Neutral Citation Number: [2023] EWHC 2933 (Ch)

Case Nos: BL-2021-000641 and BL-2021-002114

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST

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

Date: 24 November 2023

Before :

Tom Smith KC
(Sitting as a Deputy Judge of the High Court)

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Between:

(1) PAUL RICHARD KNELL
(2) PETER GERALD KNELL
(3) MARCHGALE LIMITED
(4) LANGNELL LIMITED — **Claimants**

- and –

ERIC VAN LOO — **Defendant**

And Between:

(1) PAUL RICHARD KNELL
(2) PETER GERALD KNELL — **Petitioners**

- and –

(1) ERIC VAN LOO
(2) PAUL CORNELIUS FELIX MARIA VLEK
(3) FRANKLIN GEORGE VAN BEUNINGEN
(4) ABRAHAM VAN IDDENKINGE
(5) PETER BISHTON
(6) MILLER TURNER INVESTMENT MANAGEMENT LIMITED
(7) BDI (NEDERLAND) BV

Respondents

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Jessica Brooke (instructed by **Clintons**) for the **Claimants and the Petitioners**
Ali Reza Sinai (instructed by **Rix and Kay**) for the **Defendant and the First to Fourth and Seventh Respondents**
The Fifth and Sixth Respondents did not appear and were not represented

Hearing date: 26 October 2023

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JUDGMENT

Tom Smith KC :

A. Introduction

1. This judgment is further to my judgment of 25 August 2023 ([2023] EWHC 2109 (Ch)) in which I decided questions of liability in these proceedings (the "**August Judgment**"). The purpose of this judgment is to now decide certain consequential issues as to quantum and costs. This judgment should be read in conjunction with my earlier judgment. Unless defined herein, capitalised terms are as defined in the August Judgment.

2. As a preliminary matter, the Claimants contended that I should not deal with matters of quantum at this stage but rather that they should be deferred with further orders being made for the production of documentation and the service of further expert evidence. I disagree with this contention.

3. There was no order for a split trial made in these proceedings. As such, the trial which took place in June was to deal with all matters including both liability and quantum. The disclosure which took place and the evidence, including expert evidence, was likewise to deal with all issues relevant to quantum.

4. In addition, following the August Judgment, the parties have had the opportunity to make further submissions on quantum. Further documents, evidence and submissions have been produced, both before and after the hearing which took place on 26 October 2023, including further schedules of the value of the Shares served by both sides.

5. I am very conscious of the need to deal with this matter in a proportionate way. Indeed, it was the Claimants' own submission at the June trial that I should proceed to determine quantum immediately without any further delay in order to avoid further costs and delay being incurred. In the circumstances, I am satisfied that the correct course is to proceed to deal with all issues relating to quantum in this judgment having had the benefit of the further submissions from the parties.

6. As a further preliminary matter, the Respondents also applied for permission to adduce some further evidence in the form of a witness statement from Gavin Roberts, a partner in the firm of Maxwells who I understand are the auditors to MTIM. The introduction of this evidence was not opposed by the Claimants. I therefore give permission for the introduction of this evidence.

7. As a final preliminary matter, on 7 November 2023 I received a further note from the Respondents (the "**Respondents' Note**") which included various further documents with certain documents contained in an "exhibit". Permission was sought in the note to rely on certain further documents within the "exhibit" relating to the payment of rent on the Saville Row apartment. I refused permission for the Respondents to rely on these documents.

8. As to these, it was unclear whether the relevant documents had previously been disclosed (the Respondents' Note did not suggest that they had been) but, in any event, they did not appear to have been previously included within the trial bundle. This was notwithstanding that the Saville Row apartment had been one of the issues at the trial in June. No explanation was given by the Respondents as to why the documents had not been produced previously. By the stage they were sought to be introduced both the trial and the consequentials hearing had taken place and it was in my judgment far too late for material of this nature to be introduced now. It is necessary to bring these proceedings to a conclusion.

9. I did, however, indicate that I would permit the Respondents to rely on further documents in the "exhibit" which comprise the latest set accounts for MTIM (on the basis that this is a publicly available document) and some limited further documents relating to an entry in MTIM's books and records of £200,000 relating to Oldenhoeck Holdings BV (discussed further below, and which had only arisen as an issue in the proceedings shortly prior to the consequentials hearing).

B. Buy-Out Order

10. In the August Judgment, I decided that an order should be made for BDI to purchase the shares held by Paul and Peter Knell in MTIM (the Shares). It is now necessary to determine the price to be paid by BDI for the Shares.

11. As I explained in the August Judgment, the starting point is to determine the market value of the Shares. I held that, for these purposes, the Shares should be valued as at 12 June 2023, being the first day of the trial window.

12. On this point, I agree with the Respondents that the Schedule valuing the Shares originally produced by the Claimants with their skeleton argument for the consequentials hearing (entitled "Schedule A") proceeds on an erroneous basis. For the purposes of valuing the Shares, the starting point is MTIM's balance sheet as at 12 June 2023 (or, as near to that date as is practicable). The Claimants' Schedule however took the starting point as MTIM's balance sheet of 31 December 2017. Whilst 2017 may be the correct date for valuing MTIM's damages claim against BGL under Clause 16.1 of the Bridgwater AMA, it is not the correct date for valuing the Shares in MTIM.

13. In their note of 10 November 2023 in response to the Respondents' Note (the "**Claimants' Note**"), the Claimants argue that, if MTIM had brought an action for damages against BGL in 2017, then the resulting damages payment would have exceeded the BDI debt as it stood as at 31 December 2017 (it is said after having regard to the various adjustments to the accounts and the evidence regarding the value of the Bridgwater land and the Buxton assets), and would have been applied to set off the debt owing to BDI in full. Following this, it is said that the MTIM Board would have applied the balance in the way best to benefit MTIM, and invested it in a long-term high interest deposit account, or similar investment. It is then said MTIM would not have traded subsequent to 31 December 2017 and would not, therefore, have incurred any further liabilities subsequent to 31 December 2017, so that there should be no debits to its balance sheet after this date.

14. However, in my judgment, there are two difficulties with this argument. First, it is not clear to me that the Claimants are correct that any damages payment received

by MTIM from BGL would have exceeded the BDI debt as it stood as at 31 December 2017. I have not been provided with any figures to make that point good. Secondly, and in any event, the reality is that MTIM has continued in existence since 31 December 2017 and has incurred liabilities since that date. The order which the Knells seek is for an order buying out their shares in MTIM and I have already found that the Shares are to be valued as at 12 June 2023, being one of the valuation dates put forward by the Claimants themselves. In these circumstances, in my judgment, the valuation should take place by reference to MTIM's balance sheet at that date (or as close to it as practicable), unless there is some reason to make specific adjustments.

15. In the August Judgment, I also held that a net assets valuation methodology is in principle appropriate in the present case.

MTIM's assets

16. Based on the conclusions in the August Judgment, MTIM's assets for present purposes essentially consist of its rights under Clause 16.1 of the AMAs. I also said in the August Judgment that it is appropriate to proceed on the basis that MTIM has a valid claim against BGL under Clause 16.1 of the Bridgwater AMA.

17. As to the valuation of that asset, Counsel were agreed that the correct measure of damages for breach of a reasonable endeavours clause is based on the loss of a chance.

18. Mr Sinai argued that MTIM had a negligible chance of establishing a breach of the reasonable endeavours obligation under Clause 16.1 of the Bridgwater AMA in 2015. However, I consider that this submission is unsustainable in light of the findings in the August Judgment and the evidence. It is clear that no attempts were made by BGL to comply with Clause 16.1 of the Bridgwater AMA. Indeed, Mr Sinai fairly accepted in the course of argument that there was a tension between this submission and the submission which he also made that BGL could have complied with Clause 16.1 in 2015 by selling the benefit of the options over the land. In my judgment, MTIM did have a real or substantial chance of obtaining a

Disposal fee from BGL through the operation of Clause 16.1 of the Bridgwater AMA.

19. Mr Sinai's fallback submission was that, even if I was satisfied of this, then I should apply a 40% discount to the amount of any damages in order to reflect the uncertainty surrounding the hypothetical scenario which would have depended on, amongst other things, the actions of a third party buyer. On the other hand, Ms Brooke submitted that I should not apply any discount at all. She referred to the judgment in *Nicholson v Knox Ukiwa & Co (a firm)* [2008] EWHC 1222 (QB) at [98]-[102] and pointed out that where the relevant issues which go to quantifying the loss of a chance are points of law (as opposed to points of fact) then it is for the Court to form a view on those legal points. If the Court concludes those points in favour of the claimant, then no discount would be applicable.

20. I prefer the submissions of Ms Brooke on this issue. In the present case, it is in my judgment clear that BGL breached Clause 16.1 of the Bridgwater AMA. There is also no reason to think that, if BGL had exercised reasonable endeavours to effect a Disposal of the Bridgwater Project, it would not have been possible so as to realise market value. Although there was an argument about the time at which a Disposal would have been possible (as to which, see further below), it was not suggested that a Disposal would not have been possible at all. The real question is as to the price which would have been achieved on a Disposal, but that is something which is reflected in the assessment of the market value. I therefore agree that it would not be correct to apply any discount to reflect possible uncertainties around the claim for damages for breach of Clause 16.1 of the Bridgwater AMA.

Buxton Project

21. The comments above apply to the claim for breach of Clause 16.1 of the Bridgwater AMA relating to the Bridgwater Project. In the August Judgment, I stated that I did not consider that the same applies in relation to the Buxton Project. As I noted, it is clear that the Buxton Project was not successful, and it does not appear that any development was in fact carried out. On this point, I accepted Mr

van Loo's evidence that the Buxton Project was not a success and that the land was ultimately sold with an overall loss.

22. In these circumstances, although Ms Brooke sought to persuade me otherwise, I do not consider that it would be correct to include any amount for a claim for breach of Clause 16.1 of the Buxton AMA in the calculation of the price of the Shares for the buy-out order. As I said in the August Judgment, overall, there is no basis for considering that MTIM would have a claim of any value against EPB for breach of Clause 16.1 of the Buxton AMA. As such, there is no basis for attributing any value to the Buxton Project for the purposes of valuing the Shares.

Bridgwater Project

23. So far as the Bridgwater Project is concerned, MTIM's asset is its entitlement to damages from BGL for breach of Clause 16.1. As noted in the August Judgment, I proceed on the basis that BGL would be able to meet that damages award in full. It was not suggested otherwise.

24. The quantum of the damages which MTIM is entitled to for breach of Clause 16.1 would correspond to 10% of the Sale Proceeds of the Development, being the amount which would have been realised on a Disposal of the Development. The Sale Proceeds are the net proceeds less all costs directly associated with the Disposal and correspond to the market value of the Development.

25. The parties have agreed that the likely disposal costs would be 1% of the Sale Proceeds.

26. For the purposes of valuing MTIM's damages claim for breach of Clause 16.1 of the Bridgwater AMA, it is appropriate to proceed on the basis that as, at the valuation date of 12 June 2023, MTIM had a valid claim against BGL for damages for breach of Clause 16.1. Such damages are to be assessed on the hypothesis that a Disposal of the Development had taken place, with MTIM then being entitled to a fee in accordance with Schedule 2 to the AMA.

Timing of the Disposal

27. As noted above, in the August Judgment I determined that the date of valuation of the Shares should be 12 June 2023. I also noted that there is also a further question as to the date by reference to which the damages for breach of the Clause 16.1 obligation would be assessed. I stated that it was reasonable to assume that, if the Clause 16.1 obligation had been performed, any Disposal of the Development would likely have taken place during 2015. However, I also said that, since I had not received submissions on this point during the trial, I would permit the parties to make further submissions on this issue.

28. The Claimants submitted that in the circumstances of the case 31 December 2017 should be treated as the date on which a Disposal should have taken place for the purposes of MTIM's claim under Clause 16.1. Essentially, the Claimants' submission was that: (1) the obligation under Clause 16.1 was to use reasonable endeavours to effect a Disposal, (2) a Disposal was defined as a sale, transfer or exchange of the freehold or the grant of a lease of the Development, (3) this could have not been done until BGL had exercised the Options so as to acquire the relevant land, and (4) acting reasonably the Options would not have been exercised until 2017 when the basic infrastructure on the site had been constructed. On the other hand, the Respondents submit that BGL could have sold the benefit of the Options in 2015 so that 2015 is the correct date for these purposes.

29. On this point, I prefer the submissions of the Claimants. It seems to me that the reasonable endeavours obligation in Clause 16.1 did oblige MTIM and BGL to take reasonable steps to work together in order to maximise value from a Disposal of the Development. Further, I accept the Claimants' argument that the definition of "Disposal" is a sale, transfer or exchange of the freehold or the grant of a lease of the Development which would have required the Options first to be exercised. On this basis, I accept that a reasonable date for the date on which a Disposal ought to have taken place is 31 December 2017.

Valuation of Phase 1

30. The next question is what price a third party purchaser would have paid for the Development assuming a Disposal of the Development pursuant to Clause 16.1 at or around that date. For these purposes, in accordance with my findings in the August Judgment, the Development does not include the Compass House land or Phase 3 of the Development.

31. So far as Phase 1 of the Development is concerned, as explained in the August Judgment, the available evidence indicates that the land has not been sold, but rather that a total of 10 warehouses have been built, a number of which have been let out to tenants; that there is a Costa Coffee establishment which has been let; and a further area of commercial land which has not yet been developed.

32. As referred to in the August Judgment, there is in the evidence a valuation of Phase 1 produced by Alder King LLP in October 2014 which indicated a market value (net land value) of £6 million (based on a gross value of £12.825 million then deducting infrastructure costs and a developer's profit) (the "**Alder King Valuation**"). There is also a later valuation of June 2018 produced by Cushman & Wakefield (the "**C&W Valuation**"). This indicated a market value for Phase 1 of £15.5 million. However, this valuation includes within it the Premier Inn hotel and the Compass House land which I have concluded in the August Judgment do not form part of the Development as defined in the Bridgwater AMA.

33. In the August Judgment, I provisionally noted that the C&W Valuation had valued the completed hotel at £9.8 million and, if this was deducted from the overall valuation for Phase 1 of £15.5 million, it would imply a valuation for the remaining part of the site of £5.7 million. However, Ms Brooke pointed out that the valuation of £9.8 million was based on special assumptions, and Mr Sinai agreed that, for this reason, the £9.8 million figure cannot simply be deducted from the £15.5 million overall valuation for Phase 1. I therefore accept that this approach would not lead to a reliable valuation for Phase 1.

34. Instead, for her part, Ms Brooke relied on the C&W Valuation which is dated 1 June 2018 and therefore relatively close to the December 2017 valuation date for the Disposal of the Development. I agree that, for this reason, the C&W Valuation

is the appropriate starting point rather than the Alder King Valuation which formed part of Mr Sinai's proposed approach to valuation.

35. The C&W Valuation gives a gross land value (GLV) for Phase 1 including the Compass House land of £20,535,000. The valuation given for Plot 2.1, which Ms Brooke submitted corresponded to the Compass House land, was £1,424,000. Mr Sinai also submitted that Plot 2.2 was Compass House land. However, this was disputed by Ms Brooke and, based on the contents of the C&W Valuation, it is not possible for me to tell that this is in fact the case. In the circumstances, I am not satisfied that the valuation for Plot 2.2 should also be deducted from the overall valuation.

36. Ms Brooke submitted that the correct approach was to take a starting point for the valuation of Phase 1 as £19,111,000, being £20,535,000 less the Plot 2.1 valuation of £1,424,000. She further submitted that a discount of 15% be applied rather than the larger discounts actually applied by Cushman & Wakefield in order to reflect the fact that it is known that various of the matters which were uncertain at the time of the C&W Valuation were resolved successfully. I accept this submission. Applying the proposed 15% discount provides a land value of £16,244,350 for Phase 1 and an entitlement on the part of MTIM to a fee of £1,624,435 excluding direct costs.

Valuation of Phase 2

37. Phase 2 was sold by BGL to BoKlok, a residential property developer, in around July 2022 as a freehold plot for £13.81 million. In the August Judgment, I stated that I considered it reasonable to take this figure as representing the likely net proceeds of disposal of Phase 2 if it had been sold.

38. The Respondents submitted that it was unsafe to rely on this figure because Phase 2 was not ready for sale in 2015. However, as explained above, I have accepted the Claimants' case that, in assessing damages for breach of Clause 16.1, the Court would proceed on the basis that the Disposal would have taken place in 2017. The Claimants say that not much changed from 2017 onwards and I note that even in

2022 the land was sold to BoKlok without the benefit of planning permission having been obtained. In any event, whilst I accept that the BoKlok sale is not perfect evidence of what would likely have been achieved on a sale of Phase 2 in 2017, the Court has to work with what evidence is available, and I consider that the BoKlok sale is the best available evidence, as well as being sufficiently reliable to support the Court's conclusions on this point.

39. In any event, I am not satisfied that Mr Sinai's proposed alternative valuation approach is itself reliable. That approach was based on using the Alder King Valuation for Phase 1 (of £5.7 million) and then using the transaction which took place in August 2015 to derive an overall valuation for the Development of £11.8 million which it was said meant that Phase 2 must have a valuation of £6.1 million. However, in my judgment, the C&W Valuation is to be preferred to the Alder King Valuation as a basis for valuation and, in any event, given the lack of transparency as to what actually took place in August 2015 I do not consider that it would be safe to draw any conclusions as to valuation from that.

40. The Claimants however say that one adjustment is required. This is because they say that the terms of the sale with BoKlok included obligations on BoKlok to undertake substantial infrastructure works in respect of the Phase 3 land which reduced the price. They say that the sale proceeds should be increased by £500,000 to take account of this obligation which they say would have reduced the purchase price by this amount.

41. The evidence on this is, however, very unclear. The Claimants point to the letter from BGL dated 8 June 2023 but all that says is that "*[b]y that time [i.e. November 2024], some necessary access roads will also have been built by BoKlok over Phase 2*". This may however simply be saying that, as part of Phase 2, BoKlok would be building some road infrastructure which would then provide part of the access for Phase 3. I am not satisfied that an increase of £500,000 in the likely sale proceeds for Phase 2 is justified.

42. Based on a sale of the land for £13,810,000, this results in an entitlement on the part of MTIM to £1,381,000, excluding direct costs.

MTIM's Liabilities

43. So far as MTIM's liabilities are concerned, the starting point in my judgment is MTIM's balance sheet of 31 December 2022 which shows a negative net asset position of (£7,230,212). It is then necessary to make certain adjustments to reflect the conclusions in the August Judgment.

44. The first set of adjustments are required in order to reflect the fact that the debt owed by MTIM to BDI was used to discharge BGL's debt to MTIM by way of set-off, but that the discharge of the relevant part of MTIM's debt was not reflected in MTIM's balance sheet. The Respondents have calculated that an adjustment of £4,303,726.71 by way of reduction of MTIM's liabilities is required for these purposes. I did not understand this calculation to be challenged by the Claimants and I therefore accept it.

45. The second set of adjustments are to strip out the effect of the debt relating to the Saville Row apartment. In the August Judgment, I held that the part of the loan from BDI which was attributable to the Saville Row flat should be excluded from MTIM's liabilities for the purposes of valuing the Shares. During the hearing, it was accepted by the Claimants that the original version of their Schedule A had incorrectly included rent for the Saville Row apartment for the period from 1 October 2015 when the lease had been novated from MTIM to Mr van Loo. Taking this into account, the revised total deduction for the removal of the part of the loan relating to the Saville Row apartment is £1,871,642.99.

46. The third set of adjustments suggested by the Claimants relate a loan of £200,000 said to have been provided to Mr van Loo through his company Oldenhoeck. In this respect, the balance ledger annexed to Mr Roberts' witness statement which contains an entry of £200,000 described as "06/10/2015 Oldenhoeck Holding BV" which was treated as a debt owing by MTIM to BDI. Mr Roberts did not in his witness statement explain this entry.

47. In the Respondents' Note provided following the consequentials hearing, the Respondents said that this figure related to bonus payments made to Paul Knell, Peter Knell and Mr Revell at that time. It is said that, as shown by documents contained in the trial bundle, the parties met at the Washington Hotel in London on 2 September 2015 and Mr Van Loo agreed to pay a bonus of £50,000 to each of Paul Knell, Peter Knell and Mr Revell. This was recorded in minutes dated 2 October 2015, where it was also recorded that Marchgale, Langnell and Revprop would each raise invoices for this amount. It is then said that each of Paul Knell, Peter Knell and Mr Revell raised invoices through their companies for £50,000 plus VAT on 1 November 2015, and the monies from Oldenhoeck were used to discharge those invoices.

48. The Claimants accept that it was agreed that the Knells would each receive a bonus payment of £50,000, but they say that there is no evidence at all as to how these payments were funded. They say there is no direct evidence as to why the Oldenhoeck debt was recorded in the ledger and no evidence has been provided of any relevant payment actually made by Oldenhoeck.

49. The evidence is not satisfactory. However, the Respondents' explanation is plausible. In the circumstances, I am not persuaded that an adjustment should be made to remove the £200,000 entry from MTIM's balance sheet.

Waiver of debts owing to the Third and Fourth Claimants

50. The Claimants have also included within Schedule A an adjustment to allow for the waiver of certain debts which it is said were owed to Marchgale and Langnell. I queried at the hearing what evidence was available to show that Marchgale and Langnell had waived these debts. I was subsequently provided with a copy of a letter from Clintons dated 27 October 2023 confirming that the relevant debts had been waived and were forgiven by Marchgale and Langnell.

51. I express no views on whether or not this waiver is effective as a matter of law. In any event, I consider that it would not be right to make any adjustment for this. I held in the August Judgment that the Shares were to be valued at 12 June 2023,

and the waiver letter is dated 27 October 2023. As at 12 June 2023, the relevant debts were liabilities of MTIM. Further, I doubt that it would in any event be correct to take into account steps taken subsequent to my judgment for the purposes of increasing the amount of the buy-out order to be made by the Court.

52. The Respondents also say that Marchgale and Langnell's claims were rejected at the time by Mr Van Iddenkinge on 8 January 2016 and were never entered into MTIM's accounts. In particular, they were never recorded within the amounts owing to creditors. The accounts for the year ending 2014 state that as at 31 December 2014, Marchgale was owed £12,500 and Langnell was owed £76,500, and it is said that these amounts are included in "Accruals and deferred income", which in turn is included in "CREDITORS: AMOUNTS FALLING DUE WITHIN ONE YEAR". The amount to creditors falling due within one year is circa £429,000 as at 31 December 2014 and the amount in the latest accounts for y/e 31 December 2022 is circa £398,000. Therefore, it is said that the amount due to creditors has remained at around £400,000 ever since 2014 and does not include the claims now purportedly waived. The Claimants dispute these points. Given my conclusions in the preceding paragraph, it is not necessary for me to reach any determination on these specific issues.

53. Accordingly, MTIM's balance sheet should not be adjusted to allow for the alleged waiver of these debts.

The Claimants' Note

54. In the Claimants' Note, the Claimants sought to argue that further adjustments should be made to MTIM's balance sheet. The Claimant's Note stated that "*[t]he Knells have, prompted by the Respondents' written submissions [i.e. the Respondents' Note], reviewed the Ledger, which was disclosed late by the Respondents, and have identified a number of items which should not have been entered.*"

55. In my judgment, it is illegitimate for the Claimants to seek to introduce such new points at this stage. First of all, the permission which I gave for the service of a

further note from the Claimants was limited to a note in response to the Respondents' Note. These parts of the Claimants' Note however go well beyond that. Secondly, there is no good reason why the Claimants could not have raised these points earlier, and, in any event, well in advance of the consequentials hearing since they had a copy of the ledger a number of weeks in advance of that hearing. Thirdly, and relatedly, it is now far too late to seek to introduce new points, a number of weeks after the trial has taken place and well after the consequentials hearing. Fourthly, if I were to permit these points to be advanced now, then the Respondents would no doubt be entitled to respond which would result in yet further material being introduced at a time when the arguments are already meant to have closed.

56. I therefore disregard these parts of the Claimants' Note.

Interest

57. So far as interest is concerned, in my judgment, the correct analysis is that MTIM would be entitled to interest on its damages claim against BGL and that this therefore falls to be taken into account when assessing the assets of MTIM. Interest is included in the calculation on the basis that if, at 12 June 2023, MTIM had successfully brought an action against BGL to the effect that a Disposal of the Development should have taken place in December 2017, then MTIM could ordinarily expect to receive interest on its damages award from the date when the Disposal should have taken place to the date when judgment was entered (which for present purposes has been treated as 12 June 2023). I do not agree with the Respondents that any of the principles relating to the award of interest on share buy-out orders are engaged at this stage of the analysis. Rather, interest falls to be taken into account at this earlier stage when working out what MTIM's assets actually are.

58. As to the applicable interest rate and basis, such interest would typically only be awarded by the Court on a standard basis. I accept Mr Sinai's submission that a rate of 3% would be fair given the low interest rates in the subject period.

59. I also accept Mr Sinai's submission that, in the circumstances of this case including the delay, it would not be appropriate to order interest on the amount of the share buy-out order itself.

Conclusions

60. Accordingly, the overall result is as follows:

    a. The starting point is MTIM's net assets as at 31 December 2022 of (£7,230,212).

    b. The adjustments of increases of £4,303,726.71 (for the set-off of the debt owed by BGL) and £1,871,642.99 (for the BDI loan relating to the Saville Row apartment) are to be applied to this, but not those relating to the alleged Oldenhoeck loan or the alleged waiver of the debts due from MTIM to Marchgale and Langnell.

    c. A figure of £2,975,380.65 is to be applied for MTIM's damages claim against BGL for breach of Clause 16.1 of the Bridgwater AMA, being the likely sale proceeds of the Bridgwater Development under a Disposal if such had taken place. This figure is 10% of the sum of the two land values in paragraphs 36 and 42 above less direct costs of 1%. No sum is however to be added for any Disposal of the Buxton Development.

    d. Interest is to be included on the sum of £2,975,380.65 at a simple rate of 3% from 1 January 2018 to 12 June 2023 which the parties have agreed as being £486,413.60.

    e. That gives total net assets for MTIM of £2,406,952.

    f. The Knells' 30% interest is therefore worth £722,085.60.

61. I therefore order that the sum to be paid by BDI for the purchase of the Knells' 30% shareholding in MTIM is £722,085.60. No further interest is to be payable on that sum as from 12 June 2023 to the date of the order made herein.

C. Costs

62. I turn now to deal with questions of costs.

Incidence of costs – Part 7 Claim

63. So as far as the Part 7 Claim is concerned, that claim entirely failed. The Claimants say that looking at matters in the round and taking into account the Petition, they were not the "losers" and that the Part 7 Claim and the Petition arose from the same facts. However, in my judgment, that does not detract from the key consideration which is that the Claimants decided to bring the Part 7 Claim against Mr van Loo and lost. I do not see any basis for departing from the usual rule that the Part 7 Claimants should jointly and severally pay Mr van Loo's costs of and occasioned by the Part 7 Claim. I also do not agree that I should be deterred from making any such order by any practical difficulty in separating costs relating to the Part 7 Claim from costs relating the Petition. I therefore make an order that the Claimants pay Mr van Loo's costs of and occasioned by the Part 7 Claim.

Incidence of costs – Petition

64. So far as the Petition is concerned, the Petitioners have succeeded in obtaining a buy-out order. However, a number of the allegations which they advanced as part of the Petition were rejected.

65. Moreover, I rejected the claim for relief against the First to Fifth Respondents. It was also unnecessary for any of the First to Fifth Respondents to have been joined to the Petition for the purposes of the Petitioners obtaining the buy-out order. Although Mr van Iddenkinge was implicated in the failure to pursue a claim by MTIM under Clause 16 of the Bridgwater AMA, this point could have been made without him being joined as a party and without relief being sought against him

personally. I am also unpersuaded that it was necessary to join Mr van Loo personally to the Petition for the purposes of seeking disclosure. In my judgment, the reasons why the First to Fifth Respondents were joined by the Petitioners were for the purposes of at least having the option of seeking relief against them personally; however, that claim failed and was rejected.

66. The Fifth Respondent did not participate in the proceedings and I understand from the Respondents' submissions that, so far as the Second and Third Respondents are concerned, no costs order is sought. In relation to the First and Fourth Respondents (Mr van Loo and Mr van Iddenkinge), I consider that the correct order is that the Petitioners should, on a joint and several basis, pay their costs of and occasioned by the Petition.

67. The Sixth Respondent did not take any role in the proceedings. So far as the position between the Petitioners and the Seventh Respondent, BDI, is concerned, the result is that the Petitioners succeeded in obtaining a buy-out order which had been resisted by BDI. On the other hand, a considerable number of the allegations which had been made by the Petitioners as part of the Petition were rejected. It would have been possible for the Petitioners to have put the Petition on a much narrower basis concentrating on their removal as directors of MTIM and the failure by MTIM to pursue any claim under the Bridgwater AMA. This would have resulted in a considerable saving of time and costs.

68. Furthermore, some of the costs which have been incurred by the Petitioners in relation to the Petition would relate to the claims asserted against the First to Fourth Respondents which I rejected. I do not consider that it is appropriate for BDI to pay those costs incurred by the Petitioners.

69. Overall, I accept the Respondents' submission that it is appropriate to apply a 30% discount to the Petitioners' costs. In the circumstances, I therefore consider that the appropriate order is that BDI should pay 70% of the Petitioners' costs of the Petition. As explained further below, this does not include the costs which the Petitioners are liable to pay to Mr van Loo and Mr van Iddenkinge.

Whether Mr van Loo should pay the Petition costs personally

70. The Petitioners also seek an order that Mr van Loo be jointly liable, alongside BDI, for those costs. For these purposes, they rely on the principles set out in *Paper Mache Tiger v Lee Mathew Workroom Pty Ltd* [2023] Costs LR 427 at [8]-[9]. They say that the Court has a wide discretion to award costs against a non-party in the position of Mr van Loo and that the only immutable principle is that the discretion must be exercised justly. They say that Mr van Loo was the "real party" to the Petition and that BDI is the corporate vehicle through which he acts. The Respondents, on the other hand, say that BDI has a separate legal personality and that it takes its own advice and decisions and has duties to its creditors.

71. I am not satisfied that it is appropriate to make a costs order against Mr van Loo personally in the present case. In my judgment, BDI, as the shareholder in MTIM, was the "real party" to the Petition and proper regard should be had to its separate legal personality. I do not consider that there is any special factor in the present case which means that it is appropriate for Mr van Loo to be personally liable alongside BDI for the relevant costs.

72. I do, however, have one concern. In my judgment, it would be unjust if a situation was to transpire whereby BDI failed to pay the sum due under the buy-out order to the Petitioners, but where the Claimants were nonetheless liable to pay costs to Mr van Loo under the costs orders made in the Part 7 Claim and the Petition. I consider that the appropriate solution to this is for a stay to be imposed on the enforcement of the costs orders made in favour of Mr van Loo in the Part 7 Claim and the Petition such that they may not be enforced unless and until BDI has paid the sum due under the buy-out order. For the avoidance of doubt, this does not apply to the costs order made in favour of Mr van Iddenkinge.

Whether Mr van Loo and/or BDI should pay the other Respondents' costs

73. The Petitioners say that, in the event a costs order is made in favour of one or more of the Respondents to the Petition, then it should be ordered that Mr van Loo and/or BDI be made liable for those costs. In this respect, reliance is placed on the

familiar cases of *Sanderson v Blyth Theatre Co* [1903] 2 KB 533 and *Bullock v London General Omnibus Co* [1907] 1 KB 264. However, I do not consider that there is any proper basis for making any such order in the present case. In my judgment, it was unnecessary to join either Mr van Loo or Mr van Iddenkinge to the Petition and the claim for relief against them personally failed.

Part 36 Offers

74. It is also necessary to take into account the offers which were made to settle the proceedings. In particular, the Petitioners made a Part 36 offer in the sum of £400,000 by way of a letter dated 18 June 2020. However, that Part 36 offer was not addressed to BDI, but rather to Mr van Loo, Mr Vlek, Mr van Beuningen, Mr van Iddenkinge and MTIM. The Petitioners have not obtained any relief in these proceedings against any of those persons. As such, contrary to the submission made by the Petitioners, it does not appear to me that the Petitioners have beaten that Part 36 offer.

75. The two subsequent Part 36 offers of 8 March 2023 and 3 May 2023 were not beaten by the Petitioners in the result of these proceedings.

76. As such, I do not consider that any of the consequences under Part 36 are applicable in the present case.

Discretion

77. The Petitioners also rely on the offers in the context of an alleged failure to mediate and/or negotiate by the Respondents. In that respect, they referred to the decisions in *Halsey v Milton Keynes General NHS Trust, Steel v Joy* [2004] 1 WLR 3002 and *Garritt-Crichley v Ronnan and Solarpower PV Ltd* [2015] 3 Costs LR 453. However, having carefully considered the submissions of both parties on this point, I am not satisfied that there has been an unreasonable failure on the part of the Respondents to mediate or negotiate and that the Respondents have acted unreasonably having regard to all the circumstances of the case.

Basis of assessment – Part 7 Claim

78. Finally, it is necessary to deal with the basis of assessment. The Respondents argue that all of Mr Van Iddenkinge's costs of the Petition and 50% of Mr van Loo's costs of the Part 7 Claim should be paid by the Claimants/Petitioners on the indemnity basis. They refer to the usual principles governing the award of indemnity costs set out in *Excelsior Commercial and Industrial Holdings Ltd* [2002] EWCA Civ 879, *Esure Services Ltd v Quarcoo* [2009] EWCA Civ 595, and *Three Rivers DC v Bank of England* [2006] EWHC 816 (Comm).

79. However, I do not consider that there is anything in the present case which takes it "*out of the norm*" in a way which would justify an order for indemnity costs, in other words that there was "*something outside the ordinary and reasonable conduct of proceedings*". Although the Part 7 Claim against Mr van Loo failed as did the claim for relief in the Petition against Mr van Iddenkinge, there were arguable points of criticism capable of being properly advanced in relation to the removal of the Knells from MTIM and the failure by MTIM to pursue a claim against BGL under the Bridgwater AMA. In the circumstances, I do not consider that any award of indemnity costs would be appropriate so all costs will fall to be assessed on the standard basis in the absence of agreement.

Interim payments on account

80. If any of the parties wishes to seek a payment on account, then they may apply on the papers.

D. Conclusion

81. I invite counsel to agree a draft order reflecting the above.