**IN THE GRAND COURT OF THE CAYMAN ISLANDS**
**FINANCIAL SERVICES DIVISION**

**CAUSE NO.: FSD 81 OF 2020 (RPJ)**

**IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)**
**AND IN THE MATTER OF RASIA**

**IN COURT**

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| **Appearances:** | Mr Stephen Moverley Smith QC, Peter Sherwood and Nigel Smith, Carey Olsen on behalf of the Petitioner<br>Thomas Lowe QC and John Harris from Nelson & Co. Counsel on behalf of the Company |
| **Before:** | **The Hon. Justice Parker** |
| **Heard:** | **28, 29, 30 September 2020, 19th October 2020 and 25, 26, 27 May 2021** |
| **Draft Judgment Circulated:** | **20th July 2021** |
| **Judgment delivered:** | **28th July 2021** |

**HEADNOTE**

*Winding up petition - just and equitable – standing - approach to oral evidence - approach to missing critical document - expert evidence on allegedly fabricated emails.*

**JUDGMENT**

## Introduction

1. On 1 May 2020, Red Wolf Resources Ltd (the "Petitioner") presented a winding up petition on the just and equitable ground, under section 92 (e) of the Companies Act, to wind up Rasia, a Cayman Islands exempted company (the "Company"). The Company was incorporated in the Cayman Islands on 29 May 2017 and operates as a mutual fund.

2. The Petitioner is an investment holding company incorporated in the British Virgin Islands. The Petitioner asserts that it holds approximately 78% of the non-voting participating shares issued by the Company.

3. On 8 July 2020, the Company filed a summons seeking to strike out the petition. One of the grounds relied upon was that the Petitioner is no longer a shareholder in the Company and therefore had no standing to proceed with the petition.

4. This was the trial of the preliminary issue as to whether the Petitioner has standing as a shareholder to present the petition. This issue is fairly common in winding up cases. However, this was not a dry examination of the principles of standing to present a winding up petition in this jurisdiction.

5. The court heard days of conflicting evidence from a number of factual witnesses. It is fair to say that the hearing, conducted by video link with witnesses in various parts of the world, was hotly contested and the witnesses in general 'pulled no punches' and gave conflicting accounts.

6. There was also expert evidence on the question of whether certain emails had been fabricated. One of the factual witnesses, James Dauman, produced three emails that potentially undermined the Company's case. It was put to Mr Dauman by the Company that these emails were fabricated. Following that suggestion the Petitioner commissioned an expert report in relation to the question of whether the emails had been fabricated or tampered with, which was then responded to and resulted in two experts being called and examined before the Court.

**The protagonists and their dispute**

7. The two protagonists in this dispute gave evidence. They were both equally pugnacious and firm in their evidence. Neither is a stranger to litigation. They are Mr Craig Ransley ("CR") and Mr Joseph Borkowski ("JB").

8. JB is the Company's principal director and owns and operates a group of investment companies (the Rasia Investment Group) that makes investments into distressed companies and turnaround situations in the mining and infrastructure sectors. JB manages the investment programme of the Company through Rasia Management and is based in Dubai in the United Arab Emirates.

9. CR has a broad entrepreneurial background, and has been involved in growing companies in the energy sector with extensive experience in the labour hire and service industries.

10. He said he first met JB when he was representing a company (Terracom) seeking to make a potential investment into a distressed Mongolian company (Gobi Coal) in 2015/16 and developed a good working relationship with him at that time. CR says that he started discussing fund structures with JB and the possibility of how money could be raised. He says that he (CR) came up with the idea of setting up a fund pursuant to which JB proceeded to establish the Company. However, towards the end of 2019 and the beginning of 2020 his relationship with JB began to deteriorate quite significantly[1].

**The oral evidence**

11. Their diametrically opposed evidence on a number of key issues (supported by the witnesses each side called) in this application brings into play consideration of the approach of Leggatt J in *Gestmin*[2]:

> *"In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, 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."* (my emphasis)

12. Both protagonists certainly had confidence in their own recollections of what did or did not take place. I found CR to be at times truculent and unforthcoming. I found JB to be at times clearly angry and argumentative and at other times overly dismissive. Making allowances for the fact that the witnesses gave their evidence on video link, not in person in a Court room, neither witness in my view gave wholly accurate, or complete, evidence.

13. However, in relation to the issues of funding and ownership of the Company I found JB to be unreliable. In relation to the key issue in this application, namely the existence of a Transaction Agreement, which allegedly unwound the Petitioner's ownership of shares in the Company, I

[1] *Ransley 2 §§22*
[2] *[2013]EWHR 3560 at §22*

found JB to be untruthful. I found CR on these two issues more reliable on the first and truthful on the second.

14. I would add that where the Court concludes that the oral evidence given in a case like this is not straightforward and is so polarised on the key issues, the Court's reliance on the contemporaneous documentary record and overall probabilities is much more important, however confidently the witnesses expressed themselves.

15. There is clearly no love lost between CR and JB. Each gave totally conflicting accounts on the main issues, supported by the witnesses who were called for each of their cases. They were both extensively and expertly cross-examined by Mr Moverley Smith QC for the Petitioner and Mr Lowe QC for the Company. Through cross-examination the documentary record was subjected to scrutiny and the credibility of witnesses was tested.

16. Mr Lowe QC said at § 6 of his written closing submissions on behalf of the Company:

> "*If there is one thing on which the parties can probably agree it is that regrettably both sides cannot be telling the truth. The uncomfortable reality is that one side has clearly been dramatically dishonest and untruthful in its evidence and manufactured documents.*"

**Key issue**

17. The key question for the court to determine on this application is whether the Petitioner (CR's BVI company) is the beneficial owner of 78% of the Company's participating (non-voting) share capital, which was issued as a result of various subscriptions-in-kind made during 2018 (some of the consideration being provided by shares in Kirkham International Pte Limited ("Kirkham") see below).

18. The Petitioner bears the burden of proving that this is so to demonstrate standing to present and pursue the petition.

19. The Company claims that since the petition was filed, the Petitioner has ceased to be a shareholder of the Company and so no longer has standing to petition for the winding up of the Company. The Company cancelled the Petitioner's shares on 6 July 2020 shortly before the application to strike out the petition was issued.

20. This was done, according to the Company, pursuant to an agreement the Company claims was concluded in December 2018 (the "Transaction Agreement"), by which it is said that the

Petitioner's subscriptions were conditional on there being a takeover of Kirkham by an Australian public company Terracom Ltd ("Terracom"), of which CR was a founding shareholder.

21. The Company claims that the Transaction Agreement provided that in the event that Terracom did not acquire the Kirkham shares by 2 January 2019 (12 months later), the Petitioner's acquisition could be 'unwound'. Pursuant to this, the Company has purported to amend its register of members to delete the Petitioner as a shareholder. If there was not a Transaction Agreement, and therefore no contractual basis to cancel the shares and remove the Petitioner as a shareholder, the Petitioner submits that it is entitled to proceed on the basis it is a shareholder.

22. There is a related issue as to how the Company was funded. Before 2 January 2018, the sole subscriber of participating shares in the Company was Mondoe Company Limited ("Mondoe"), a Marshall Islands company. The shares in Mondoe were registered in the name of JB on 2 December 2016. CR asserts that JB did not own those shares but that they were held in his name only (as a nominee) on CR's behalf for tax efficiency purposes[3]. It is JB's case that he was the beneficial owner.

23. The Petitioner submits that the Transaction Agreement is an invention of JB, and is a fraudulent attempt to appropriate the Petitioner's shareholding. It is the Company's case that the Petitioner is contractually entitled under the Transaction Agreement to unwind the subscriptions that occurred. Alternatively if there was no binding agreement then the subscriptions were agreed by JB by mistake believing that there was such an agreement.

24. Therefore the existence of the Transaction Agreement is a central factual issue and was hotly disputed. There is no original Transaction Agreement or copy of it produced by the Company or indeed by anyone else. JB says he cannot find it. The court is therefore left to assess the existence of this critical agreement relied on by the company without the document itself.

25. I bear in mind the comments of the Court of Appeal in a recent decision in this regard[4]:

> *"....There may simply be no, or no relevant, contemporaneous documents, and, even if there are, the documents themselves may be ambivalent or otherwise insufficiently helpful. The case could be one about an oral promise which turns entirely on the word of one person against another's, and the uncontested facts may well not point towards*

[3] *CR 5 §18*
[4] *Nat West Markets [2021] EWCA 680 at §§50 and 51*

> *A's version of events being any more plausible than B's. Even in a case which is fairly document-heavy (as this one was) there may be critical events or conversations which are completely undocumented.*
>
> *"Faced with documentary lacunae of this nature, the judge* ***has little choice but to fall back on considerations such as the overall plausibility of the evidence; the consistency or inconsistency of the behaviour of the witness and other individuals with the witness's version of events; supporting or adverse inferences to be drawn from other documents; and the judge's assessment of the witness's credibility, including his or her impression of how they performed in the witness box, especially when their version of events was challenged in cross-examination."*** (my emphasis).

**The company's evidence through the written evidence of JB**

26. JB's case is that he first met CR in 2014[5]. Over the following four years CR pitched a number of investment opportunities to him in relation to both Terracom and Kirkham, companies which CR had founded[6].

27. JB says that subsequently, in June 2017, he incorporated the Company as an investment fund. At that time, he was its sole director. All of the participating shares were issued to Mondoe.

28. JB claimed that Mondoe was a company that he himself owned and that Mondoe had made cash subscriptions of US$905,000 for shares in the Company. Mondoe's shareholding had subsequently been transferred to a Cayman company of the same name which had subscribed for further shares. JB claimed that the Rasia investment group companies have paid total cash consideration in return for subscriptions totalling US$4.795m[7].

29. JB says he was approached in late 2017 by CR with a Kirkham related opportunity. Terracom which CR had founded and continued to influence through its board, intended to purchase 100% of Kirkham. The Company had already purchased some shares in Kirkham and would apparently earn 7 to 10 times its investment if the Terracom acquisition of Kirkham went ahead.

30. JB says:

> *"For this opportunity, I caused* [Red Wolf, the Petitioner] *to be incorporated in the British Virgin Islands on 13 December 2017"*[8].

[5] *Borkowski 2 § 47*
[6] *Ibid § 48*
[7] *Ibid § 43 ff*
[8] *Ibid §61*

JB describes CR's intention to use Red Wolf (the Petitioner) to subscribe for shares in the Company, providing Kirkham shares as a subscription-in-kind rather than cash, and that, to that end, CR transferred Kirkham shares to Red Wolf for them to be used as consideration.

31. A fuller and important explanation of the Petitioner's subscriptions-in-kind is given by JB at §§ 62-64 of Borkowski 2:

> *"62. Rather than subscribe cash in the company, Mr Ransley was going to use the Petitioner to provide Kirkham shares to make subscriptions in kind as opposed to a cash subscription. He therefore transferred his shares in Kirkham to the Petitioner so that they could be provided as consideration for the intended subscriptions the Petitioner would make into* [the Company]. *The Kirkham shares were only of interest if the Terracom transaction went ahead as Mr Ransley had suggested and the takeover was therefore a condition of this deal. The parties documented this deal in a short agreement drafted by Mr Ransley that he and I signed in late 2017 or the first few days of 2018 (the* ***Transaction Agreement****).*
>
> *63. I have not been able to locate a copy of the Transaction Agreement. I recall that the original was provided to Maples Fund Services (then the administrator of* [the Company] *at the time) at a meeting in Dubai but was not returned to me at handover of documents when changing fund administrators. However, the key terms of that Transaction Agreement are set out in a resolution of* [the Company] *dated 2 January 2018 that I exhibit at pages 362 to 462,, namely that:*
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> *a. Mr Ransley would cause Red Wolf to make various subscriptions-in-kind into* [the Company] *of approximately 25% of Kirkham shares during 2018;*
>
> *b.* [The Company] *would invest a minimum of US$5 million to purchase existing Kirkham shares and royalty interests from other Kirkham shareholders and to fund Kirkham to facilitate the M&A sale of Kirkham to Terracom;*
>
> *c. I would conditionally sell substantially all of my participating shares in* [the Company] *(worth approximately US$8 million as of 31 December 2017 and held in Mondoe Cayman Islands) to Red Wolf on or before 30 June 2018 for an amount equivalent to the NAV then prevailing;*
>
> *d.* [The Company] *would concurrently allow Red Wolf to make a cash redemption of up to US$500,000;*
>
> *e. Mr Ransley would cause Terracom to purchase 100% of Kirkham shares (including those to be transferred from Red Wolf to* [the Company] *within 12 months at a valuation comparable to US$39.12 million (this being the value that Mr Ransley asserted Kirkham was worth);*

*f.* *In the event that Terracom did not complete the purchase of Kirkham within 12 months (i.e. by 2 January 2019) and no consideration had been provided to* [the Company], *that anytime thereafter the transaction could be unwound by:*

*i.* *voiding any non-cash transfers of participating shares and subscriptions-in-kind and returning the associated Kirkham shares to Red Wolf; and*

*ii.* *Any redemption, if completed, will be dealt with either by way of offsetting cash subscriptions or voiding of the redemption and return of the cash.*

*64.* *Red Wolf then made a number of in-kind subscriptions by transferring Kirkham shares and a redemption as contemplated by the Transaction Agreement, as well as receiving the contemplated transfer of shares from Mondoe:….*

**The Petitioner's case through the written evidence of CR**

32. CR challenged this account in its entirety on the main issues in dispute[9]. In summary, he explained that he was concerned to ensure that his assets and businesses were properly structured and that JB had represented that he could assist him with that by using offshore structures to hold certain assets. That was the reason for CR's investment in the Company as well as the creation of Mondoe which was at his instigation.

33. The Company was incorporated as a direct result of those discussions[10]. JB was to be remunerated by a small interest in the investments. As at the time CR had a very good relationship with JB and trusted him, he allowed JB to hold the shares in Mondoe in his own name, as a nominee for CR, and to control bank accounts of the various entities beneficially owned by CR, including the company[11].

34. Mondoe had been incorporated at CR's direction by Mr Dauman. The suggestion that JB paid US$4.795m for shares in the Company was completely false. At least US$3m had come from funds which had been provided by CR to Mondoe[12]. CR says that he has always been either the holder of the entire (in the initial stages of the Company's formation through Mondoe), or

[9] *CR 5*
[10] *Ibid §§12-14*
[11] *Ibid § 15*
[12] *Ibid §§ 17-22*

the majority (following minor investments from JB and Landing Point of US$1.7m and US$2m respectively) economic interest in the Company[13]. In addition the two main assets of the Company, namely its shareholdings in Terracom and Kirkham, originally belonged to him and were transferred to the Company[14].

35. The Transaction Agreement was a complete fabrication. In relation to the suggestion that he had drafted it, he pointed out that he had never drafted any legal agreements, nor would have the requisite skills to draft, such a complex legal agreement[15]. CR says that it is commercially absurd that he would agree to give up his valuable interests held through the company in the event that a transaction which was beyond his control (i.e. the purchase by Terracom of Kirkham) did not materialise[16].

**The company's response through the written evidence of JB**

36. JB served a further affidavit in response to this[17]. He said that in fact there were two meetings at which the Transaction Agreement was discussed. The first was said to be in November 2017 at a hotel in Hong Kong, when Mr Maud, a business colleague of his, was also present.

37. According to JB, CR said he wanted to subscribe in the Company but had no cash to do so. He instead proposed that he subscribe in kind with Kirkham shares. JB claimed he was not initially interested but was persuaded on the basis of the potential return if Terracom acquired Kirkham. CR had said that the enterprise value of Kirkham was US$39m.

38. JB further explained, in relation to agreement he says was reached, i.e. on a deferred consideration basis for the transfer of 90% of his participating shares in the Company, that he had been advised that if the Company was to be marketed as a fund, his holding should only be between 2% and 10%.

39. JB further says that he explained to CR that a timeline of 12 months was critical and that, as the promised returns were entirely contingent on the acquisition of Kirkham by Terracom and the company funding Kirkham in the sum of US$5m, the deal, specifically the subscriptions-

[13] *Ibid §40*
[14] *Ibid §41*
[15] *Ibid §§31 and 33*
[16] *Ibid §42*
[17] *JB 4*

in-kind and the sale of JB's participating shares for deferred consideration, would need to be unwound if Terracom did not acquire Kirkham, and that CR accepted that[18].

40. JB says he discussed the transaction mechanics with his lawyers, Maples & Calder ("M&C"). That resulted in M&C drafting a subscription-in-kind agreement and JB adapting the draft for the Red Wolf subscription[19].

41. The second meeting is described as taking place on 11 December 2017 in the St. Regis Hotel in Singapore[20]. JB said that he in fact drafted the Transaction Agreement on his notebook computer, while sitting with CR. It did not take more than an hour. The Transaction Agreement was about 2 to 3 pages long and between Mondoe Marshall Islands, the Petitioner and the Company. It clearly laid out the deal to be implemented during the next 12 months including the estimated 25% subscriptions-in-kind of Kirkham shares to be held by the Petitioner and the purchase of approximately 90% of JB's participating shares held in Mondoe Marshall Islands[21].

42. JB claims he printed out the incorporation checklist for Red Wolf along with the Transaction Agreement. JB and CR, it is said, signed the Transaction Agreement and CR also signed the incorporation checklist. JB says that he procured the hotel to scan the checklist and email it to CR, and CR then emailed it to M&C.

43. On 17 December 2017 at a meeting with M&C in Dubai, JB says he left them with the original Transaction Agreement. M&C provided fund administration assistance to him and he routinely, but not always, requested M&C to scan and email back to him original documents. He recalls that an associate at M&C at the time (who has since left the firm)[22] did not need to record the Transaction Agreement in the corporate books[23]. The only corporate record that was necessary to make was to record the deal in the company board meeting minutes or a company written resolution and he elected to do the latter.

44. JB claims he documented the Transaction Agreement into a resolution of the Company dated 2 January 2018 which was sent to M&C on 25 January 2018[24]. The resolution sets out the

[18] *Ibid § 18*
[19] *Ibid § 20*
[20] *Ibid § 22ff*
[21] *Ibid.§25 and 26*
[22] *Wilbert Pascual*
[23] *Ibid §§ 28-30*
[24] *Ibid §§ 37-39*

unwinding mechanism for the subscription in the event that Terracom did not complete a sale and purchase of Kirkham within 12 months of the date of the resolution.

45. He says that the existence and terms of the Transaction Agreement were not in dispute until the current proceedings commenced and he therefore had had no reason to look for it until he intended to execute the unwind and that he had searched his computer for any draft 'Word version' of it, but could not find any record[25].

46. JB also further explains his ownership of Mondoe[26]. He says that he acquired Mondoe from Island Sands Corporation, a company represented by Mr Dauman, because he wanted to acquire the shares that Mondoe held in Terracom.

**Submissions of the Petitioner**

47. Following the cross-examination of the witnesses Mr Moverley Smith QC pointed out a number of 'problems and inconsistencies' with JB's account. I summarise these below into thirteen points.

**The Transaction Agreement**

48. First, the Transaction Agreement has not been produced. That is obviously a huge missing piece in the Company's case.

49. Second, JB originally said that it was drafted by CR.[27]. Mr Moverley Smith QC submitted that once it became obvious that CR could not have drafted it - he was plainly not a legal draftsman – the story changed to JB who produced the draft on his notebook computer[28].

50. JB's claim in cross-examination that there was a typographical error in his written evidence and he intended to say "with Mr Ransley" not "by Mr Ransley"[29] Mr Moverley Smith QC submitted is unconvincing.

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[25] *Ibid 47ff*
[26] *Ibid §§ 77ff*
[27] *JB 2 § 62*
[28] *JB 4 §25*
[29] *T1/99/20-25*

51. Third, there was no attempt to allow JB's computer to be interrogated to establish whether there was any draft. When this was pointed out to JB in cross-examination, his response was that it was a silly suggestion that he should produce his computer and that it was not incumbent upon him to allow someone to examine it[30].

52. Fourth, JB said in his written evidence on oath that he did look in his computer for any draft 'Word version' of the agreement[31], but an attempt by the Petitioner's attorneys to follow up the point had been met by the answer in correspondence that the computer had crashed in August 2019 and had been 'thrown in the garbage'[32].

53. JB then said in cross-examination that he had had two computers since then and had not lost any data because it was kept on a backup drive which he was able to access. He accepted that he had not given the backup drive to his attorneys, but said that he did not have to do that[33].

54. Mr Moverley Smith QC relied on Mr Maud's confirmation in cross-examination that JB kept his affairs in very good order[34]. He submitted that if JB created the Transaction Agreement he plainly should still have it or at least some record of it.

55. The upshot was that whilst JB maintained in cross-examination that he himself had made a search for draft Word documents on his computer and had searched through thousands of the same, he had not located the Transaction Agreement and could offer no explanation as to why that might be, if it existed[35].

56. Fifth, JB claimed that he had given the original to M&C in Dubai on 17 December 2017 but that M&C had not passed it over to his new service providers in May 2019, a reasonable inference being that M&C had mislaid it. This is inherently unlikely.

57. JB said that at the meeting with M&C he had a conversation with Mr Pascual of M&C who said that he did not need a record of the Transaction Agreement to keep on the corporate books of the Company. This seems strange where JB's evidence in cross-examination was that the

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[30] *T1/102/17*
[31] *JB 4 §47*
[32] *T1/105/20*
[33] *T1/105/25 and T1 /104/17-T1/107/18*
[34] *T3/91/21*
[35] *T1/103/6-14*

Company was party to the Transaction Agreement and so one would reasonably infer that M&C would have been likely to keep a record of it[36].

58. This gives rise to the unlikely state of affairs that any record of the agreement has disappeared from JB's computer and has also not been located at M&C.

59. Sixth, Mr Moverley Smith QC also pointed out that when challenged in cross-examination about whether he was able to draft such an agreement JB claimed that he was able to do so because he could use as a precedent a binding framework agreement he had signed with a Mongolian company in relation to a coalmine railway system[37]. That agreement was not produced on discovery. Mr Moverley Smith QC submitted that it seems doubtful from the subject matter whether it would provide a good precedent for a share subscription agreement.

60. Seventh, the Transaction Agreement involved JB selling substantially all of his shareholding in the Company to the Petitioner for a deferred consideration. Therefore his evidence that it was a 'a very risky transaction for me to engage in'[38] would give rise to the reasonable inference that it was an important document which he would have been kept and scanned and emailed to M&C.

61. M&C had responsibility for the Company's affairs. Mr Moverley Smith QC submitted that JB's explanation that it was not scanned and emailed to them because the checklist was being sent to their office in Singapore, whereas the Company records were being sent to Dubai, does not adequately deal with the point.

62. Mr Moverley Smith QC submitted that it was equally extraordinary that a copy was not provided to CR.

63. JB's evidence when challenged on this was that 'it wasn't that important an agreement[39]; I didn't view it as that important. If it were extremely important I would have, you know, hired-Shearman Hong Kong to do all my documents'[40].

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[36] *T1/111/22-24*
[37] *T1/80/17-20*
[38] *T1/87/8-9*
[39] *T1/97/20*
[40] *T1/98/10-12*

64. This is not consistent with his evidence that it was a very risky transaction for him to have engaged in.

65. Eighth, JB asserts that the absence of the Transaction Agreement does not matter because it was 'memorialised' in a resolution of the Company dated 2 January 2018. Mr Moverley Smith QC pointed out that the resolution made no reference to any 'Transaction Agreement' having already been entered into by the Company and the Petitioner and refers (in paragraph 1.2) simply to a proposal by CR.

66. JB was also challenged in cross-examination on his evidence that he handed over the original Transaction Agreement to M&C on 17 December 2017 and kept no copy. It was put to him that he would therefore have been unable to have recorded the Transaction Agreement in the resolution when he did not have it to hand.

67. His answer was to suggest that the terms of the resolution were the same 'just more detail… It's just refined …the resolution is simply memorialising the deal we agreed'. Furthermore, since his evidence was that a resolution was required in order to enter into a subscription agreement[41] he would have known he would have to draft one. If it was going to refer to the Transaction Agreement, Mr Moverley Smith QC submitted that it would have made no sense to leave it with M&C.

68. Ninth, Clause 1.3 of the resolution reads 'the form of the subscription agreement and this resolution has been fully reviewed and considered by the sole director of the Company …and Red Wolf'.

69. In cross-examination it was put to JB that he had produced no email by which the resolution was sent to CR for his review[42]. In response JB suggested, for the first time, that CR had approved the resolution when they were in Singapore together between 18 and 23 January 2018[43]. Mr Moverley Smith QC pointed out that the resolution is dated 2 January 2018 and records that it had been fully reviewed and considered by Red Wolf.

70. Tenth, JB's evidence was that he kept no copy of the Transaction Agreement. If CR was approving the resolution he was approving something in different terms. If that were the case,

[41] *T1/33/21*
[42] *T1/90/3-8*
[43] *T1/90/9-10*

plainly JB would have required CR to signify his approval by signing the resolution. When the point was put to him, JB took refuge in the suggestion that he didn't anticipate ending up in litigation[44].

71. Eleventh, in order to subscribe for shares, the Petitioner entered into a subscription agreement dated 2 January 2018. JB explained that the subscription agreement was adapted from a draft created by M&C which he often used[45].

72. Clause 10 of the subscription agreement is an entire agreement clause. JB said he recognised such a clause and used it often but claimed he did not overly focus on it[46]. Mr Moverley Smith QC submitted that the entire agreement clause is inconsistent with there being any kind of Transaction Agreement.

73. Twelfth, it is to be noted that on 30 June 2018 a stock transfer was executed for the transfer of 11,969,214 shares in the Company from Mondoe's Cayman successor, Mondoe Company Limited to the Petitioner. The transfer was accompanied by a subscription agreement executed by the Company and the Petitioner. The reason for a subscription agreement is obscure and there is no evidence of any consideration paid (JB's evidence was it was what M&C mandated). The subscription agreement made no reference to the Transaction Agreement and, again, contained an entire agreement clause. There was a further resolution of the Company which made reference to the earlier resolution. However, it was accepted by JB that CR would not have seen that resolution[47]. There is no evidence that CR paid any price for these shares which the Petitioner asserts is because CR owned Mondoe and he was only in effect selling the shares to himself.

74. Finally, if the Transaction Agreement were genuine, the ability to "unwind" it would have arisen on 2 January 2019. Mr Moverley Smith QC submitted that it is hugely telling that the first mention of it was in the evidence filed in support of the strike out application. Prior to that on 15 April 2020 the Petitioner's attorneys wrote to JB explaining that they acted for the Petitioner who owned approximately 78% of the participating shares in the Company and detailing various complaints regarding the Company. In an email response of the same date JB responded stating :

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[44] *T1/118/1-4*
[45] *T1/85/20*
[46] *T1/86/10-17*
[47] *T1/123/5-7*

*'[the company] will not educate you regarding fund investments, valuation and operations or the fact that neither Ransley nor Crawford have made cash subscriptions in [ the company] rather they have made reversible subscriptions ' in kind' related to Kirkham and a transferred subscription from an investment company of [the company] with substantial consideration remaining payable.'*

75. Mr Moverley Smith QC submitted that what is notable about this email is that, whilst there is a reference to reversible subscriptions, JB makes no reference to any Transaction Agreement or to the transaction with the 'investment company' being able to be unwound. Similarly there is no reference to any unwinding in a letter from JB's then attorneys[48] dated 20 April 2020 to the Petitioner's attorneys.

**Other evidence**

76. Mr Moverley Smith QC submitted, in relation to the Company's effort to bolster JB's evidence with the evidence of Mr Maud and Mr Thornber, that limited weight should be given to their evidence since both are friends and associates of his, Mr Thornber being a director of the Company, and their evidence was clearly partisan.

77. Mr Maud in his affidavit evidence said he was party to the first meeting in Hong Kong in November 2017. He said that after some discussion he recalled that JB and CR agreed in principle that CR would inject Kirkham shares into the Company and in return would acquire the majority of JB's interest in the Company, not for cash to be paid, but in kind[49].

78. Mr Maude recalled that JB was generally content with the proposal but had a major concern that everything was contingent on Terracom buying the corporate interest that owned the Indonesian coking coal mine (Kirkham) and that was why it was agreed that if the acquisition had not occurred within 12 months then they would both drop hands and revert to the previous position that subsisted prior to this agreement[50]. Mr Maud confirmed in his oral evidence that he specifically remembered JB voicing his concern about the Terracom takeover not occurring and CR agreeing to a condition to unwind the deal if the takeover did not occur within 12 months. He also remembered that a deal was done/agreed on the basis of a handshake.

79. Whilst CR accepts that there was a meeting and that Mr Maud was present (although the worse for wear after a heavy night), he vehemently denies discussing the terms of any deal in front of

[48] *Quinn Emanuel*
[49] *Maud 1 § 16 f*
[50] *Maud 1 16 g*

him (Mr Maud being a complete stranger to him). Mr Moverley Smith QC submitted that it is wholly incredible that CR would have done so.

80. Similarly, Mr Thornber's alleged recollection[51] of a discussion at a dinner in Dubai in February 2019 where CR acknowledged that the share subscriptions were liable to be revoked is, according to Mr Moverley Smith QC, all too convenient. JB and CR were essentially interviewing Mr Thornber for a potential job. Mr Moverley Smith QC submitted that, again, it is unlikely that CR would be discussing the details of the Petitioner's share subscriptions in front of Mr Thornber.

**Submissions of the company**

81. Mr Lowe QC submitted CR's case, that he was just taking assets he already owned (as his assertion was that he had established the Company, which was his idea in the first place), and had contributed US$3m in cash, was wholly false with no supporting evidence whatsoever to prove it. It was put forward to support the argument that there would be no need for him to conclude anything along the lines of the Transaction Agreement.

82. He submitted that CR's evidence cannot be believed in relation to the funding and set up of the Company. It follows that he cannot say that as a matter of logic the Transaction Agreement was not concluded, because it would be reasonable to look for an overarching agreement of some kind if CR had not funded the company and JB had. It follows that although the existence of the Transaction Agreement is a freestanding issue, a key question is how the cash subscriptions were made into the Company, before 2018. It is therefore important for the court to examine the beneficial ownership of Mondoe from 2 December 2016.

**Mondoe**

83. Mr Lowe QC submitted that having at first said nothing in his evidence about Mondoe and given no particulars of how he came to acquire an interest in the Company, in his fifth affirmation of September 2020, CR claimed for the first time that he had also owned Mondoe throughout the relevant period and was supported in this contention by his close associate Mr Dauman. This Mr Lowe QC submitted was not the true position.

[51] *Thornber 1 §31*

84. The Company was itself incorporated by JB in Cayman on 29 May 2017 as a 'multi-strategy' open-ended investment fund with JB as its sole director. It is JB's case that he was also indirectly the sole owner of participating shares through Mondoe's 2017 subscriptions.

85. The focus of the Company was on financially distressed mining assets and the circumstances of its formation do not suggest that CR came up with the idea to set it up as he has suggested. CR had no voting shares in the Company. All of the Company's participating shares were issued to Mondoe. The Company had been formed to operate as a conventional investment fund, issued offering memoranda from 2018 to 2020 and was registered with the Cayman Islands Monetary Authority as a mutual fund on 2 August 2018.

86. If it was CR's idea to set the Company up from the start, Mr Lowe QC submitted that it is notable that the Petitioner did not become a shareholder until 2 January 2018, and during the intervening period 100% of its shares were held by Mondoe which it had acquired by subscription when the Company was incorporated. Mondoe was not only the initial subscriber but until 2018 the only participating shareholder in the Company. JB said that he had contributed funds of US$950,000 cash and had produced relevant records which Mr Lowe QC submitted remained, on all the probabilities, 'a striking pointer to ownership'.

87. Mr Lowe QC also pointed to JB's track record in the operation of a number of companies in the Cayman Islands, the UAE and Singapore which carried the Rasia name (Rasia group) dating back to 2009,well before JB had met CR in 2014.

88. He reminded the court that JB is himself an investment professional and that prior to founding his own business in 2009 he trained and worked in M&A and leveraged buyout transactions at RBC and Merrill Lynch. He also referenced JB's association with Mr Thornber[52] who was appointed a director of the Company on 25 March 2018, who said he has helped him on a number of deals.

89. Mr Lowe QC submitted that JB has shown that he subscribed through Mondoe and Rasia group for a total of US$4.795m in the Company from subscription agreements, proof of payments and bank records. He relies on the Share Transfer Agreement executed and signed by JB in his personal capacity and by Mr Dauman as director of Island Sands in Singapore on 2 December 2016. JB was registered as the legal owner of Mondoe shares. The share register was then altered on 2 December 2016 by the Singapore corporate secretary. Mr Dauman signed a

[52] *Who had been CFO at Aabar the Abu Dhabi sovereign wealth fund from 2012 to 2019.*

resolution dated 2 December 2016 for the transfer of the Mondoe shares from Island Sands to JB. A share transfer form of the same date and the resolution approving the transfer was signed by JB as incoming director. Mr Lowe QC submitted that the provisions of the Share Transfer Agreement are wholly inconsistent with JB acquiring the Mondoe shares in the capacity of a nominee. He submitted that the Share Transfer Agreement of 2 December 2016 is what it purports to be on its face.

90. Mr Lowe QC submitted that the Petitioner's case that none of these documents are what they seem, that there was no real sale and purchase agreement to JB and the document was signed after the event in July 2017, together with some kind of agreement that JB was merely to act as CR's nominee, is not credible and is largely based on disputed emails created subsequently, not on contemporaneous material.

91. By contrast CR has not produced any evidence whatsoever that he funded the cash subscriptions by Mondoe or explained why other Rasia entities subscribed US$3.9m if the Petitioner had taken over the Company. CR's evidence that he invested US$3m should be seen in the light of his inability to recall any details, such as what bank account was used and whether the account was a personal or a business account. CR's inability to document key elements of his story is an important factor affecting the probabilities.

92. CR had claimed that he created and transferred Mondoe to JB for tax efficiency reasons, but those contentions were wholly unexplained and undocumented, as was the alleged cash payment of US$3m to Mondoe.

93. Without evidence of funding by CR to Mondoe, CR cannot plausibly explain how he acquired shares in the Company in 2018, particularly in the light of what is known about his solvency at the relevant time. Mr Lowe QC submitted that there was evidence that CR was painfully short of cash and had no source from which this amount of capital could have come.

94. In addition Mr Lowe QC submitted that there could be no reason why JB would have caused Mondoe subscriptions to be made into the Company if CR already owned 100% of it through Mondoe. He pointed out that CR could not explain why he needed the Petitioner to be established at all on 13 December 2017 if he already had the entire beneficial interest in the Company through Mondoe.

95. Mr Lowe QC further pointed to the array of conventional and reputable service providers that the Company had engaged which would have been an unnecessary and expensive waste if it was intended to be CR's private vehicle.

96. He submitted that there was not a single document in which the nominee arrangement is recorded and acknowledged let alone anything resembling a trust instrument. Even if CR did, as he claims, rely and trust JB personally in the period 2016 to 2018, that was no reason not to document a nominee agreement and neither CR nor Mr Dauman created a single document to show JB's ownership was that of a nominee or bare trustee[53].

97. Again by contrast the email sent to Allen Bryan on 18 November 2016 by Mr Dauman describes JB as the new director/BO (beneficial owner), and is contemporaneous.

98. In addition CR acknowledged that the Company and Mondoe were beneficially owned by JB in email discussions with his own bank in the context of concluding a sale and purchase agreement of 7 August 2017 for the transfer of Terracom shares.

99. Furthermore on 26 October 2017 in response to a request for the Company's audited accounts JB described himself as 'the UBO of all companies' when referring to Mondoe as the sole subscriber for the Company.

**Submissions in response by Petitioner on Mondoe**

100. Mr Moverley Smith QC referred to the repeated theme in JB's evidence that the Company was his investment fund not an investment vehicle for CR[54] as being patently untrue. He downplayed Mr Lowe QC's reliance on the unanswered questions in relation to the Mondoe investment from CR, pointing out that there was no answer to the other irrevocable subscriptions the Petitioner had made.

101. Mr Moverley Smith QC relies in particular on the evidence in a 'WhatsApp message' sent by JB to CR setting out the shareholdings and cash investments made in the Company. This he says reflects the true position as to beneficial ownership in the Company.

[53] *Allen Bryan would have been used for nominee shareholder agreements.*
[54] *JB2 §§34ff*

102. The message reads as follows:

> *'Landing Point Ltd c. USD 1.5m (6%) vs USD vs 1 m cash investment*
> *Rasia Group c. USD 3.9m (15.8%) vs USD 2m cash investment*
> *Red Wolf Resources Limited c. USD 19.2m (78%).'*

103. JB accepted that the message had been sent after 24 November 2019 (after Landing Point's subscription) and said in his evidence that:

> *'This was [Mr] Ransley calling me on the telephone and asking me to write back to him a text message so he could send it out to Matthew Crawford and someone else to placate them. It's a little trick, one of many.*[55]

104. Mr Moverley Smith QC relies on the fact that JB in cross-examination did not explain why he wrote in those terms if the figures were wrong. He points out that it is notable that in his initial protestation he focused on the investment made by Landing Point and not immediately on the investments made by Rasia group and the Petitioner[56]. When asked why in particular he described the investment by Rasia group as being US$2m he was not able to give any explanation. All he could say was that it was wrong and that he had *'all the evidence to show all [his] investments*[57].

105. Mr Moverley Smith QC contrasted that with his response when challenged that the money invested in the Company was not his money and that he had not produced anything to prove that it was his money:

> *'I don't need to prove that someone else hasn't put money into my fund. That person, if they think they've put money into my fund, they need to prove it…. I don't have to prove that I have put money into the fund*[58]*….. I don't think it is incumbent on me to evidence that I made all these subscriptions'*

106. When it was pointed out that he had never challenged the WhatsApp message his explanation was *' I didn't notice it, I've been busy'*[59]

107. Mr Moverley Smith QC submitted that it is not in dispute that Mondoe and subsequently its successor Mondoe (Cayman) made a series of subscriptions for shares in the Company and that the shares transferred to the Petitioner by the stock transfer came from Mondoe (Cayman). If

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[55] *T1/39/19-23*
[56] *T1/39/15-23*
[57] *T1/40/2-3*
[58] *T1/30/9-20*
[59] *T1/40/13-16*

Mondoe and its successors were investment vehicles for CR that would provide an obvious justification.

108. In this regard he relied on the documentation which showed that the share capital of Mondoe was originally held by Island Sands Corporation.

109. That was described in the first affidavit of Mr Dauman sworn on 2 September 2020. He describes how he established Mondoe on CR's instructions to hold various of his investments and how the shares in Mondoe were subsequently transferred from Island Sands Corporation (a companying administered by Mr Dauman) to JB for JB to hold as a nominee for CR[60].

110. He says that the assets owned by Mondoe Marshall Islands at the material time were transferred into the Company by CR, including some through Island Sands Corporation.[61]

111. Consistent with Mr Dauman's evidence and exhibited to his affidavit is an email dated 25 October 2016 addressed to JB. Mr Moverley Smith QC relies on the particular words used:

> *'I understand [Mr Ransley] has discussed with you becoming a director and nominee shareholder of Mondoe, a company we currently hold in the Marshall Islands'.*

112. JB in cross-examination did not dispute that he had received that email but claimed he had overlooked the reference to a nominee[62]. Mr Lowe QC submitted that this email was taken wholly out of context because it was followed by Mr Dauman's email of 18 November 2016 to Allen Bryan which refers to JB as the 'BO' [beneficial owner] of Mondoe. In addition it ignores JB's evidence that there had never been any suggestion that he should take shares in Mondoe as a nominee and not as a principle and that he had never acted as a nominee shareholder or director.

113. In the same chain of emails JB replied stating that he was not planning to transfer assets or funds to Mondoe. Against this Mr Lowe QC submitted that cannot be taken to mean that there was no consideration moving as JB was taking over obligations which were roughly equal in value to the fair value of the asset and the email preceded the date of the share sale agreement, before JB had examined Mondoe's assets and decided what to pay. This was consistent with the ultimate transaction which only involve the transfer of deferred consideration.

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[60] *§7 JD 1*
[61] *§9 JD 1*
[62] *T1/11/6-24*

114. In cross-examination JB said he had been attracted to acquire Mondoe because it held Terracom shares[63]. He accepted that the conversation with CR had taken place prior to the email of 25 October 2016[64]. However, Mr Moverley Smith QC pointed out at that time there were no Terracom shares held by Mondoe. They were transferred after JB had agreed to become Mondoe's director and nominee shareholder. Terracom shares to the value of US$1,796,584.69 were deposited with Mondoe on 14 November 2016. Mr Lowe QC submitted that by 2 December 2016 JB had made his own valuation of Mondoe's investments and considered the Terracom holding to be distressed because it was coupled with a significant funding obligation and as a result he agreed to pay US$250,000 on a deferred basis.

115. A share transfer agreement dated 2 December 2016 with the Island Sands Corporation was entered into for the transfer of the share capital of Mondoe by Island Sands to JB. Mr Moverley Smith QC points out that JB accepted in cross-examination that if he were not a nominee shareholder under the terms of this agreement he would be getting Mondoe essentially 'for nothing'[65].

116. In relation to the subsequent subscriptions by Mondoe for shares in the Company CR explained that these were funded by margin lending[66].

**The allegedly fabricated emails**

117. On 29 September 2020, the day after JB had given evidence denying he had acted as nominee, the Petitioner tendered new material from Mr Dauman in the form of three emails dated 29 March 2017, 10 July 2017 and 12 December 2017. These documents indicate that the agreement for the acquisition of Mondoe shares by JB from Island Sands was not as beneficial owner, not in fact concluded until mid-2017, rather than (as the sale agreement date suggests ) on 2 December 2016, and that JB repeatedly recognised that he was simply an undocumented nominee for CR.

118. JB was recalled to deal with these emails and alleged that they were fraudulent i.e. fabricated to deceive the court. He categorically denied that he had seen them or participated in any related conversations. He regarded the content of the emails as absurd.

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[63] *T1/15/10-20*
[64] *T1/16/4-6*
[65] *T1/21/10-13*
[66] *T2/36/11ff*

119. During the course of his cross-examination Mr Dauman was also referred to the email (relied upon by Mr Lowe QC) dated 18 November 2016 to Allen Bryan, company secretaries, where he described JB as the beneficial owner of Mondoe. Mr Moverley Smith QC submitted that Mr Dauman's answers indicated that for the purposes of the forms company secretaries were required to fill out, JB could be described as a beneficial owner even if he was not. This rather unsatisfactory position was accepted by Mr Moverley Smith QC to be '*not entirely the way things should be done*', but he still submitted it does not prove that JB was in fact a beneficial owner.

120. Mr Dauman was cross examined by Mr Lowe QC on the basis that he had fabricated these emails to assist CR. The first email was dated 29 March 2017 from JB to Mr Dauman and reads as follows:

> *"Hi James,*
> *Hope you are doing well. In terms of one administrative item, I want to put in place a confidential nominee and POA agreement with Craig [CR] in relation to my Mondoe, Square Brackets, Dhalia, etc ownership and directorships with a catch all for any additional ones require. I believe something amended based on the attached precedent would work but it should be suitable for the corporate secretary and for the banks e.g. Pictet. Essentially if I die or become incapacitated tomorrow Craig [CR], should be protected. Is it ok for me to reach out to Karen in this regard and get this agreement in place in a form suitable for these purposes (and I assume that Karen understands I am a nominee)?"*

121. This email had been sent to Carey Olsen acting for the Petitioner on 31 August 2020 by Mr Dauman but by an oversight had not been included in the exhibit to Mr Dauman's affidavit. It had not been produced prior to JB's cross-examination which took place on 28 September 2020.

122. Mr Moverley Smith QC relies on it as being entirely consistent with the earlier email of 25 October 2016 confirming that JB was acting as a nominee shareholder for CR. He submits that there was no apparent incentive put to Mr Dauman to fabricate the email other than to assist CR, but if it was part of a scheme to create false evidence then it is extraordinary that Mr Dauman had not insisted that it was included in the exhibit to his affidavit sworn on 2 September 2020, so that it was before the court.

123. Mr Lowe QC submitted that this email came out of the blue and there was no response to it or any prior email leading up to it. He argued that the text had no integrity at all and as a matter of probability it was clearly inauthentic. He argued that Mr Dauman was partisan and had been

contacted through an unorthodox source, who was a close associate of Mr Ransley[67], and had been contacted in sufficient time to carefully consider what he was going to supply to the attorneys. It was clear that not all the relevant emails were provided to the attorneys and Mr Lowe QC argued that the way the evidence was produced was highly suspect. It was a question of whether it was more probable that JB or Mr Dauman was giving truthful evidence.

124. This email and related emails became the subject of the expert evidence called by the parties.

**Expert evidence**

125. After Mr Lowe QC put to Mr Dauman that he had forged these emails in response to JB's oral evidence, which Mr Dauman denied[68], JB swore a further affidavit confirming his belief that the emails were forged by Mr Dauman in response to his evidence[69].

126. The Petitioner engaged Mr Mansfield to opine on the authenticity of the disputed emails and he was given direct access to Mr Dauman's email account. Mr Mansfield is a director of Borelli Walsh with expertise in forensic analysis. On 17 October 2020 he produced a report confirming that he had located the emails in Mr Dauman's email account and opined that the emails were in their original form and had not been altered. He also confirmed that the IP address used to send them matched the IP address for an email put in evidence by JB, which supported the fact that the email was indeed sent by JB.

127. On 17 March 2021 the Company filed their own expert evidence in the form of a report from Mr Thoburn and there within a series of meetings of the two experts held by telephone which resulted in a Joint Memorandum setting out the areas on which they agreed and disagreed. Mr Thoburn is a senior vice president specialising in digital forensics and incident response within the cyber risk practice at Kroll. The Joint Memorandum at paragraph 1 states that both experts agreed that there is no evidence to support the contention that the disputed emails have either been fabricated or otherwise altered.

128. The Thoburn report described how the contents of an email inbox can be altered using the 'IMAP' Internet protocol that Mr Dauman's email employed and provided an example of an

[67] Mr Suckling
[68] T3/64/1
[69] Mr Nigel Smith of Carey Olsen confirmed in an affidavit that his firm had received the email on 31 August 2020 before JB was cross examined

email that Mr Thoburn manipulated using that technique. However Mr Thoburn accepted that this still left a trail which was not present in the metadata for the emails in dispute.

129. The upshot is that both experts agreed that there is no evidence to support the contention that the disputed emails had been fabricated or otherwise altered. Both experts agreed that security audit logs which would have added credence to their authenticity are not available. These are not typically retained by Google Default after 30 days.

130. Mr Thoburn contended that it was possible to use the 'IMAP 'protocol to manipulate emails without leaving behind the obvious traces that were present when the methodology used in his report was employed, but he was unable to provide Mr Mansfield with an explanation of how this could be done.

**Decision**

**Expert evidence**

131. I accept Mr Moverley Smith QC's submission that the whole purpose of Mr Thoburn's exercise was to try and create an email that appeared to have been sent at an earlier point in time without leaving a trace. It was accepted by the experts that that could not be done.

132. It may be theoretically possible that Mr Dauman could have altered the text of the second email which he sent, but the first and third emails came from JB. If the second email had been altered the time stamp would have dated it and it was in fact sent to JB's account so it could have been seen that the text had changed. There is no evidence from JB to this effect.

133. I have formed the clear view that the emails are not fabricated. They were genuine and this was another attempt by JB to avoid the inferences to be drawn from the available documentary evidence that JB's engagement was by CR as a nominee.

**Standing**

134. I have come to the firm conclusion that the Petitioner has proven that it has standing to present the petition, and has not lost its standing as a shareholder in the Company in relation to shares which it had subscribed for, or in relation to shares in the Company that were transferred to it by Mondoe.

135. Irrespective of the source of the Mondoe funding, in order to subscribe for shares in the Company, the Petitioner entered into three subscription agreements in January, April and November 2018. Clause 10 of each of the subscription agreements contain an entire agreement clause. On the face of it each one is a binding and complete subscription which is not revocable and for which consideration was provided.

136. Moreover, on 30 June 2018 a stock transfer was executed for the transfer of shares in the Company from Mondoe Cayman's successor, to the Petitioner. The transfer was accompanied by a subscription agreement executed by the Company and the Petitioner. There is no evidence of any consideration paid. The subscription agreement made no reference to any Transaction Agreement and contained an entire agreement clause. The NAV for these shares is close on US$12.5m, yet there is no evidence that CR paid any price for these shares. In my view the logical explanation for this, consistent with the contemporary record, is because CR owned Mondoe and this was a reorganisation of his assets and a transfer from one company he owned, to a fund in which he was to be the majority investor and participating shareholder.

**The Transaction Agreement**

137. Mr Lowe QC characteristically grasped the bull by the horns at one stage of his closing submissions:

> "*Can I just say something about Gestmin? Ultimately, this case is about a pretty big scam on one side or other. It is not something where recollections are dimmed, where psychology plays a part. This is about a transaction where two sides disagree fundamentally. They disagree about a version of events. But one side must know that what it is doing is fundamentally dishonest. So, when you ultimately have to look at their evidence, it is not simply about the documents.*"

138. Referring to the approach of the Court of Appeal in *Nat West* he went on to submit

> "…..*in a case like this I suggest the approach is bound to have to be a bit more nuanced, because ultimately a lot of the problem with a white collar crime like this is that one person does absolutely know what is going on and then is trying to spin a story to make the rest of it fit and there are inevitable red flags that come up but there are also other things that lend to plausibility. Your Lordship will have formed some impression of the witness and that is not unimportant'.*

139. I have, in accordance with the Court of Appeal's recent approach in Nat West[70] had regard to the overall plausibility of the evidence, the consistency or inconsistency of the behaviour of the witness and other individuals with the witness's version of events, the supporting or adverse inferences to be drawn from other documents, and my assessment of the witness's credibility, including my impression of how they performed in the witness box, especially when their version of events was challenged in cross-examination.

140. I have come to the firm conclusion that the Transaction Agreement is an invention of JB conceived in order to try to demonstrate a contractual right to unwind the Petitioner's shareholding. There was no agreement to unwind and CR never understood that there was one. There was no agreement and no mistake operating between JB and CR.

141. The court does not accept JB's evidence in relation to the Transaction Agreement which is inherently implausible and contains serious inconsistencies as set out in Mr Moverley Smith QC's submissions distilled into the thirteen points set out above. The court has reached the conclusion that JB's evidence is untruthful and demonstrably so. The court's reasons for this finding are as follows.

142. JB's first account that it was drafted by CR may have excused the fact that he had been unable to produce it himself. JB's story then changed in his fourth affidavit when CR refuted that he would ever have drafted an agreement of this nature, to an account of drafting it himself on his notebook computer while sitting with CR. His answers in cross-examination that he originally had meant 'with' not 'by' CR are not credible.

143. The account involving M&C is also not plausible. JB says he took the original and gave it to M&C at a meeting in Dubai but it was not returned to him at the handover of documents when changing the fund administrators. One might reasonably think that he would have first made enquiries of M&C before swearing an affidavit in support of a strike out application relying on the Transaction Agreement. However, his second affidavit was sworn on 8 July 2020.The first request for M&C's help in tracking down the agreement did not come until 27 July 2020.

144. It seems to me inconceivable that if such a document had been produced and agreed to by CR no copy was ever made of it by anyone. It is most unlikely that the original of such an important document would not have been scanned and emailed to a number of persons including notably CR and M&C such that a record would be available.

[70] *ibid*

145. It is also inherently implausible that JB, if he had created the document in the first place on his computer, has been unable to find it through his own digital searches. This adds to the other improbability that M&C would have lost or mislaid the original.

146. JB's account that he was able to draft a Transaction Agreement by using as precedent an agreement relating to a Mongolian coal mine involved in the development of a railway system may, in terms of plausibility, have had some support if the agreement in question had been produced so that a comparison could be made, which it was not.

147. JB's evidence that this was a very risky transaction for him to engage in, involving the transfer of almost the entirety of his shareholding in his fund to CR on the contingency of a potential of a takeover of Kirkham by Terracom, is inconsistent with his evidence that it was 'not that important of an agreement'. Mr Lowe QC valiantly submitted that what JB meant was that it was risky not to have the ability to unwind, which is why he drafted the Transaction Agreement. It seems to me unlikely that this would have been a pretty straightforward agreement that he was able to 'knock out' on his computer within an hour for which he did not need external lawyers.

148. The written resolution of the Company purporting to memorialise the Transaction Agreement dated 2 January 2018 do not refer to it having been entered into. It is not credible that the written resolution could have been an accurate record of the Transaction Agreement when the original had already been left with M&C with no copies taken and with no evidence on JB's computer of it. Notwithstanding the language of clause 1.3 there is no evidence that CR reviewed and considered the written resolutions at all. The meeting in Singapore JB relied on in cross-examination was later, between 18-23 January 2018 and appeared to the court in the way the evidence was given to be recent invention by JB. It was not referred to in his affidavit evidence.

149. Moreover when the takeover did not occur and JB had the right to unwind on 2 January 2019, there is no demand for the return of his shareholding or any claim to an ability to unwind the Petitioner's shareholding until evidence was submitted in support of this application 18 months later. JB's explanation for this delay is also not satisfactory. I accept that he was put under pressure by the petition (dated 1 May 2020) seeking the appointment of Provisional Liquidators and so had to prepare his evidence quickly. Had there been an agreement of the kind contended for by the Company and JB it is inconceivable that there would have been no reference to it between 2 January 2019 and 8 July 2020. The email of 15 April 2020 addressed to the Petitioner's attorneys contains no reference to any kind of overriding agreement which would

result in the subscriptions being unwound, as on JB's case he had the right to effect, over a year earlier.

150. Having regard to the personality of CR I accept his evidence over that of Mr Maud (in support of JB) that CR would not have been prepared to discuss the details of transactions which JB alleges, quite possibly involving price sensitive information in respect of a listed company (Terracom), and his own cash position, in front of Mr Maud who he had never met before. I also give little weight to Mr Thornber's evidence in relation to a discussion over dinner in Dubai in February 2019 a month after the period for the takeover to have occurred expired.

**Funding of the company**

151. Mr Lowe QC directed a substantial proportion of his oral submissions to whether or not Mondoe was beneficially owned by CR. I reject, for the reasons given below, his overall submission that Mondoe was beneficially owned by JB.

152. In any event this has no bearing on the three subscriptions made by the Petitioner in the Company itself in January, April and November 2018, for which consideration was paid by the Petitioner. There is no overarching agreement asserted by the company to unwind them, and they contained no provision for revocation. These agreements by themselves clearly establish the Petitioner's standing as a shareholder and are not displaced by the testimony of the witnesses or other evidence.

153. The narrative provided by CR in his evidence is on the overall probabilities believable. It makes commercial sense that he wanted to ensure that his assets were structured for the reasons he has given relating to asset protection and consolidation, tax efficiency and regulatory compliance and that JB was in a position to assist by using offshore structures to hold certain assets.

154. It is probable that that was the reason for the establishment of the Company, his investment in the Company, as well as the creation of Mondoe in the Marshall Islands which CR directed Mr Dauman to incorporate. This was part of the plan and shares in it were put in the name of JB to be held on CR's behalf as a nominee.

155. The detailed sources of funding relating to the monies paid into the Company are incomplete. However once the conclusion is reached, based on the overall probabilities and arising from what clear documentary evidence there is, particularly in the form of the disputed emails and What's App message, that CR put the vast majority of funding into the Company. This adds to

the irresistible conclusion that the Transaction Agreement must be a fiction. The court accepts that it makes no commercial sense for CR to have agreed to give up interests which he held in the Company in the event that a transaction which was beyond his control did not take place within a year.

156. I have based my finding on the funding and beneficial ownership of the Company principally on the overall probabilities, the consistencies and inconsistencies in the various evidential material and the supporting or other inferences I have drawn from the documents, incomplete as they are. I also took into account the evidence given by the witnesses and the way it stood up to cross-examination. I found CR to be more credible than JB as a witness on the ownership and funding of the Company, notwithstanding his inability to produce financial records.

157. The WhatsApp message, despite being described by JB as 'a little trick', on its face identifies who the shareholders in the Company are, what percentage shareholding they had and what has been invested. I do not believe that JB would have written this message at CR's suggestion to placate others, or that it is credible that references to his own investment of US$2m cash and the Petitioner's contribution at 78% were plucked out of the air and/or were made up. JB's evidence that he did not notice and therefore challenge the message as being knowingly false because he had been busy is weak.

158. As to Mondoe, I accept Mr Dauman's evidence in his affirmation of 2 September 2020. It is corroborated by his email of 25 October 2016 to JB referencing a discussion CR had had with JB with regard to becoming a director and nominee shareholder of Mondoe. JB's response on 28 October 2016 was not to challenge this intended status but to ask for guidance as 'he was not planning to transfer funds or assets to the Company'. I also bear in mind that JB accepted in cross-examination that if he was not a nominee shareholder he would be obtaining a beneficial interest in Mondoe for nothing, which makes no commercial sense, given CR's prior investment.

159. There is then the disputed email of 29 March 2017 where JB says that he seeks to:

> *"... put in place a confidential nominee and PoA agreement with Craig in relation to my Mondoe, Dhalia, etc ownership and directorships with a catch all for any additional ones required. I believe something amended based on the attached precedent would work but it should be suitable for the corporate secretary and for the banks e.g. Pictet. Essentially if I die or become incapacitated tomorrow, Craig should be protected. Is it ok for me to reach out to Karen in this regard to get this agreement in place in a form suitable for these purposes (and I assume Karen understands I am a nominee)?"*

160. This is consistent with Mr Dauman's evidence. It is also consistent with CR's version of events that he was engaging JB to set up a fund in order to advise on and implement offshore structures to deal with CR's assets. Notwithstanding Mr Lowe QC's cogent submissions as to the terms of the Share Transfer Agreement dated 2 December 2016 detailing the Island Sands transfer, the email referring to the beneficial ownership of JB and the fact there is no separate nominee agreement, I have concluded having regard to all the available evidence, that the way in which JB himself has described his status as a nominee is more likely to be true.

161. As a starting point even before considering the expert evidence, it seems to me to be unlikely that Mr Dauman, if he had fabricated this email, would have failed to ensure that it was in his evidence first time round. I accept that it was overlooked by the attorneys assisting Mr Dauman to prepare his evidence and had been produced to them by Mr Dauman on 31 August 2020.

162. The upshot of the expert evidence is that if the email had been fabricated or tampered with in either of the two ways suggested by Mr Thoburn there would have been an identifiable trace left and he has not been able to identify any other means of fabricating the email or tampering with it that did not leave a trace. No trace that it has been fabricated has been found.

163. My conclusion is that this is a genuine email. In addition, I prefer the evidence of Mr Dauman over JB. This evidence confirms that Mondoe was beneficially owned by CR. This is supported by the transaction dated 2 December 2016 which only makes sense if JB was not the beneficial owner as explained by Mr Dauman. The fact that no consideration passed supports the finding that CR was the beneficial owner.

164. It also makes commercial sense that CR caused assets to be transferred to Mondoe and then to JB so that JB could manage these investments through a fund. It would not make any sense for the rights pertaining to the shares set out at paragraph 4 of the Share Transfer Agreement detailing cash and shares in Kirkham and Terracom, which were owned by CR, to have been transferred to JB for no payment.

165. I therefore reject Mr Lowe QC's submission that the Petitioner's case is not credible because it is largely based on disputed emails created subsequently, not on contemporaneous material.

166. I accept Mr Moverley Smith QC's submission that Mr Dauman's answers to questions relating to the email dated 18 November 2016 to Allen Bryan, company secretaries, where he described JB as the beneficial owner of Mondoe may well be unsatisfactory, but does not prove by itself

that JB was in fact the beneficial owner. The other evidence all points the other way to JB in fact being a nominee.

167. I accept that the details of CR's financial investments into Mondoe are not clear or properly evidenced for the reasons submitted by Mr Lowe QC. Although he said he put US$3m into Mondoe in cash he was not able to access his bank statements and he had no recollection of the financial details. He said various documents were held in a safe in Singapore which is inaccessible due to COVID-19 travel arrangements. He also asserted but provided no documents to support his assertion that funding was obtained by margin lending.

168. Whilst CR's evidence is incomplete in various respects, that does not affect my overall conclusion that the Petitioner has standing because of the conclusions I have reached on the three subscriptions made by the Petitioner in 2018, the overall probabilities on funding, and because I found CR to be a more reliable witness than JB on this issue.

**Conclusion**

169. The Petitioner has proven it has standing as the beneficial owner of shares in the Company to continue to petition for the winding up of the Company.


**THE HON. JUSTICE PARKER**
**JUDGE OF THE GRAND COURT**