

"94. The amendments to article 7 were as follows:

- (a) Article 7.1 excludes the operation of sections 60 to 62 of the Act. Sections 60 and 61 were already excluded by the old article 18.6. (Section 62 of the Act concerns the process for redemption at the option of the shareholder, which is not material for present purposes.)
- (b) Article 7.2 repeats (with minor clarifications) the old article 18, providing that the Company may purchase, redeem or otherwise acquire the Company's own shares.

(c) Article 7.3 provides that the directors may amend the memorandum to increase or reduce the number of shares the Company is authorised to issue. The Company already had such a power under paragraph 9 of the memorandum.

(d) Article 7.4 provides that the Company may by resolution of members divide or combine any issued shares of a class. This reflects the statutory power which applied in any event under section 40A of the Act.

(e) Article 7.5 provides that the board may resolve any difficulty that arises in regard to any consolidation or division. This is a new provision but does not effect a substantive change: the power relates only to resolving difficulties that arise on consolidation or division.

95. The amendments to article 7 were clarificatory or a 'tidying up' exercise.

96. In approving the amendments to article 7, the board was advised that clarifications were made as to increasing or reducing authorised share capital and the division or combination of issued shares."

[66] I agree with Hollsys' points. The amendments are simply clarificatory.

[67] The claimants argue that the new wording "permits the Board to issue new authorised shares (without shareholder consent), and thereby to dilute the rights of existing shareholders, whilst conferring a broad discretion on the Board to trump the rights of members with respect to any difficulty with the division or combination of a class or series of shares." This is true, but faces the same difficulty as the claimants' argument on article 3. The argument does not distinguish between the amendment itself and the exercise by the board of the power given by the amendment. The board must have regard to its fiduciary duties to the company when it exercises the power. An amendment cannot in my judgment be invalidated as a matter of construction on the basis that the board at some future time might breach its fiduciary duties in the exercise of the power given by the amendment. (Whether an amendment was proposed in breach of section 120 or 121 is a different issue, and is for consideration as part of "Plan C".)

[68] Further merely issuing further shares does not affect the rights of existing shareholders. In **White v Bristol Aeroplane Co Ltd**, the defendant company proposed to issue further

preference shares *pari passu* with the plaintiff's preference shares, thereby diluting them. Sir Raymond Evershed MR held:³⁹

"It is necessary, first, to note... that what must be 'affected' are the rights of the preference stockholders. The question then is: are the rights which I have already summarized 'affected' by what is proposed? It is said in answer — and I think rightly said — No, they are not; they remain exactly as they were before; each one of the manifestations of the preference stockholders' privileges may be repeated without any change whatever after, as before, the proposed distribution. It is no doubt true that the enjoyment of, and the capacity to make effective, those rights is in a measure affected; for as I have already indicated, the existing preference stockholders will be in a less advantageous position on such occasions as entitle them to register their votes, whether at general meetings of the company or at separate meetings of their own class. But there is to my mind a distinction, and a sensible distinction, between an affecting of the rights and an affecting of the enjoyment of the rights, or of the stockholders' capacity to turn them to account; and that view seems to me to flow necessarily from certain other articles which I have already read."

- [69] The same approach must, in my judgment, be taken in considering whether the issuance of further shares "restricts" the rights of existing shareholders. In my judgment it does not.
- [70] The general point as to whether this amendment is part of an illegitimate Plan C, I will consider later.

The new article 8

- [71] The amendments to article 8 are summarised by Hollysys as follows:

"97. Article 8 does include substantive new provisions. In summary, it provides that:

(a) The board may issue a notice in writing (Disclosure Notice) requiring *inter alia* persons whom the Company knows or has reasonable cause to believe is interested in the Company's shares to make written disclosure (a Disclosure Statement): Article 8.1.

(b) Any member wishing to propose business to be put before a general meeting shall also submit a Disclosure Statement: Article 8.3.

³⁹ [1953] Ch 65 at pp 74-75.

(c) The content of the Disclosure Statement is prescribed by Article 8.4 and includes, namely:

- (i) the person's name and address
- (ii) their interest in the Company's shares;
- (iii) any 'Associates' that are interested in the shares;
- (iv) beneficial and 'synthetic' equity positions and rights to dividends;
- (v) actual or threatened litigation with the Company or its officers etc;
- (vi) material relationships with the Company or its officers etc;
- (vii) any direct or indirect interest in any contract or agreement with the Company or its affiliates; and
- (viii) such further information as may be required in a Disclosure Notice.

(d) Where a member is in default of its Disclosure Statement obligations (within the meaning of Article 8.8), the board may declare such member to be in default: Article 8.7.

(e) Where the board has declared a member to be in default, the member shall not be entitled (unless otherwise determined by the directors) to attend or vote at any meetings; to receive any payment by way of dividend; or to transfer or agree to transfer his shares: Article 8.10.

Those restrictions apply until the directors determine that the default has been remedied: Article 8.11."

[72] The main thrust of the attack on these amendments is that they are a key element of the illegitimate Plan C (and as before I shall consider this separately). The claimants' argument on the law is narrow:

"104. The Court is invited to read the amendments to Articles 8 and 9 (and Article 10, a closely related provision) in their entirety. The Claimants' case is that their essence is:

- (i) excessive, largely pointless, bureaucracy,
- (ii) significant discretion afforded to the Board to determine whether or not a shareholder has complied, and
- (iii) draconian consequences in the event of default, unless and until remedied (and whether a default has been remedied is itself a matter for the Board (alone) to determine, and which cannot occur in the period 15 days prior to a meeting)."

- [73] They dispute the extent to which disclosure provisions, at any rate in this particular form, are standard among companies quoted on US stock exchanges.
- [74] The answer to the draconian point is the same as above: the board must act in accordance with its fiduciary duties. I agree that a board could misuse the power. For example, on day 16 before the meeting it could, possibly on the thinnest of grounds, declare some minor non-compliance. The following day would be too late for the requisitionists to remedy the non-compliance. However, the Court would no doubt be sensitive to such abuses.
- [75] Do these disclosure obligations nonetheless amount to a “restriction” on shareholders’ right to amend the M&A, so as to be unenforceable under section 12(5)(a)? There is a surprising dearth of authority on what constitutes a restriction. (The English Court of Appeal in **Williams v Devon County Council**⁴⁰ held that changing the direction of flow of traffic in a one-way street was a “restriction” within the meaning of regulation 9 of the **Local Authorities’ Traffic Orders (Procedure) (England and Wales) Regulations 1996**,⁴¹ but the facts are so far removed from the present that the case is of no assistance.) In my judgment it is necessary to distinguish between a provision which amounts to a restriction and a provision which merely deals with modalities.
- [76] A requirement that a shareholder requisitioning a meeting or proposing a motion at a shareholders’ meeting provide information in the form of a “disclosure statement” as set out in the new article 8 in my judgment on its face merely provides for the modality of making a requisition.
- [77] Now I accept that some requirements as to the modalities of making a requisition might at the same time also amount to a restriction. A provision that a requisition had to be made on pink paper (in order, say, to assist dyslexic staff at the company)⁴² might not be a restriction, but a requirement to engross a requisition on vellum or carve it on marble, or to write the

⁴⁰ [2016] EWCA Civ 419.

⁴¹ SI 1996 No 2489.

⁴² Cf *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at p 776 *per* Lord Hoffmann.

requisition at an atomic nanoscale size,⁴³ might amount to a restriction. Likewise a requirement that a requisitionist had in the requisition to express sympathy with the aims of a particular political party or a named terrorist organisation might amount to restriction on that shareholder's right to seek the amendment of a company's M&A. A mere disclosure statement of the type in issue here does not, however, in my judgment amount to a restriction.

- [78] Since these amendments are those on which greatest reliance is placed in showing an abusive Plan C, I shall consider the other issues raised by the claimants in relation to this amendment as part of that aspect of the case.

The new article 14

- [79] The claimants' challenge to the amendments to article 14 is put this way:

“110. Finally, Article 14 introduces two main amendments of present relevance:

- (i) the reduction of the maximum number of directors to not more than five (from not more than 15) (Article 14.1); and
- (ii) a new requirement that no person may be appointed a director by members' resolution 'unless the information and documents required by Article 9.3 and Article 9.4 to be submitted... including pursuant to a Member's Business Notice, have been provided to the Company in respect of such director' (Article 14.5).

111. Neither of these amendments had featured in the Latham Report. The Board Presentation mentioned the reduction of the maximum size of the Board to five (but not the other amendment at Article 14), but gave no explanation for either amendment. According to Walkers' Internal Memorandum, this seems to have been one of the few points in relation to the 2021 Amendments that prompted a question from the Board at the 7 January 2021 meeting. ...[I]n response to Madame Qiao's question as to why the maximum number of directors would be five, not seven, the response given was revealing:

'Under the current M&A — any shareholders should they seek to change the board they don't have to change the composition of the directors — they can simply add directors by majority. By limiting the size of the board, if the consortium wants to have an impact on the board, they need to amend the M&AA first.'

⁴³ See, eg, the abstract of S Lamon and others, Nanoscale optical writing through upconversion resonance energy transfer, *Science Advances* (24th February 2021) Vol 7 No 9.

112. The Company has suggested that there is nothing remarkable about reducing the maximum number of directors to five, because, since 2010 (save during one short transitional period), the Company had never had more than five directors. This misses the point expressly stated in Walkers' Internal Memorandum: the significance of the reduced maximum number of directors was precisely that it limited the number of directors to the existing number: i.e. five. That meant that it would no longer be possible for members to appoint any more new directors, and since existing directors could only be removed by members for cause, and any attempt to appoint new directors by members' resolution would in any event now be subject to the (onerous) requirements of Articles 9.3 and 9.4, the position was exactly as described in Walkers' Internal Memorandum: 'if the consortium wants to have an impact on the board, they need to amend the M&AA first.' Moreover, for the reasons already given above, amendment of the Articles was also made as difficult as possible by the various other 2021 Amendments. Unlike the position with some of the other amendments, where the explanation provided was incomplete, the specific purpose of the amendments to Article 14 with respect to the reduced maximum number of directors was explained to the Board, in direct response to Madame Qiao's question. The only purpose and clear effect of this amendment was to entrench the incumbent Board."

- [80] Under the existing M&A, it was open to the board to dismiss a director without showing cause. By contrast, as the claimants note in the passage cited, the shareholders could only dismiss a director for cause. Under the old articles, the board was limited to fifteen directors, thus the shareholders (without sacking any existing director) could appoint up to ten new directors, thereby taking control of the board. After taking control of the board, it would be possible for the new board to ignore the protections against hostile bids given, for example, by the rights plan and accept an offer, such the current proposal, even if there were substantial doubts as to whether the proposal was in the best interests of the shareholders as a body.
- [81] The claimants rely heavily on these amendments as part of their Plan C case. As a free-standing legal attack, however, in my judgment the claimants fail. There is no breach of section 12(5)(a), because there is no restriction on a shareholder seeking to requisition a meeting or putting forward a resolution at a meeting already called for the purpose of changing the M&A back to what it had been. The sole effect of these amendments was that increasing the size of the board (or allowing directors to be dismissed by shareholders without cause) became a two-stage process. First, a meeting of shareholders had to

approve the change in the M&A. Then, second, a meeting had to replace the existing directors or (depending on what the amendment passed first permitted) appoint further directors.

- [82] It is right that this two stage process could lead to delay. This is because the first stage of amending the M&A would only complete once the amendment was registered. As Mr. Drewry explained, unless the registration was expedited, there could be delay. Further the defeated directors would have no incentive to expedite registration. Accordingly, the shareholders' meeting would have to be adjourned, potentially for weeks or even months, until it (or a freshly summoned meeting) could consider the second stage of the process. This point does not, in my judgment, lead to a free-standing assault on the validity of these amendments.

Plan C: was it illegitimate?

- [83] I turn then to the claimants' points on the illegitimacy of Plan C. Central to Mr. Valentin QC's argument on this is the proposition that after Plan A (the rights plan) and Plan B (the subscription agreement) were shown to be likely to fail "all that remained as a means of defeating the Consortium's Proposal... was Plan C: the 2021 Amendments."
- [84] I do not accept this. The proposal had, so far as the evidence shows, no support from any shareholders other than the members of the consortium themselves. Although the proposal was at a premium to the prevailing stock price, it was below the longer term stock market price, at which most shareholders would have brought. Accepting the proposal would have resulted in most shareholders losing money: see Mr. Xia's evidence at para 45 of his witness statement (which was not challenged). As various shareholders pointed out, once the cash held by Hollysys was stripped out, only a very low value was placed on the business itself. Mr. Sung suggested that the proposal valued the business at only \$4 a share, although this may be an undervaluation. It is not true that the only means of defence was the adoption of a "die in the last ditch" Plan C. Whether the proposal was considered by the board or by a shareholders' meeting, it was likely to be defeated as being at an undervalue.
- [85] This is also the answer to Mr. Valentin QC's point in closing:

“119. Mr. Sung ultimately accepted that all of the 2021 Amendments were a reaction to the Proposal, although (implausibly) he also attempted at times to suggest that they were made in anticipation of hostile takeovers that might be made in the future.”

[86] The 2021 Amendments did not need to respond to the proposal, because the proposal was too low in any event. I find as a fact that the proposal was a “ranging shot”. CPE pitched the price at an amount which was not derisory and which Hollysys would not have been able properly to reject out of hand. However, I find as a fact that CPE would not have expected the board simply to accept the offer. As discussed above, various matters were identified immediately by other shareholders, as showing this was a low-ball offer. These matters were in the public domain and would have been equally known to the consortium, so it is unlikely CPE or the other consortium members would have expected the offer to be accepted or at least not without any bargaining. Further, expressing the offer as “non-binding” meant that the consortium could consider its position once the board’s and other shareholders’ reaction became known. This conclusion is reinforced by the fact that the consortium did come back with a revised proposal at \$17.10 per share instead of the \$15.47 originally offered.

[87] That is sufficient to dispose the main thrust of the claimants’ argument. There is, in my judgment and contrary to Mr. Valentin QC’s submission, nothing implausible about “the 2021 amendments [being] made in anticipation of hostile takeovers that might be made in the future.” On the contrary, I find as a fact that the amendments were directed at future hostile bids.

[88] However, it is also necessary to look at the overall position, since the claimants’ fall-back argument is that the purpose of the amendments was illegitimate regardless of when a decision to reject the \$15.47 proposal was made.

[89] The starting point in considering this issue in my judgment is the degree of attention which was given to the amendments by the board and the way in which the amendments came to be made. It is not in dispute that in fact comparatively little time at the board meeting on 7th

January was devoted to the amendments. The best estimate is about a quarter of an hour, which stands to be contrasted with the hour or so devoted to the merits or otherwise of the proposal, where a lot of time was spent on the financial aspects.

[90] Further, the amendments were presented in the board pack for 7th January in a form which was not conducive to analysis by the directors, none of whom were lawyers. There was no version of the proposed amended M&A with track-changes. Nor was there any means of comparing the original M&A with the proposed amended version.

[91] Nonetheless I need to consider the witness evidence on these matter and it is to this that I turn.

The independent directors

[92] Dr. Teh's account of the board meeting is this:

“25. During the Board meeting on 7 January 2021, [L&W] and Walkers jointly presented the Board with their independent legal advice in relation to the 2021 Amendments, including:

- (i) the fiduciary duties of directors under BVI Law;
- (ii) the directors' powers to amend the M&A; and
- (iii) key considerations in relation to each of the 2021 Amendments.

In particular, based on my experience from previous and current board positions I have held or hold in other companies, I am familiar with the concept of a directors' fiduciary duties, and the need for directors to act in a manner which they believe is in the best interests of the Company when exercising their powers.

26. My personal understanding that I formed on the basis of the advice presented to me during the meeting was that the 2021 Amendments involved the proposal of measures to protect the company against unsolicited offers or hostile takeovers.

27. This was not surprising to me, and was in accordance with my own views on what I thought the Company should be doing. I understand from the Company's balance sheets that it holds a significant amount of cash or cash equivalents, which in my experience, makes it an attractive target for a takeover. As mentioned above, during my time with the Company, I feel that the Board has always been aware of and alert to the Company's vulnerability to hostile takeovers.

28. Additionally, I understood from the legal counsels' presentation that the 2021 Amendments were likely to be within what was legally permitted. Further, applying my own experience, I did not think any of the 2021 Amendments were problematic or surprising. For example, reducing the size of the Board to five directors is a

sensible decision as it makes the Board more nimble and permits the Company to make decisions faster.

29. Having understood and considered the advice of [L&W] and Walkers, I was satisfied that the 2021 Amendments would be in the interests of the Company and its shareholders as a whole. Accordingly, I exercised my right to vote in favour of adopting the 2021 Amendments.

30. In this regard, I do not agree with the Claimants' assertion in the Reply that the 2021 Amendments were adopted in 'great, and unnecessary, haste'. In terms of timing, my view is that when Madame Qiao and Colin took over as Chairperson and CEO respectively in July 2020, they would have had more immediate issues to address such as ensuring that the business of the Company continued to run smoothly and familiarizing themselves with matters to which they may not previously have been privy to as members of the Board. At most, I believe that the Proposal may have accelerated an already ongoing process to adopt measures against hostile takeovers."

[93] As I have noted above, the claimants accept that Dr. Teh was a witness of truth. The above account of his belief was not shaken in cross-examination. It was also the view taken by Ms. Tan, who again was a witness of truth. Prof. Chai is to the same effect. He did not give live evidence in circumstances which I have explained. His evidence corroborates and is corroborated by that of Dr. Teh and Ms. Tan. (The burden of proof is on the claimants to disprove what Prof. Chai says, but, since I accept what Prof. Chai says, nothing turns on this.) Prof. Chai says:

"41. The Claimants allege that the 2021 Amendments are to 'thwart' the Consortium's Proposal and any consideration of it by the Company's shareholders. The truth is that the Proposal, and the Board's response to it, did not form part of the discussions in relation to the 2021 Amendments. Further, if the Board wanted to reject the Proposal, it could do so directly; there is no need to take further measures to obstruct it. It is always open for the Consortium to buy the Company's shares by itself on the open market.

42. In my view, I voted in favor of the 2021 Amendment with reference to the professional opinions of the Company's legal advisers, in accordance with my fiduciary duties of diligence and loyalty to the Company, to make a decision I believed was in the best interests of the Company."

[94] I accept the evidence of the three independent board members that from their perspective the amendments were not made for any improper purpose.

Madame Qiao

[95] In considering the evidence that Madame Qiao acted for an improper purpose, I start from the point that Madame Qiao does not speak English. Her ability to interpret the technical language of the proposed amendments to the M&A was non-existent. She says that her secretary assisted her with understanding the board pack and translated at the board meeting. There is no evidence that she had any input into the giving of instructions to L&W and Walkers, still less into the detailed drafting of the amendments.⁴⁴ Her hesitancy about which law firms were advising is consistent with her limited involvement and in my judgment supports, rather than undermines, the credibility of her testimony.⁴⁵ Her rôle in Hollysys was on the operations side. Although she had regular discussions with Mr. Sung, there is no evidence that, during December when the amendments were being drafted by L&W and Walkers, they ever discussed the details in these discussions. I find as a fact that she did not have any involvement, either direct or via Mr. Sung in the drafting of the amendments.

[96] Madame Qiao said the purpose of the amendments were as follows:⁴⁶

“When we were considering selecting the lawyers to include this provision [the 2021 amendments] we had three items in mind. The first is that we haven’t amended our M&A in over ten years, so it has to be updated in order to meet the current status of the Company’s development and the current time as well. And then, secondly, we must have the Rights Plan is due very soon. We also take into consideration how to react to any hostile takeovers. And then, thirdly, as for the shareholders, we must provide them with sufficient information in order to be just, fair and transparent.

...

The number one [consideration] is that as it been over years since the amendment, we have to update our articles of association to reflect the current version and the current status and following the law as a listed company in the US as well as the law in the BVI. The second issue that we wanted advice from our attorneys was about the hostile takeover and also the extension of the poison pills. And then certainly we had to amend the Articles of Association for the protection of the rights of all shareholders. Those are the principles that we follow when we decide to amend the Articles of Association.”

⁴⁴ See her cross-examination, transcript, day 5 p 16.

⁴⁵ See day 5, transcript, p 22.

⁴⁶ Day 4, transcript p 144 and pp 145-146.

[97] Mr. Valentin QC submitted (roman numbering added):⁴⁷

“(i) Madame Qiao’s evidence was untrue in a number of important respects. Critically, she told the Court that the Board’s consideration of the 2021 Amendments on 7 January 2021 was entirely unrelated to the Board’s consideration (and rejection) of the Consortium’s Proposal: the fact that they happened at the same meeting was merely a ‘coincidence’. This (inherently implausible) evidence involved the remarkable assertion (not advanced by any of the other witnesses) that she thought that any discussion of the amendments in the context of dealing with the Consortium (the word repeatedly used in the Walkers memorandum) was in the context of some future, different ‘consortium’, not the consortium consisting of CPE and the Claimants, that was repeatedly referred to in the materials in the Board Pack. This evidence was blatantly untrue.

(ii) Madame Qiao was also unwilling to accept that the purpose of the reduced maximum number of Board members was the one stated in the Walkers memorandum (and which Ms. Lit, who had conceived of it, had confirmed was its purpose). Madame Qiao’s refusal to accept something that was obvious was all the more striking because she had asked the very question which had prompted the answer, and therefore must have been listening to the answer, when it was given, and fully understood its meaning.

(iii) Her evidence was so brazen at points that towards the end of Day 4, it included the words: ‘If we amended our Articles just because of proposal from CPE, that would be too ridiculous.’

(iv) As a result, Madame Qiao’s evidence (which she repeated under cross-examination) as to her belief as to the purpose of the amendments, and her belief that the amendments were in the best interests of shareholders, cannot be the truth.

(v) Having orchestrated the removal of Mr. Shao from his positions with the Company and with Ningbo (albeit denying any personal involvement in either of these events), Madame Qiao was plainly motivated at the Board meeting by her wish to thwart the Proposal (and any Revised Proposal), not by any genuinely held view of the merits of the Consortium’s bid. She therefore enthusiastically approved the 2021 Amendments, without any thought for the best interests of shareholders, as the only available means of putting as many hurdles in place as possible.”

[98] As to (i), what Madame Qiao said was:⁴⁸

⁴⁷ Closing submissions para 9.

⁴⁸ Transcript, day 4, p 155.

“When we discussed the amendment to the M&A, CPE was not brought up. As I mentioned earlier, these two are separate issues. They are not interconnected. Because if we would change or amend our Articles of Association just because of a proposal from CPE, that would be too ridiculous for a board.”

[99] I do not accept Mr. Valentin QC’s point that this shows Madame Qiao was lying. The decision whether to accept the proposal was discussed by the board separately to the consideration of the amendments. Consideration of the proposal proceeded on the basis particularly of the Deutsche Bank presentation on the financial aspects of the proposal. The discussion of the amendments was not put to the board by Hollysys’ lawyers on the basis that it was a key defensive move to counter the consortium’s proposal. Madame Qiao was not alone in treating the amendments as a general response to hostile takeover bids rather than a specific response to the consortium’s proposal.

[100] As to (iii) (the “ridiculous” comment), Ms. QinQin McCarthy’s translation was of a very high standard, but some allowance must still be made for cultural nuances to come across wrong. Madame Qiao later explained her comment in this way:⁴⁹

“We did not amend it [the M&A] just because of one CPE [proposal]. Otherwise if there are CPE 2 or CPE 3, then we would have to amend our M&A two or three times. So I think this is the requirement of our governance structure. It has nothing to do with the Consortium.”

(See also the translation issue about the Mandarin translation of “consortium” raised in reexamination.⁵⁰)

[101] Mr. Sung’s evidence about this was to the same effect:⁵¹

“[T]hese amendment is not towards the ACE or CPE’s offer. These amendment to the Article is towards any hostile action, right. So in other words we cannot do amendment to any Article because one particular offer. Then if there’s another offer come through, we have to make amendment again? Maybe the proposal be different? So it would be ludicrous we just do this particular one for this offer, no.”

⁴⁹ Transcript, day 5, p 20.

⁵⁰ Transcript, day 5, p 33.

⁵¹ Transcript, day 6, p 150.

[102] As to (ii), the Walkers note of the 7th January meeting included this:

- “• The chairwoman asked why the size of the board is reduced to 5 instead of 7 — because the Company will need to appoint an extra independent director.
- Under the current M&A — any shareholders should they seek to change the board they don’t have to change the composition of the directors — they can simply add directors by majority. By limiting the size of the board, if the consortium wants to have an impact on the board, they need to amend the M&AA first.”

[103] There was lengthy cross-examination on day 4 at pages 151 to 157 of the transcript, but Madame Qiao’s evidence that the amendments were not directed at the existing consortium was not in my judgment shaken.

[104] Subject to my overall view of the evidence in the case, I find that Madame Qiao was a witness of truth. I will review this assessment, when I look at all the evidence in the case. On this view of Madame Qiao’s veracity, I reject Mr. Valentin QC’s point (iv). (v) falls away as well.

Mr. Sung

[105] Mr. Valentin QC critiques Mr. Sung’s evidence in this way:⁵²

“Mr. Sung’s oral evidence revealed a number of examples where (as he, for the most part, eventually accepted) his witness statement was inaccurate because, he suggested, he had not read the relevant passages carefully enough before approving them. He also stepped back, at the outset of his evidence, from the clear thrust of large tracts of his witness statement, which had sought to blame Mr. Shao for the delay in implementing the Latham Report. The overall impression this left was that his witness statement was an unreliable document, albeit that it had been crafted by lawyers. More concerning, however, were the lengths to which Mr. Sung seemed prepared to go to seek to explain away the various pieces of legal advice he had received in December 2020 in relation to Plan B, suggesting to the Court that there was (so far as he was concerned) no ‘Alternative Plan’ or ‘Plan B’ (despite the various express references to those terms in documents which he had seen at the time) and that Mr. Su of [L&W].”

⁵² Closing submissions, para 11.

- [106] This puts a slightly unfair gloss on Mr. Sung's evidence. The Latham report was not progressed during Mr. Shao's time in office. Although Mr. Sung was cross-examined at length about this (pages 15 to 23 of the transcript, day 6), Mr. Sung reasonably said that it was Mr. Shao who had been dealing with the instructions to L&W and the taking forward of the Latham report. The board, after Mr. Shao's ousting, had more urgent tasks than amending the M&A, in particular it needed to push through the rights plan before the old plan expired.⁵³ The allocation of blame for the delay is in any event inconsequential. Key matters, such as the renewal of the rights plan, were done timeously by Mr. Sung.
- [107] There were inaccuracies in para 63 of Mr. Sung's witness statement, which were investigated at length in cross-examination.⁵⁴ Likewise in paras 93 and 94 of his witness statement.⁵⁵ These do not in my judgment affect the general truthfulness of his evidence.
- [108] The claimants also sought to make some mileage from the fact that Mr. Sung in his first affidavit said that it was Walkers who "held the pen" when the amendments adopted on 7th January 2021 were drafted and had to correct this in his first witness statement to L&W.⁵⁶ In my judgment this is an immaterial slip on Mr. Sung's part which does not affect his credibility.
- [109] The claimants placed reliance on Mr. Sung's description in his witness statement of the amendments to the M&A being "time-sensitive". He said⁵⁷ that this was in fact a reference to the different time zones from which people were attending the board meeting and the need to keep the meeting reasonably short. Miss Nicholson of Walkers was the only person who would have been in an inconvenient time-zone for the board meeting if she had attended. He was wrong in thinking (or misremembered) that Miss Nicholson of Walkers had attended the board meeting from Tortola; she had not. I cannot, however, exclude his making a genuine mistake about Miss Nicholson being on the call. As to the language of "time-sensitivity", there seems (as in other parts of his witness statement) to have a lot of

⁵³ See transcript, day 6, pp 24, 26 and 33 to 34.

⁵⁴ Transcript, day 6, pp 40 to 46.

⁵⁵ Transcript, day 6 pp 162-163.

⁵⁶ Transcript, day 6 pp 125-127.

⁵⁷ Transcript, day 6, pp 144 and 145-148.

lawyerly input, so there are limits to the weight to be put on certain phrases. Although the point is finely balanced, on balance of probabilities I accept his explanation of what he meant by the need to consider the amendments as being “time-sensitive”. Even if I were wrong about this, there would be nothing particularly surprising in the board wanting to get the amendments to the M&A in place as soon as possible. The point does not bear the weight Mr. Valentin QC sought to put on it and would not affect my overall conclusion.

[110] Mr. Sung explained the subscription agreement as follows:⁵⁸

“I saw this as two different things we are asking, not the same thing, right? Because Latham is basically saying this is a Plan B defence mechanism which I asking Walkers, it’s about the alignment, right, so I thought those were two different things.

Q. So you are seeking advice from Walkers in relation to your alignment issue?

A. Yes.

Q. And at exactly the same time, you’re seeking advice from Latham & Walkins on the US litigation risks involved in allotting shares to senior management to block a hostile takeover bid?

A. No. I was seeking advice if we do issue shares, is there any potential risk on the US [unclear].”

[111] This evidence is not very clear, but the question of aligning management interests with shareholder interests was a fairly longstanding issue. It seemed desirable to senior management, both before and after Mr. Shao’s ouster, that directors and management should have a substantial shareholding, so that they had the same interests as the shareholders. Consideration had been given to how that could be affected. The lawyers, however, in December 2020 were clear that the subscription plan, particularly if entered when there was a hostile takeover bid being made, had substantial risks. If litigation ensued, the company might well lose.

[112] The two men with lay input into the amendments were Mr. Sung and Mr. Xia. Neither did the actual drafting, which was left to the lawyers. Mr. Xia seems to have spent a substantial

⁵⁸ Transcript, day 6, p 110.

time in discussions with L&W. He was asked how he came to have such a knowledge of the amendments and said:⁵⁹

“Because from 2015 until now, as I have been communicating with lawyers about my work, so I be on the phone for hours with them from time to time which include about the amendment to the M&A back in 2016, so I have, at best, understanding. It is also something I’ve learned from my work. Therefore, I often joke if give me two more years, I could possibly change from engineer to a lawyer.”

[113] However, Mr. Sung had a bigger part in the discussions with L&W and, as CEO, had the last word:⁶⁰

“Mr. Valentin QC: Now can I ask you then about the process of drafting the amendments, the 2021 amendments of the Articles. Mr. Xia when we spoke to him, when I spoke to him yesterday gave evidence to the Court that he thought that you were the person who was responsible for dealing with the lawyers in relation to the drafting of the amendments. Is that right?

A. It’s correct.

Q. Right. And on the 29th of December you received, and you deal with it actually in paragraph 84 of your witness statement, you say, page 111 again: ‘A first draft of the proposed M&A was circulated to me with a Draft Share Subscription Agreement and a Draft Indemnification Agreement.’

...

Now this is — the text in the e-mail is very short just really explaining what’s attached to the document, to the e-mail. And what I suggest this shows is that you must have known when you received this e-mail, that the lawyers were preparing amendments to the Articles?

A. Yes, yes.

Q. Yes. And the reason that you knew that is because you had been dealing with the lawyers, with Latham and Watkins in Hong Kong I think, I suggest to you, over a number of days in relation to the amendments that the Article, that were going to be made to the Articles? That’s right, isn’t it?

A. If my recollection is correct, I was, primarily was talking to Chris, Mr. Drewry for those amendment.

Q. I see. Okay, perfect. And how would you talk to him? Just by telephone presumably, because he was somewhere else?

A. I think so, yes, because again this is a quite technical thing so I just need to understand it.

Q. Yes. And what did Mr. Drewry explain to you in relation to the amendments over the various conversations you had with him by telephone or do you not recall?

⁵⁹ Transcript, day 5, p 66.

⁶⁰ Transcript, day 6, pp 123-125, 127 and 131. See also p 139.

A. I think in very summation [sic] format, I think it's basically sort of procedure, procedural thing, i.e. to amend. I think that's my recollection.

...

[A]gain as I say it's quite technical, you know. To me I trust our Counsel's advice particularly to relay those terminology or technical issue.

...

[T]his is a very technical document or point. I rely on our Counsel to provide opinion same as the other four members listen to that presentation.

Q. Absolutely. No, I understand that. And when you're considering whether or not to adopt the amendments, you're dependent, because it's a technical issue, you're dependent on the advice that the lawyers are giving you, aren't you?

A. Yeah. Under the fundamental understanding does not deprive or take away the existing shareholders rights and powers."

[114] Mr. Sung's evidence about the amendment to change the size of the board was this:⁶¹

"Mr. Valentin QC: And then the change of the size of the Board to formalize what had been the *de facto* size of the Board for almost a decade. And you knew, didn't you, at the Board Meeting that the purpose of the amendment in relation to Board size was about making it as difficult as possible for the consortium to shift the balance of power on the Board?

A. No, it's not, because I do remember the particular topic. I had the specific discussion with Mr. Drewry.

Q. At the meeting?

A. Prior to the meeting. That particular question was asked by me to Mr. Drewry saying historically company only have five director, right, so should it be reflected in the Article. But my question to him is, is it right for Board member or shareholder, can they change that to make amendment to either increase or decrease, there's any limitation to that with the existing shareholders right? And he told me specifically, no. He says board member or shareholder could do with the right they have already. So that is basically saying if that's a case I say fine let's put five member to reflect the current situation given the size of the company, the market capitalization of the company. So that's my question at the time when they put these provision in there."

[115] I found Mr. Sung to be a witness of truth. (I will, however, keep this conclusion under review when assessing the whole of the evidence holistically.) Even if I were wrong in this, no case was put under legal propositions (xix) and (xx); he was in a minority on the board.

⁶¹ Transcript, day 6 pp 132-133.

My holistic view

- [116] I turn then to the holistic view I need to take of the case. I have expressed my preliminary assessment of the witnesses as I have discussed their evidence. Nonetheless, I need to check that assessment against all the other evidence in the case.
- [117] I also need to consider the criticism made by the claimants in opening as to the paucity of documents disclosed by Hollsys. In fact, apart from some general observations in para 133(4) of his closing, Mr. Valentin QC made no concrete submissions as to any particular conclusions or adverse inferences I should draw from the limited documentation. In order to draw any inferences, in my judgment I need to have at least some idea of what documentation there is likely to be and what the contents of the documents might potentially be. In the current case, there might be internal notes of the lawyers giving a more detailed record of when and what instructions were given as regards the amendments which Hollsys wanted the law firms to draft. However, I have accepted both Mr. Drewry and Ms. Lit to be honest and indeed impressive witnesses. Mr. Valentin QC has also accepted them as witnesses of truth. In those circumstances it is difficult to see what inference I could properly draw. I decline to do so.
- [118] I turn then to the claimants' case that the amendments were part of a "Plan C". In their closing they submitted:

"31. It is... necessary to take with a pinch of salt the Company's submission that the reason that the 2021 Amendments were 'significantly different' (to use Mr. Drewry's latest formulation) was due to the jointly developed wording that [L&W] and Walkers had worked on in the intervening nine months in relation to one or more of their other clients. It may be that they did have various precedents to call upon (although there are no documents whatsoever that support that). It is also significant that Ms. Lit did not even mention the point in her witness statement, despite including a discussion of her advice to [L&W] on whether Articles 8 and 9 contravened BVI law. But, even if they did, it does not follow that the lawyers' selection or the purpose of the 2021 Amendments was aimed at continuing the Corporate Governance Review, or that any Board member genuinely believed that making the 2021 Amendments was in the best interests of shareholders. By far the most likely explanation is that the selection of amendments was specifically tailored to the situation in December 2020 — i.e. the urgent need to respond to the Consortium's Proposal, and that this was also made clear or obvious to the Board by the time that they voted unanimously to adopt the 2021 Amendments."

[119] As to Mr. Sung's contribution to the amendments:

"103. ...It is to be inferred... that Mr. Sung was well aware by 29 December 2020 of: (i) the likely scope of the draft amendments, (ii) the fact that the amendments were now the Company's main line of defence to the Proposal (the Rights Plan and the preferred shares for senior management both being regarded as inadvisable), (iii) the true purpose of the amendments, which was to thwart the Proposal, and to make it as difficult as possible for shareholders to challenge the Board's decision to reject it (as it was known they would when they met in early January 2021), and (iv) it was essential that the Board adopt the amendments at the same time as they rejected the Proposal, because the two decisions were inevitably inter-connected."

[120] Further, things not said by the lawyers were, it was suggested, significant. In para 116(3) of the claimants' closing submissions, Mr. Valentin QC, after summarising the (otherwise unexceptional) legal advice given to the board on 7th January 2021 by L&W (with Ms. Lit of Walkers in attendance), submitted:

"This advice was (deliberately) silent as to (a) the purpose of, and reasons for, the 2021 Amendments, (b) whether they were in the best interests of shareholders, and (c) the likely consequences if they were adopted. Significantly, [L&W] and Walkers did not give specific advice that, in their opinion, the Board would be acting consistently with their fiduciary duties, having regard to the reasons not to proceed with the 2021 Amendments and the context in which the decision was being taken. Instead, the remainder of Section 3 consisted only of a table setting out the 'Current Position', an explanation of each of the 'Recommended Changes' and (vaguely expressed) 'Considerations' in respect of each of the most significant 2021 Amendments, and a general description of the other amendments (without even any 'Considerations'), before noting that the 2021 Amendments 'will be effective upon registration of filing with the BVI Registry'." (Emphasis in original.)

[121] I do not accept these submissions. It is true that the 2021 Amendments were in large measure not flagged in the Latham report from April. However, Mr. Sung and Mr. Xia seem to have left the formulation of the amendments almost entirely to the lawyers. I find as a fact that, save in relation to the share subscription, the teams led by Mr. Drewry and Ms. Lit used their own initiative to draft what they considered appropriate amendments. Even the reduction in the board size, which was expressly discussed by Mr. Sung before the board

meeting and by Madame Qiao at the board meeting, was the idea of Ms. Lit. It is true that the lawyers' instructions to draft amendments were given against a background of the consortium having made the proposal. However, it does not follow that the directors' main purpose in approving the amendments was to defeat the proposal.

[122] I do not accept that an inference should be drawn from the failure of L&W to advise the board that the amendments *were* in accordance with the directors' fiduciary duties. In the summary of the relevant legal principles, points (iii) and (xi) emphasise that it is the directors' subjective motivations which is key to assessing the propriety of the directors' decisions. It will be rare that the lawyers advising them will know these subjective matters. Lawyers can point to the fiduciary duties of directors and can advise on how proposed amendments can be reconciled with those fiduciary duties. It is not for them to cross-examine directors to ensure that they are following the relevant principles.

[123] The central flaw in Mr. Valentin QC's logic in my judgment is that the board did not need any defence against the proposal. The proposal was simply too low. There was no realistic chance of its going to be accepted, either by the board or by the shareholders. I accept Hollsys' case that the amendments were directed at future hostile takeover bids, not at the proposal which was considered at the meeting of 7th January 2021.

[124] Taking this overall view of the evidence of the case reinforces my view that Madame Qiao and Mr. Sung were witnesses of truth. I find that the directors all acted for proper motives and that the amendments were not made in breach of their fiduciary duties to Hollsys.

Final conclusion

[125] It follows that I dismiss the action. I will hear counsel on costs and any consequential orders.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar