Neutral Citation Number: 2014 EWHC 3066 (CH)

Case No: Claim Numbers HC14D02543, HC14B02717, HC14B02770, HC14C02771

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 19th September 2014

Before :

HIS HONOUR JUDGE PELLING QC
(SITTING AS A JUDGE OF THE HIGH COURT)

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Between :

PEAK HOTELS AND RESORTS LIMITED	**Claimant**
- and -	
(1) TAREK INVESTMENTS LIMITED	
(2) PEAK HOTELS AND RESORTS GROUP LIMITED	
(3) SHERWAY GROUP LIMITED	**Defendants**
PEAK HOTELS AND RESORTS LIMITED	**Claimant**
and	
(1) SHERW AY GROUP LIMITED	
(2) MR CARL JOHAN ELIASCH	**Defendants**
PEAK HOTELS AND RESORTS LIMITED	**Claimant**
and	
(1) SHERWAY GROUP LIMITED	
(2) MR CARL JOHAN ELIASCH	**Defendants**
(1) SHERW AY GROUP LIMITED	
(2) MR CARL JOHAN ELIASCH	**Claimants**
and	
(1) PEAK HOLDINGS AND RESORTS LIMITED	
(2) PHRL HOLDINGS LIMITED	
(3) MR OMAR SHARIF AMANAT	**Defendants**

Hearing dates: 19th September 2014

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JUDGMENT

His Honour Judge Pelling QC Friday, 19 September 2014
(10.02am)

HIS HONOUR JUDGE PELLING QC:

1. This hearing is principally of applications for interlocutory injunctions over until trial following the grant of injunctions over until today at earlier hearings that were either without notice or short notice hearings. The applications made by the Claimant as against Tarek Investments Limited have been compromised subject to one point which I explain in more detail below. As between Peak Hotels and Resorts Limited, Sherway Group Limited and Mr Eliasch it is agreed that orders previously made against Sherway Group Limited and Mr Eliasch will continue in the form of undertakings until trial. The Claimant seeks additional further injunctive relief Sherway Group Limited and Mr Eliasch, which is resisted, and Sherway Group Limited and Mr Eliasch seek the continuation until trial of orders previously made in their favour against the Claimant, which the Claimant resists. This judgment is concerned only with those two contested elements of the injunction applications. There are various other applications before me to which I refer in passing below. They are not the subject of this present judgment.

2. These proceedings arise out of the acquisition earlier this year of a group of hotels known as the Aman Hotel Group by Mr Amanat acting through a BVI registered special purpose vehicle controlled by him called Peak Hotels and Resorts Limited ("PHRL"), and Mr Doronin acting through an investment vehicle controlled by him called Tarek Investments Limited ("Tarek"). PHRL and Tarek acquired the hotel group using a joint venture vehicle called Peak Hotels and Resorts Group Limited ("JVC"). JVC acquired Aman Resorts Group Limited which was and is the holding company for Silverlink Resorts Limited, the company which operates the hotel group. The conduct of JVC's shareholders is governed by a shareholders agreement ("JVC SHA") to which it will be necessary for me to refer in some detail shortly.

3. Mr Amanat and Mr Doronin fell out at the latest very shortly after completion of the JVC SHA. The reasons for this falling out are highly contentious between the parties. Each alleges that the other has acted from the outset in serious breach of the duties which each owes to the other. Each alleges that the other has acted in the ways alleged for the purpose of obtaining the shares of the other at a significant discount to their true worth, a result which will benefit the party who is successful by many millions of dollars.

4. Aside from the two principals I have so far referred to, there is one other that I need to mention by way of introduction: Mr Eliasch. He is an experienced businessman with a number of significant business interests. He controls Sherway Group Limited ("Sherway"). In April 2014, two agreements were entered into in effect between Mr Eliasch on the one side and Mr Amanat on the other, whereby Sherway acting by Mr Eliasch lent PHRL acting by Mr Amanat US$50 million in return for Sherway acquiring an indirect interest in JVC by acquiring some of the shares in JVC held by Mr Amanat's vehicle PHRL, which shares were to be held in a new joint venture company controlled ultimately by Mr Amanat and Mr Eliasch. I call this new joint venture company hereafter "*Newco*" to distinguish it from JVC.

5. The relationship between Sherway and PHRL was governed by two agreements, being a shareholders agreement applicable to their relationship as shareholders in Newco ("Newco SHA"), and a loan facility agreement, each dated 2 April 2014. Mr Amanat maintains that he entered into these agreements on the basis of representations by Mr Eliasch that he was independent of and had no material connection with or relationship with Mr Doronin. Mr Amanat maintains that what he was told by Mr Eliasch was entirely untrue and that Mr Eliasch had a well established relationship with Mr Doronin at the material time.

6. Under the JVC SHA, each of the shareholders was entitled to nominate up to two directors of JVC, known as the "*A directors*" in relation to directors nominated by PHRL, and the "*B directors*" in relation to directors nominated by Tarek. Following the making of the April agreements, Mr Eliasch was appointed by PHRL as one of the A directors. Mr Amanat maintains that this was simply because of the representations made by Mr Eliasch and in the expectation that Mr Eliasch would exercise his powers as an A director in the interests of or in accordance with the wishes of PHRL acting by Mr Amanat and strictly in accordance with the terms of the shareholders agreement governing JVC. Mr Eliasch denies that this was the basis of his appointment. He maintains that he was investing US$50 million in order to obtain an indirect interest in JVC and that he would not have made such an investment -- and it is absurd to suggest that as an experienced businessman he would have agreed to make such an investment -- other than on the basis that he had a seat on the board of JVC, being the company in which it was intended Sherway would acquire its indirect interest and that he would be free to exercise his powers as a director of JVC as he judged to be in the interests of JVC. He maintains that this is the

true effect of the Newco SHA. Mr Brisby QC on behalf of PHRL maintains that Mr Eliasch's case that he was entitled to be appointed as a director of JVC under the terms of the Newco SHA is entirely unarguable and thus, to the extent that Sherway seeks injunctive relief restraining PHRL from seeking to remove Mr Eliasch as an A Director of JVC, or seeks to resist his client's case that it is entitled to injunctive relief beyond that which has been agreed for the purpose of controlling the conduct of Mr Eliasch while he remains an A Director, those positions are also entirely unarguable.

7. I now turn to these proceedings. No less than four claims have been commenced: three by PHRL and one by Sherway. To date there have been three contested hearings at which various injunctions have been sought and granted. At least two proceeded on the basis that there would be a full interlocutory hearing, being the hearing before me, at which the injunctions that are to apply until trial would be established. Aside from the various injunction applications before me to which I turn in a moment, there is an application before me by Sherway for fortification of PHRL's cross-undertaking in damages and by PHRL and Tarek for various procedural directions. The relief sought today by PHRL against Tarek has been agreed as I have said, subject to issues of costs.

8. In relation to the claims between Sherway and PHRL, there is agreement that the orders made by Mr Robert Englehart QC sitting as a deputy judge at the Chancery Division at the second hearing in these proceedings, should be continued, but in addition PHRL seek an order that if granted would prevent Mr Eliasch from attending JVC board meetings until after trial, even though he is currently a director of JVC. PHRL also seek the discharge of an Injunction which precludes it from taking further steps to remove Mr Eliasch as an A director of JVC. This is opposed by Sherway and Mr Eliasch on the basis that he is entitled to be a director by the terms of the Newco SHA and the injunctions sought are an unwarranted interference with his right under the Newco SHA to protect the interest of Sherway. PHRL denies that Mr Eliasch is entitled to be or remain a director of JVC as a matter of construction of the Newco SHA, but in any event maintains that it has rescinded the April agreements with Sherway, or Sherway has repudiated, and PHRL has accepted the repudiation by Sherway, of those agreements. On this basis PHRL submits that there is no arguable basis on which Mr Eliasch can maintain he is entitled to remain a director of the company and thus resist the further relief that PHRL seeks. Sherway denies each of these contentions on factual and legal grounds.

9. Mr Brindle QC, appearing on behalf of Sherway and Mr Eliasch, indicated at the outset that he would not continue his application for fortification of the cross-undertaking in damages given by PHRL unless PHRL was successful in obtaining the further relief it seeks against Sherway and/or if Sherway failed in its application to continue the order made by Mr Englehart QC, by which he restrained PHRL from taking further steps to remove Mr Eliasch as a director of JVC. In those circumstances I directed that the parties should first address the applications by PHRL for the further relief I have referred to and by PHRL to discharge the order granted by Mr Englehart QC preventing it from further seeking to remove Mr Eliasch as an A director of JVC.

10. Mr Brisby took up a significant amount of time on the first day of the hearing outlining orally the allegations that PHRL makes against Tarek and against Sherway, with particular focus on the role his client alleges Mr Eliasch played in effect in conspiracy with Mr Doronin. For the most part this took the matters I am concerned with no further, because, while the allegations are disputed, it is nevertheless acknowledged by Sherway and Mr Eliasch that they cannot be resolved on an application of this sort, and because they are largely historic in nature and thus can only be relevant to the applications I have to decide if they form a proper basis for inferring the risk of future wrongdoing in the absence of injunctive interference by the court. It was by reference to these allegations that Tarek had consented to the continuation of the relief sought against it and why Sherway had consented to the continuation by way of undertaking of the orders made by Mr Englehart against it. Both maintain, however, that any additional relief was unnecessary and contrary to the true balance of convenience and for those reasons ought to be refused.

11. With that regrettably lengthy introduction I turn to the more detailed facts of this dispute. In doing so I acknowledge the reliance I have placed on the judgments already delivered in these proceedings by Miss Catherine Newman QC and Mr Englehart QC, sitting respectively as deputy judges of the Chancery Division, and by Mrs Justice Rose.

12. At the outset I remind myself, as is common ground, that the principles applicable to the application before me are those identified in American Cyanamid v Ethicon [1975] AC 396. Broadly this involves identifying whether the applicant for the injunction has shown there to be a serious issue to be tried and, if it has, then to ask: (a) whether damages would be an adequate remedy for the party seeking the injunction, (b) whether damages would be an adequate remedy

for the party against whom the injunction is sought, and, in the light of the answer to these questions and generally, where the balance of convenience lies.

13. Before turning to the central matters in dispute, it is necessary that I summarise in more detail the various agreements that I have referred to by way of introduction.

14. The principal agreement by which JVC is governed is the JVC SHA dated 31 January 2014 made between PHRL and Tarek and to which JVC is also a party. As might be expected in a transaction as substantial as this, the agreement was professionally negotiated and drafted and is immensely detailed. Insofar as is material for the present purposes it provided in the definition section at clause 1 that "*A director*" meant any director appointed to the board by PHRL and "*B director*" meant any director appointed to the board by TIL, that is Tarek. I can then move forward in the agreement to clause 5.3 which provided:

> "Subject to clause 5.4 no shares should be allotted except with the prior written consent of each shareholder."

Clause 5.4 provides:

> "(a) The shareholders wish to fund a capital reserve to address capital expenditures and working capital requirements of the JVC Group ('the capital reserve') to the extent that such expenditures and requirements are not covered by cashflows. The amount of the capital reserve will be specified in the initial resort's business plan and in no event shall the total capital reserve exceed US$60 million. Each shareholder agrees with the other to make available to the JVC its respective proportion of the amount of any capital reserve as determined under clause 5.4(c) below in consideration of the pro rata issuance to it of further shares in the JVC in accordance with this agreement and the memorandum and articles.
>
> "(b) In addition to its respective proportion of the capital reserve, each shareholder agrees with the other to make available to the JVC its respective proportion of the amount of any further funding required under any resort's business plan (other than the initial resort's business plan) or under the development business plan, (other than the initial development business plan), in each case as determined under clause 5.4(c) below in consideration of the pro rata issuance to it of further shares in the JVC in accordance with this agreement and the memorandum and articles. For the avoidance of doubt, the initial resort's business plan and the initial development business plan cannot require further funding beyond the capital reserve in the first 12 months following completion."

In clause 5.4(c) the due date for an additional capital amount as defined within that provision was described as being not less than 60 days from the date of written notice, but at clause 5.4(d) the agreement provides:

> "Notwithstanding clause 5.4(c), the board shall give notice immediately after completion that US$50 million of the capital reserve is being called and that the due date for each shareholder is 60 days from completion. The shareholders agree that they shall instruct their nominated directors to comply with this clause."

In relation to directors, clause 6.1(c) provides:

> "The A shareholder may nominate up to a maximum of two A directors (unless the board has been expanded in which event the A shareholder may nominate three A directors), and may request the removal of any of the A directors which it nominated, by giving notice to the JVC and the other shareholder. The B shareholder may nominate up to a maximum of two B directors (unless the board has been expanded in which event the B shareholder may nominate three B directors), and request the removal of any of the B directors which it nominated, by giving notice to the JVC and the other shareholder. In advance of such nomination(s) a shareholder will consult with the other shareholder on the identity of the individual proposed as a new director. Upon receipt of any such nomination or request for removal, the shareholder shall procure the passing of such resolutions as may be necessary to appoint or remove the relevant director."

In relation to the meetings of directors clause 6.2 provides insofar as is material as follows:

> "(c) The parties shall ensure that at least five business days' notice of a meeting of the board is given to all directors entitled to receive notice accompanied by;
>
> (i) an agenda specifying in reasonable detail the matters to be raised at the meeting; and
>
> (ii) copies of any papers to be discussed and/or voted on at the meeting.
>
> (d) A shorter period of notice of a meeting of the board may be given if both an A director and a B director agree in writing but the notice provisions under clause 6.2(c)(i) and (ii) will still apply.
>
> (e) Matters not on the agenda, or business conducted in relation to those matters, may not be raised at a meeting of directors unless an A director and a B director agree in writing.
>
> (f) The quorum at any meeting of directors is at least one A director and one B director. No business shall be conducted at any meeting of directors unless a quorum is present at the beginning of the meeting and at the time when there is to be voting on any business. If a quorum is not present within 30 minutes after the time specified for a directors' meeting in the notice of the meeting then it shall be adjourned for five business days to the same time and place. If at least one A director and one B director are not present at such adjourned meeting, a quorum shall be the directors so present.

> (g) A meeting of directors shall be adjourned to another time or date at the written request of an A director or a B director. No business may be conducted at a meeting after such has been made.
>
> …
>
> "(i) At a meeting of directors, each director has one vote; provided that if an equal number of A directors and B directors is not present at any meeting of the board, then the A director(s) present shall (between them) at the meeting have two votes and the B director(s) shall (between them) at that meeting have two votes."

In relation to the management of JVC, clause 6.6 provides, insofar as is material:

> "(a) Subject to clause 7, the shareholders agree that for the purpose of better furthering the business and without limiting the provisions of this clause 6.6, the day-to-day activities, policies and operations of the JVC should be carried out by a chief executive officer ('CEO'). The appointment and removal of the CEO will be made by the board and is a board reserved matter until Schedule 2 Part 1(b). Notwithstanding the foregoing, the initial CEO of the company for the first six months following the completion date will be Adrian Zecha and thereafter Adrian Zecha will be the chairman of the resorts business or CEO of AMBV, as determined by the board following discussions with Adrian Zecha."

Clause 7 is concerned with reserved matters, which I need not take up time describing. clause 13.4 the agreement provides as follows:

> "Incentive fees, if any, payable to PHRL affiliates shall be set forth in schedule 7, as such schedule may be modified by the shareholders from time to time. There shall be no restriction on the ability of PHRL affiliates to assign the benefit of any of the incentives set forth in schedule 7 to any other affiliate."

Clause 15.5(a) of the shareholders agreement under the heading "*Conditions of transfer*" provided as follows:

> "(a) It shall be a condition of any transfer of any equity interest that:
>
> (i) the transferee, if not already a party to this agreement, enters into a deed of adherence."

The deed of adherence was set out, or rather the form of it was set out as a schedule to the agreement. The detail of the incentive arrangements to which I have referred is set out in schedule 7 to the agreement. The detail does not matter for present purposes, other than to note that the schedule as drawn entitled PHRL to recover very substantial sums annually.

15. The articles of association of JVC included, at Article 9.1, the following:

> "Subject to the memorandum and these articles the business and affairs of the company should be managed by or under the direction or supervision of the directors of the company and the directors of the company shall have all the powers necessary for managing and for directing and supervising the business and affairs of the company, provided that at all times the directors shall manage the business and affairs of the company in accordance with the shareholders agreement. The directors shall pay all expenses incurred preliminarily to and in connection to the incorporation of the company and may exercise all such powers of the company as are not by the act or by the memorandum or the articles required to be exercised by the shareholders."

Article 9.5 provided that:

> "Each director shall exercise his powers for a proper purpose and shall not act or agree to the company acting in a manner that contravenes the memorandum, the articles, or the act, or the shareholders agreement. Each director in exercising his powers or performing his duties shall act honestly and in good faith in what the director believes to be the best interests of the company."

16. At the same time as the JVC SHA was entered into, a loan agreement was entered into by Pontwelly Hotel Company Limited, an entity controlled by Mr Doronin, with the hotel operating company, by which US$168 million was lent to that company. That is significant, principally because Pontwelly's consent to the transfer of any shares in JVC by PHRL is required before such a transfer can take place and may be significant also because of an assertion made by Mr Brisby QC on behalf of the claimant, both in his written submissions and orally, that the rate of interest payable under that agreement was, as he put it, usurious, that is to say significantly higher, he maintains, than rates which would be obtainable for such loans from other more regular financial institutions.

17. I now turn to the Sherway agreements. Mr Amanat was looking for other investors and he maintains was attracted to Mr Eliasch because of the representations made by Mr Eliasch that he was not connected to or otherwise had any relevant relationship with Mr Doronin. Mr Amanat and PHRL claim that they entered into the two Sherway agreements on the faith of these representations, which PHRL maintain were entirely fraudulent. Whether these representations were made is hotly disputed and cannot be resolved today. The two agreements between PHRL and Sherway included the Newco SHA to which PHRL and Sherway Group Limited were parties. By clause 3.8 of that agreement completion was:

> "... conditional upon Pontwelly having provided its consent to the transfer of the 12,339 A shares held by Peak in PHRG to the JVC and completion of such transfer of shares and delivery to Sherway a copy of the updated register of members of PHRG reflecting the JVC as the owner of such shares in PHRG."

For the avoidance of doubt, the reference to JVC in that clause is to Newco and the reference to PHRG is to JVC. This needs to be borne in mind at all times when reading this agreement and comparing and contrasting its provisions with that of the JVC SHA. It is common ground that the completion condition has yet to be satisfied. Insofar as is material, Clause 3.3 of the Newco SHA provided as follows:

> "At completion (or as otherwise provided), Peak and the JVC shall:
>
> "(a) procure that each shareholder shall and board resolutions of the JVC are passed as may be necessary to:
>
> "(iii) ... appoint or designate, as the case may be, Omar Amanat as the A director and Johan Eliasch as the B director, and, in accordance with clause 7.2(k), Omar Amanat as chairman of the board; and.
>
> "(b) procure that such steps are taken (including, if required, the passing of shareholder and relevant board resolutions of the JVC, PHRG, ARGL, Silverlink and ARDL ...) as may be necessary with effect from the date hereof (or as soon as reasonably practicable thereafter) to appoint Johan Eliasch as a director nominated by the JVC pursuant to all of the boards in respect of which JVC has the right to appoint two directors pursuant to the PPHRG SHA (including, without limitation, the PHRG board, the ARGL board, the Silverlink board and the ARDL board ...) and that Johan Eliasch receives compensation and indemnification arrangements at an equivalent level to those which have been granted to other board members of PHRG. Provided that in the event that, for reasons beyond the control of Peak or the JVC, it is not possible to appoint Johan Eliasch to such board positions at completion:
>
> "(i) JVC hereby irrevocably and by way of security for its obligation under this clause appoints Sherway as its attorney for the purpose of (i) exercising all of the JVC's rights in connection with appointment of one of the directors to the PHRG board, ARGL board, the Silverlink board and the ARDL board. Sherway's ability to use such power shall be limited to the appointment of one representative of Sherway on the aforementioned boards; and (ii) procuring satisfaction of the completion condition in the event that PHRL has not provided written notice to Pontwelly requesting such consent within two business days of the date hereof."

18. Clauses 3.9 and 3.10 respectively provide as follows:

> "… For the avoidance of doubt the provisions of clause 3.3 ... shall apply from the date hereof, notwithstanding the fact that Sherway will not become a shareholder of the JVC until completion.
>
> 3.10: Without prejudice to the foregoing, within 1 business day of the date hereof, PHRL shall provide a notice to PHRG requesting the removal of Nader Tavakoli or Omar Amanat from the board of PHRG, ARGL and Silverlink and the appointment of Johan Eliasch in their place."

Clause 4.1(a) provides that:

> "The business of the JVC should be the exercise of its rights as a shareholder in PHRG in accordance with the terms of the PHRG SHA in connection with the management of the PHRG business."

Clause 4.2 provides, under the heading "*Shareholder obligations*", as follows:

> "(a) Each shareholder shall use reasonable endeavours to ensure that the business is carried on in accordance with this agreement.
>
> (b) Each shareholder agrees to exercise its respective rights under this agreement so as to ensure that the business of the JVC consists exclusively of the business and that the business shall be conducted on commercial principles with a view to optimising overall returns in accordance with the terms of the agreement.
>
> "(c) Each shareholder shall procure that the director(s) appointed by it shall act in good faith in discharging their duties as directors of the JVC (as well as PHRG, ARGL, Silverlink and ARDL ... as applicable)."

19. At the same time as the Newco SHA was entered into, a loan agreement between PHRL and Sherway was also entered into. Under this agreement Sherway lent US$50 million nominally to PHRL. By clause 2.2 of that agreement it was provided that:

> "Purpose of the facility.
>
> "2.2.1 the borrower shall apply all amounts borrowed under the facility for working capital purposes.
>
> "2.2.2 the lender is not obliged to monitor or verify how any amount advanced under this agreement is used."

It was not in the end in dispute that the sole or main purpose of PHRL was to hold the A shares in JVC.

20. Difficulties developed between Mr Amanat and Mr Doronin, as I said, at a very early stage. Mr Amanat maintains that this was the result of Mr Doronin wanting to deprive him of his interest in JVC, or so reduce the value of his interest as to compel him to sell it to Mr Doronin at

significantly less than its true value. He maintains that various steps were taken by Mr Doronin which were contrary to the terms of the JVC shareholders agreement and which he was only able to take because Mr Eliasch, who on or about 19 April 2014 had been appointed as one of the A directors of the JVC following the making of the Sherway agreement, was prevailed upon to exercise his powers as a director, contrary to the interests of PHRL and/or in breach of the JVC shareholders agreement.

21. Although there are a large number of allegations made, again in essence these boil down principally to three, namely that:

    a. the board of JVC, consisting of the B shareholders and Mr Eliasch, sought to remove the existing chief executive officer and founder of the hotel group, Mr Zecha, contrary to clause 6.6(a) of the JVC shareholders agreement;
    b. the board sought to make capital calls in circumstances where, as was well-known to Mr Doronin and Mr Eliasch, PHRL was not in a position to meet such calls, and at par values which could not be justified other than for the purpose of increasing the total number of shares and thereby diluting the capital value of PHRL's interest in JVC; and
    c. the board sought to deprive PHRL of the incentive payments to which it was entitled under clause 13.4 and schedule 7 of the JVC shareholders agreement, when alteration of those entitlements was a reserved matter which could be modified only by the shareholders.

22. PHRL and Mr Amanat maintain that for the purpose of enabling disadvantageous or objectionable resolutions to be passed by the board of JVC, Mr Eliasch consented to board meetings at short notice and/or to the addition of business to be considered at such meetings that was not contained in the formal agendas for board meetings, circulated when notice of such meetings were given, so as to thereby deprive PHRL of the protections conferred by clause 6.2 of the JVC shareholders agreement of seeking an adjournment of a board meeting pursuant to clause 6.2(g) of that agreement.

23. It was the first of these issues that led to the commencement of the first claim by PHRL and to the first injunction application that was heard by Miss Newman QC sitting as a deputy judge of the

Chancery Division. Three orders were ought on that occasion, which were summarised by Miss Newman at paragraph 3 of her judgment in these terms:

> "Agreement was not reached on three orders sought by Mr Brisby in terms that the second defendant/respondent ('the JVC'), (whether by itself or any other officer, servant or agent of the JVC or otherwise howsoever) be retrained from:
>
> "(i) Taking any steps to remove or exclude Mr Adrian Zecha from his position as CEO of the JVC until 31 July 2014 (or such time as he is replaced by the board of directors later if later); and also (ii) the position of CEO of Aman Resorts Management BV, including interfering with his functions as such and excluding Mr Zecha from his residence in Singapore ...
>
> "(ii) Making any internal and/or public announcements to the effect that Mr Zecha has resigned and/or has been removed from his position as CEO of the JVC ... and/or to the effect that Mr Vladislav Doronin has been appointed CEO of the JVC and
>
> "(iii) Holding out Mr Doronin as the CEO of the JVC."

Having noted that PHRL alleged that the board had resolved to remove Mr Zecha and replace him with Mr Doronin and that such was in breach of the JVC shareholders agreement, Miss Newman then referred to and set out clause 6.6 of the shareholders agreement. At paragraph 10 of her judgment, Miss Newman noted that schedule 2 of the JVC SHA provided that "*entering into agreements or arrangements with Adrian Zecha*" was a board reserved matter and that, subject to clause 7, appointing or removing or changing the terms of employment of any chief executive officer of the JVC was a board reserved matter as well. It is asserted by Tarek that Mr Zecha had announced his resignation and that what happened thereafter proceeded on that basis. That is hotly in issue and cannot be resolved until trial. Miss Newman concluded at paragraphs 44 to 46 of her judgment that:

> "Peak has an arguable case that Mr Zecha did not resign with immediate effect at the board meeting on 22 April or at any other time. It has a clear prima facie case that Mr Zecha is the duly appointed CEO of the JVC until 31 July 2004.
>
> "It is absolutely clear at this stage, on the material before me, that the same board meeting did not have the power to appoint a new CEO as this was not on the agenda for the meeting. All Mr Zecha said at the meeting was that he was prepared to propose Mr Doronin as his successor. Mr Zecha did not have the power, and did not purport to exercise any power, to ride roughshod over the provisions of the SHA. The meeting had no power to appoint Mr Doronin as CEO or even as interim CEO.

> "It is also clear to me that there is a very real risk that damages will not be an adequate remedy. Not only has there been a clear breach of contract which has had a serious impact on the relationships between the two groups of shareholders, who are litigating against each other rather than working together, but there is also evidence before me that the absence of Mr Zecha from a visible, even if non-executive role within the Aman Resorts group of companies could be damaging to the goodwill and reputation which attaches to the business and the brand, and that is notoriously difficult to quantify. In my judgment therefore there is a real risk that damages would not be an adequate remedy if Mr Zecha is completely excluded from any role."

All this led Miss Newman to order at paragraph 5 of her order that:

> "Pending the further hearing of the injunction application on the return date, the second defendant, whether by itself or any officer, servant or agent of the second or otherwise howsoever be restrained from ...
>
> "5.1 taking any steps to remove or exclude Mr Zecha from his position as CEO of the second defendant in reliance upon his alleged resignation on 22 April 2014 before 31 July 2014, or interfering with his functions as such, save as permitted by the SHA or the second defendant's memorandum or articles of association."
>
> "5.2 making any further international public announcements before 31 July 2014 to the effect that Mr Zecha had been resigned or had been removed from his position as the CEO of the second defendant effective before midnight on 31 July 2014 and;
>
> "5.3 unless Mr Vladislav Doronin is validly appointed as CEO of the second defendant by the board of directors effective after 31 July 2014, holding out Mr Doronin as the CEO of the second defendant, including by making any public announcement."

24. It has been agreed between Tarek and PHRL that these orders will continue to the extent they remain necessary, given the passage of time, in the form of undertakings. There is an issue that is yet to be resolved, at any rate to my satisfaction, as to whether or not these are undertakings which are intended to be contractual and thus take effect otherwise than by order of the court but not subject to a cross-undertaking in damages, or whether they are intended to be undertakings given to the court and thus given subject to such a cross-undertaking. That is something which I will have to hear further argument about following the delivery of this judgment. What I have described is said to be material as between Sherway and PHRL because Mr Brisby relies on the incident concerning Mr Zecha as demonstrating that Mr Eliasch cannot be trusted to act in compliance with the JVC shareholders agreement, and thus that he ought not to be permitted to attend board meetings.

25. The next occurrence of note concerns some JVC board activity between the date when Miss Newman's judgment was circulated in draft and when it was handed down. The principal thrust of this activity appears to have been an attempt by the Tarek interests to circumscribe the role of CEO to the point where there was no substance left, as long as it was a role exercised by Mr Zecha.

26. PHRL allege, and it is not in dispute factually, that on 6 July 2014, in the evening, short notice was given of a JVC board meeting to be held the following day. This would have been a plain breach of the shareholders agreement but for the fact that Mr Eliasch had consented to it in his capacity as an A director. PHRL was nonetheless able to exercise its power of adjournment over to 11 July 2014.

27. On 10 July 2014, however, notice of several additional items to be considered at the adjourned meeting was circulated. The effect of these provisions included, as I have said, the adoption of guidelines that would have precluded Mr Zecha as CEO from exercising any powers in that role. Mr Eliasch signed a consent for discussion at short notice of these additional items. This caused PHRL to request a further adjournment of the board meeting to 21 July 2014. A further attempt to convene a board meeting at short notice at 6.55 on 11 July 2014 was also attempted by the B directors, but again was met with an application for an adjournment.

28. All this led to the commencement of the second action and to a second application for further injunctive relief which was listed initially before Miss Newman QC at the hand-down of her judgment to which I referred earlier in this judgment, and ultimately before Mr Englehart QC sitting as a deputy judge of the Chancery Division. It led initially to undertakings in the terms set out in paragraphs 12 to 14 of Miss Newman's order and then to the order of Mr Englehart QC by which he ordered over to today's hearing as follows:

> "Pending the further hearing of the injunction application on the return date:
>
> "5.1 The second defendant (whether by himself or any servant or agent of the second defendant or otherwise howsoever) be retrained from:
>
> "5.1.1 consenting (whether in writing or otherwise) to a period of notice for the convening of a board meeting of Peak Hotels and Resorts Group Limited ('the JVC') shorter than the five business days' notice required by clause 6.2(c) of the

> shareholders agreement between the claimant, TIL and the JVC dated 31 January 2014 ...
>
> "5.1.2 consenting (whether in writing or otherwise) to matters (or business in relation to such matters) being raised at any meeting of the board of the JVC where such matters are not on the agenda for the relevant board meeting; and in either case, save with the prior written consent of the claimant or leave of the court, with liberty to apply by either party."

29. PHRL had also sought an order that prevented Mr Eliasch from attending board meetings. That was refused by Mr Englehart and it is that application that PHRL advances at this hearing, or in the alternative they seek an order restraining Mr Eliasch from attending meetings which PHRL has requested should be adjourned. The logic behind this application appears to be that by being present at a meeting Mr Eliasch creates a quorum which thereby facilitates the meeting taking place, even if PHRL has requested that it be adjourned and even though, as a matter of contract, a meeting which proceeds in the face of such a request appears to be irregularly constituted and thus non-effective.

30. Before turning to that application I ought to mention the hearing before Mrs Justice Rose. That hearing was concerned with two meetings that PHRL had requested should be adjourned, but which the B directors and Mr Eliasch proceeded with. The issue there was whether PHRL had an entirely unfettered right to adjourn meetings, or whether there was some implied qualification to what appears to be the absolute right of either the A interests or B interests under the JVC shareholders agreement to adjourn meetings of the board of JVC. It was contended that PHRL had to act in good faith. Mrs Justice Rose held it was at least arguable that this was not so. Although Tarek and Mr Eliasch continue to maintain that there is an implied qualification to the apparently unqualified right to seek the adjournment of board meetings that excludes capricious, arbitrary or bad faith exercise of the power to adjourn, Mr Brisby contended that the result of Mrs Justice Rose's decision was to establish as between the parties that it is arguable that the contrary was the case. The reality is therefore that since the order made by Mrs Justice Rose, any attempt by Tarek and/or Sherway to block an adjournment request on the basis of an argument that PHRL is acting mala fides, would be met with the point that it was at least arguable that the contract was not subject to any qualification which enabled such an objection to be advanced. Against that

background I turn to the question of whether or not the additional orders sought by the claimant against Sherway and Mr Eliasch ought to be granted.

31. Mr Brisby contended that there was no arguable basis on which Mr Eliasch could argue that he was entitled to remain a director of JVC and thus there could be no valid objection, either to an order that precluded Mr Eliasch from attending board meetings of JVC, or from taking further steps to end his appointment as a director. The basis of these submissions were first that there was no entitlement under the Newco SHA for Mr Eliasch to be appointed a director of JVC ahead of its completion and/or because PHRL had rescinded the Sherway agreements for fraudulent misrepresentation on the part of Mr Eliasch concerning his relationship with Mr Doronin and/or that Sherway had wrongfully repudiated the agreement, which repudiation had been accepted.

32. Of these, it is only the first that has at least the potential to assist the claimant on an application of this sort by eliminating Sherway's right to rely on rights created by the Newco SHA as relevant to an assessment of the balance of convenience. The point was argued before Mr Englehart, but he reached no conclusion on it as far as I can see. His conclusion was that an order in the terms now sought before me was to be resolved against the claimant on the ground that it was not necessary because the other relief granted was sufficient to protect the claimant's interest over until this hearing.

33. In my judgment, all that I need to be satisfied of is that Mr Eliasch and Sherway have at least a realistically arguable basis for saying that Mr Eliasch was entitled to be appointed a director of JVC, notwithstanding the non-completion of the Newco SHA for this point to be resolved against PHRL. In my judgment they have surmounted that relatively modest hurdle for the reasons that follow. I do not go further than that (a) because the true meaning and effect of the Newco SHA can only be determined following a trial at which each of the parties have had the opportunity to adduce factual matrix evidence and (b) because it is not necessary to do so on an application of this sort in the light of the way the point has been argued before me by Mr Brisby. Subject to those qualifications, my reasons for concluding that Sherway has at least a realistically arguable case concerning the right of Mr Eliasch to be appointed an A director of JVC are as follows.

34. The key provision is clause 3.3. Mr Brisby's submission is that the entitlement to appoint a director arose only "*on completion*" and since there had been no completion it follows that

Sherway is not entitled to insist on the appointment and retention of Mr Eliasch as a JVC director. In consequence Mr Eliasch can only have been appointed a director of JVC by PHRL pursuant to its powers under the JVC SHA and thus (a) Mr Eliasch is obliged to act strictly as an A director and (b) can be removed as an A director in accordance with the terms of the JVC SHA as and when PHRL choose to do so.

35. In my judgment this approach is at least arguably mistaken for at least the following reasons. First, clause 3.9 provides that the provision of clause 3.3 shall apply from the date of the Sherway agreement, notwithstanding that Sherway has not become a shareholder in Newco, until completion of the Newco SHA. Although Mr Brisby suggested that on true construction this provision was confined in its effect to clause 3.3(a), it is at least arguable that that is not so if only because clause 3.9 is not expressly so circumscribed when it could have been had that been the intention, and because there is no necessary reason for its effect to be so circumscribed. PHRL was entitled to nominate Mr Eliasch as a director of JVC if it chose or agreed to do so using its powers to appoint up to two A directors, and was so entitled as well before as after completion of the Newco SHA. In my view the arguability of this point is put beyond question by the effect of clause 3.10, since it requires notice of the removal of an existing A shareholder and the appointment of Mr Eliasch in place of that director within one business day of the date of the Newco SHA. That was at least reasonably foreseeable as likely to be before completion, given the effect of clause 3.8 and that notice to Pontwelly requiring consent had to be given by PHRL within only two working days of the date of the agreement - see clause 3.3(b) (ii).

36. That being so Mr Eliasch is fully entitled to say, as he does, that this was an arrangement he insisted upon for the purposes of protecting what was in effect his investment in JVC of US$50 million. Mr Brisby submitted that this was unlikely to be so given the terms of the Sherway loan and that it was made to PHRL not JVC. Whilst I cannot and do not say that this point is completely without substance, I conclude that the point is one that is at best arguable. PHRL was a special purpose vehicle and it’s only or main purpose was to invest in JVC. The sole purpose of Mr Eliasch making the loan and entering into the structure I have described is because he wished to participate in JVC not PHRL. The money, or a substantial part of it, was going to JVC and it was the activities of JVC that Mr Eliasch would have to be involved in if he was to see a reward on his investment or prevent his investment being lost or severely reduced.

37. Mr Brisby submitted that even if the position was as I have described, Sherway and Mr Eliasch lost any right they had for Mr Eliasch to be an A director of JVC when PHRL gave notice rescinding the Sherway agreement and/or accepting what it contends to be the wrongful repudiation of the Sherway agreement. In my judgment reliance on these points too is mistaken. First, in relation to rescission, the alleged fraudulent misrepresentations that are relied on are very strongly contested. The truth or otherwise of those allegations can only be determined at a trial. If PHRL considers the point to be incorrect, then it can of course apply for summary judgment in relation to that issue, but it has not done so. That is sufficient to dispose of the point I am now considering. However, I make it clear that I also consider the point that a party claiming rescission has to be ready to restore the counterparty to its former position as and when rescission is granted by the court to be at least as strongly arguable – see paragraph 6-120 of volume 1 of Chitty on Contracts. The evidence suggests strongly that PHRL is not currently in a position to do so. The only funds it appears to have are the US$50 million drawn down under the Sherway facility agreement. Sherway's solicitors have sought information as to its whereabouts and the best that PHRL has done so far is to offer a bank statement from April 2014 that is redacted to the point where even the account holder's name is not apparent. This, in combination with the fact that (a) PHRL did nothing to force performance of clause 5.4(d) following completion of the JVC shareholders agreement suggests that it did not have funds then, and (b) that is has not taken up any part of the capital calls that have most recently been made and about which there is or can be no objection suggests it does not currently have the funds to do so. In the course of his submissions Mr Brisby maintained that the underlying assets were very valuable and his client anticipated no difficulty in raising the money to restore Sherway to its pre-contract position as and when it was necessary to do so. Again, whilst I cannot and do not reject this point as beyond argument as an answer to the point I'm now considering, it has to be seen in context. It is unlikely that the hotel operating company would have been borrowing at the rates applicable under the Pontwelly agreement, which was described by Mr Brisby as usurious in both his written and oral submissions, as I said, if funding could be borrowed elsewhere at lower rates. That is not obviously consistent with the operation being soundly financially based. In the result I am unable to accept PHRL's rescission case as being, as it were, a knock out answer to the points I am now considering.

38. The wrongful repudiation case suffers from many of the same difficulties. Aside from the restitution point, which is of no application for obvious reasons, there are issues as to whether the

breaches occurred as alleged, whether they are repudiatory in effect and whether the contract has been affirmed. I do not propose to take up time with all of these because, in my judgment, Mr Brisby's position on the issue is, with respect, an unreal one. The points and counterpoints give rise to a raft of arguable issues and certainly do not permit the conclusion that Sherway's contention that it is entitled to have Mr Eliasch appointed and remain a director of JVC is unarguable at this stage.

39. I now turn to the balance of convenience. As matters stood following Mr Englehart's judgment, Mr Eliasch was precluded from sanctioning short notice meetings and the addition of business to agendas after formal notice of the relevant meeting had been given. Mr Englehart's conclusion was that the relief that the claimant now seeks, an order precluding Mr Eliasch from attending board meetings, was not necessary because the power to adjourn in practice gave PHRL all the protection it could properly require. No longer could meetings be called without proper notice, nor could business be placed before the meeting that had not been referred to in agendas circulated with notice of the meeting, in accordance with the express terms of the JVC shareholders agreement. If that analysis is correct then I would be unwilling to conclude that the balance of convenience requires further court driven interference, because the balance of convenience points towards the minimum amount of interference by the court in what is a dynamic commercial context and because the further orders sought could impact unnecessarily on Sherway's ability to play a role in the affairs of a company in which it has indirectly invested at least a significant portion of the US$50 million advanced under the Sherway facility agreement to PHRL.

40. Mr Brisby submits, however, that Mr Englehart's analysis overlooks two points: (a) that Sherway and Tarek contend that the power to adjourn meetings is impliedly qualified so as to disqualify PHRL from requiring adjournments on grounds that Sherway or Tarek contend are capricious, arbitrary, or are advanced in bad faith; and (b), it ignores the fact that the need to request adjournments of board meetings could quickly stultify the business of the JVC because it would preclude the passing of uncontroversial business at board level, about which there was no realistic objection as long as objectionable business was included on the agenda as well.

41. These points, and in particular the second, are ones that have given me cause to hesitate before refusing Sherway the additional relief it claims, but in the end I have concluded that, at any rate at

this stage, they do not justify me granting the relief that PHRL now seeks on balance of convenience grounds. My reasons for reaching that conclusion are as follows.

42. First, in relation to the Sherway/Tarek point concerning qualification to the power to adjourn, Mrs Justice Rose's judgment is binding for the proposition that it is at least arguable that no such qualification should be implied into the JVC shareholders agreement. There are a number of reasons why it is at least arguable that this is so. First, the agreement is professionally drawn. If either party intended such a qualification it could easily have included such a provision within the agreement. Secondly, in my judgment the question of capricious conduct is addressed expressly by clause 14.3 of the JVC shareholders. It is at least arguable that the inclusion within an agenda of something that either side objects to would not trigger that provision and that it can apply only where the business to be transacted is necessary:

> " ... to enable the JVC to carry on the business properly and efficiently in accordance with the then current approved resort business plan or development business plan."

Thirdly, a failure, through adjournment or otherwise, to agree the matters identified in clause 14.1 generates a deadlock which then triggers various dispute resolution provisions, and thus the ability to force an adjournment is part of the mechanism by which either party can protect itself. In those circumstances, the qualification which Sherway/Tarek contend for is at least arguably not necessary in order to make the contract work, or to give effect to an unexpressed common intention in those circumstances and thus on conventional legal analysis, prevents the implication of a term that qualifies the express right to request the adjournment of a JVC board meeting to the effect contended for by Sherway/Tarek. Thus, with respect, I agree with Mrs Justice Rose's conclusion on this issue. Furthermore, there is no evidence at all that either Sherway or Tarek will maintain that the point can be revisited other than at trial. Although Mr Brisby submitted that it was this point that triggered the application to Mrs Justice Rose, that misses the point because it was at that hearing that the issue I am now considering was resolved. Thus on the face of it this point is not one that gives rise to an entitlement to the relief now sought on balance of convenience grounds. There is no evidence or basis for thinking that unless the order sought now by PHRG is granted, this point will arise again before trial.

43. The effect of the grant of such an order as far as Sherway is concerned could be significantly disadvantageous. First, Mr Eliasch would be unable to attend meetings and directly protect his substantial investment, notwithstanding that at least arguably that is precisely why he was appointed in the first place. Mr Brisby was unable to identify any other basis for his appointment. If the only purpose was to do PHRL's bidding then it is difficult to see why Mr Eliasch would accept the appointment. It would not advance any benefit so far as he is concerned. Further, and perhaps more importantly, it is difficult to see why Mr Amanat would need or want to appoint him since Mr Amanat could, as the sole A director, achieve what was required without the intervention of Mr Eliasch as an additional A director. Secondly, requiring a validly appointed director not to attend board meetings places that director at least a potentially in a vulnerable position given his various ongoing duties.

44. Thus on the issue I am now considering, in my judgment balance of convenience comes down in favour of refusing the order. No present need for it has been demonstrated and, at least potentially, granting it might have adverse consequences for Sherway without any consequential benefits to the claimant and is in consequence a great than necessary interference with what at least arguably are Sherway's rights under the Sherway agreement.

45. I now turn to the potentially stultifying effect of repeated adjournments of board meetings. I agree that there theoretically could be a problem if, for example, nine out of ten items on a board agenda were non-controversial but one item was not and the result was an adjournment request that would prevent the nine items being passed. However, in my judgment that is at least presently purely a matter for speculation. Whatever might have been the position in the period of maximum intensity that led to the applications to Miss Newman and Mr Englehart, at any rate since the clarification given by Mrs Justice Rose, there is no evidence of the sort of difficulty that Mr Brisby postulates. There have been two board meetings since Mrs Justice Rose's judgment, neither have been the subject of an adjournment application and the result of each was that capital calls were made without opposition from the claimants.

46. Tarek and Sherway are fully aware that if attempts are made to bring business before the board that PHRL objects to it is likely to result in an adjournment request. They are aware too that their ability to challenge such a request on capriciousness grounds has in effect been eliminated by Mrs Justice Rose's conclusions that it is arguable that there is no such implied qualification to the

express contractual right before trial. Both have very substantial funding locked up in the group controlled by JVC. It is plainly contrary to the interests of both Tarek and Sherway to run the risk of loss caused by business disruption resulting from avoidable board meeting adjournment requests.

47. Finally it is open to PHRL, when applying to adjourn, to offer to withdraw the request if the particular item to which objection is taken is withdrawn from the agenda. Whatever might have been the reaction to such requests in the past, there is now no commercial logic in failing to engage with such requests on the part of either Sherway or Tarek. Indeed, failing to do so and/or attempting to circumvent an adjournment request is likely to result in a renewed application for relief of the sort I am now considering. Such conduct, if established, may well alter the balance of convenience in favour of the grant of an order such as is sought by the claimant.

48. I should briefly mention the alternative relief sought, that is that Mr Eliasch should be restrained from attending board meetings which PHRL has requested should be adjourned. In my judgment there is no current justification for an order in these terms either. As I have said, there is no evidence of a present intention to attempt to circumvent PHRL's right to seek an adjournment of a board meeting. The landscape has changed since Mrs Justice Rose's judgment, for the reasons I have given. There is no basis for inferring that either Sherway or Tarek will seek to circumvent the power of PHRL to request adjournments of board meetings going forward.

49. There is thus no balance of convenience that would justify interfering by injunction with the conduct of a dynamic and substantial cross-frontier business. In those circumstances I consider that the proper course, applying the American Cyanamid test, is to refuse the further relief sought by PHRL.