Case No: **CL-2024-000084; CL-2024-00008**

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

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

Date: **27 June 2024**

Before :

Dame Clare Moulder DBE

- -

Between :

J.P. MORGAN INTERNATIONAL FINANCE LIMITED	**Claimant**
- and -	
WEREALIZE.COM LIMITED	**Defendant**

And Between:

WEREALIZE.COM LIMITED	**Claimant**
- and -	
J.P. MORGAN INTERNATIONAL FINANCE LIMITED	**Defendant**

- -
- -

Richard Handyside KC, Rosalind Phelps KC, Rupert Allen, Christopher Langley and Gillian Hughes (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Claimant**
Richard Lissack KC, Robert Weekes KC, Timothy Lau and Charles Redmond (instructed by **Quinn Emanuel Urquhart & Sullivan LLP**) for the **Defendant**

Hearing dates: **27th June 2024**

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RULINGS

Dame Clare Moulder DBE **Thursday, 27 June 2024**
(**12:06** pm)

Ruling on Declarations

1. I am going to deal with the scope of the declaratory relief. I have in front of me the draft order with JPM's proposals in green and WRL's proposals in red.

2. In terms of the general principles, it was submitted for WRL that:

   i. it ought to be uncontroversial that a declaration should only be made where the court has directed in the judgment one should be made, and in terms of the relevant passage of the judgment; and

   ii. it is not necessary to translate the terms of the narrative judgment into declarations where no declaration was sought and the terms of the judgment are clear.

3. It was further submitted that it is clear from the judgment where in principle declaratory relief was appropriate, and that JPM was seeking declarations where no declaration had been granted in the judgment.

4. It was submitted for JPM that the expedited trial was ordered precisely because of the numerous serious disagreements between the parties, with a view to providing the parties with certainty on as many issues as possible as quickly as possible, and that the court should not therefore take what it described as a "minimalist" or "restrictive" approach to the grant of declaratory relief.

5. It was further submitted for JPM that the touchstone is utility, not necessity, and that where the court has resolved an issue before it, the court should, where possible, grant declaratory relief, formally recording its key findings to give clarity for future option exercise periods.

6. On the US law questions, the court expressly stated in the judgment that the precise terms of any declaratory relief were matters for the consequential hearing: [113] of the judgment.

7. In general, where the court did not indicate that no declaration would be granted, it seems to me that the matter was at large, and that is borne out by the extract from *Zamir and Woolf* set out at [112] of the judgment, that the terms of declarations can often only be decided after the court has determined the facts.

8. I note that the expedited trial was not ordered, contrary to the submissions by JPM, with a view to providing the parties with certainty on as many issues as possible, as quickly as possible. In my view, the driver for ordering the expedited trial was the imminence of the next call option period, and the need to determine the basis for determining the Call Option Fair Market Value. I refer to paragraphs 44 and 45 of my judgment on the applications for expedition, dated 22 March 2024:

   > [44] "WRL submitted that the valuation dispute needs to be resolved before the Second Measurement Date, otherwise there is a significant risk that the valuation experts would determine the Call Option Fair Market Value on an incorrect basis.

> [45] "I accept that there is urgency given the imminence of the next call option period. I also accept that the dispute is a substantial commercial dispute. I accept, therefore, that this is a case which is suitable for expedition".

In that judgment, the other issues were said to be included because the submission had been that they were short questions of construction which could be dealt with at the same time. I refer to paragraphs 62 and 63 of that judgment.

> [62] "The question then arises whether any other issues raised by JPM should be included within the expedited trial. There are a number of issues which JPM say are short questions of construction. As referred to above, one is the appointment of the third valuation expert and whether the period for exercising the option is extended in the circumstances that arose…"

> [63] "… it seems to me that it would be sensible (and in accordance with the overriding objective) for as many issues as possible to be dealt with on one occasion and I would, therefore, include those issues."

9. The principles governing the exercise of the court's discretion to grant declaratory relief include whether the declaration would serve a useful purpose and is the most effective way of resolving the issue. I was referred to the decision of Cockerill J in *BNP Paribas SA v Trattamento Rifiuti Metropolitani SPA* [2020] EWHC 2436 (Comm) at [78].

10. From that judgment I note the following at [60]:

> "The power to make declarations appears to be unfettered, but the grant of a declaration remains a discretionary remedy. Thus, although 'a claimant or an applicant may have proved his case, he still has to persuade the court both that it should in its discretion make a declaratory judgment, and if it does, that the terms he seeks are appropriate': see *Zamir & Woolf*, The Declaratory Judgment ... at 4-01."

11. The principles (relevant to that case) are summarised at [78] of the judgment of Cockerill J, as follows:

> "[78] The overarching issues relevant to this case which can be taken away from the authorities and which I apply when coming to consider the individual declarations sought are as follows:
>
> i) The touchstone is utility; ...
>
> (iii) The prime purpose is to do justice in the particular case ...
>
> (iv) The Court must consider whether the grant of declaratory relief is the most effective way of resolving the issues raised ... In answering that question, the Court should consider what other options are available to resolve the issue.
>
> (v) This emphasis on doing justice in the particular case is reflected in the limitations which are generally applied. Thus:

(a) The court will not entertain purely hypothetical questions ...

(b) There must in general, be a real and present dispute between the parties before the court ...

(vi) Factors such as absence of positive evidence of utility and absence of concrete facts to ground the declarations may not be determinative ...

However, where there is such a lack in whole or in part the court will wish to be particularly alert to the dangers of producing something which is not only not utile, but may create confusion."

12. I do not, therefore, accept the submission for JPM that the key findings in a judgment need to be formally recorded in order to give clarity.

13. I was also referred to the case of *FSA v Rourke* [2002] CP Rep 14 by WRL, and I note the passage at page 10 of the judgment that:

> "the court should not grant … a declaration merely because the rights, facts or principles have been established, and one party asks for a declaration."

14. Dealing with whether it is appropriate to issue a declaration on the US law questions, in its skeleton, WRL sought to raise again whether a declaration was the most appropriate option, given the possibility of approaching the Federal Reserve. This was addressed in the judgment at [115]-[130]. The absence of Viva was also addressed at [131]to[135]. I do not, therefore, see it as necessary to revisit or reconsider my conclusion in this respect.

15. Turning to the individual questions of US law and whether the court should exercise its discretion to issue a declaration in the terms sought by JPM in its draft order, and whether the terms sought by JPM are appropriate.

16. On question two, at [175] of the judgment there is a clear finding that Viva is a subsidiary for the purposes of Regulation K. At [176] the court concluded that it is a matter in dispute between the shareholders, and all arguments were before the court, notwithstanding the absence of Viva, such that the court concluded that a declaration would serve a useful purpose.

17. However, as noted above, by [113] of the judgment, the court noted that the precise terms are a matter for the consequential hearing.

18. WRL have sought to caveat the declaration sought by JPM with the words, "as between WRL and JPM and excluding Viva". JPM submitted that the court had rejected WRL's submission that a declaration should not be made because Viva was affected by the issue, and it was inappropriate for WRL to try to "repackage" the same argument.

19. In deciding the scope of the declaration and its utility, the court is mindful that the dispute with which it is concerned is the dispute under the shareholders' agreement, and specifically in this context the determination of the Call Option Fair Market Value, and there is no need,

in my view, to issue a declaration for any wider purpose, including disputes which may exist between the parties, but which were not before the court on the expedited trial.

20. However, in my view, as noted at [130] of the judgment, the issue of whether Viva is a subsidiary for the purposes of Regulation K is relevant to the valuation exercise in the sense that the valuers need to understand how they are to disregard the restrictions under Regulation K applicable by reason of JPM having a shareholding in Viva.

21. Further, in my view, the proposed language in the draft order on question two is clearly tied to Regulation K, and is not of wider ambit. I therefore do not accept the potential concerns that were raised by WRL in its submissions in relation to other regulators being somehow confused or affected by the terms of the declaration which is sought by JPM.

22. In my view, there is no other option of resolving the dispute under the shareholders' agreement which is before the court in a timely manner. I am, therefore, of the view that it is appropriate to issue the declaration in the terms sought by JPM.

23. I do not accept that the additional language sought by WRL should be included. However, to make it clear that Viva was not party to the proceedings, this, in my view, should be included in the recitals.

24. On the recitals, JPM sought to include a recital which it said was merely setting out the definitions in relation to Regulation K. In my view, that recital is too broad, and the definition of Regulation K can be incorporated into the relevant paragraph without it being necessary to widen the language, referring as it does currently, to:

> "a dispute as to … the applicability and interpretation of US banking regulations".

25. I also do not think it is necessary in order to understand the declaration to include the recital that JPM is an Edge corporation.

26. As regards the other US questions sought by JPM in the draft order, JPM submitted that it had sought to reflect the court's key findings so that the parameters of the exercise to be carried out by the valuation experts are clearly stated. It was submitted for JPM that the issues of US law have been in dispute for many months, and were ordered in the expert list of issues as requiring determination at the expedited trial, were addressed in the expert reports and in evidence at the trial, and it was therefore submitted for JPM that it was "helpful and necessary" for the court's findings on those issues to be declared to minimise the scope of disagreement going forward.

27. For WRL it was submitted that the valuation experts do not need to know the details in order to give effect to the judgment, and in any event the declarations proposed by JPM do not provide the relevant detail.

28. In my view, the fact that the questions were ordered in the expert list of issues as requiring determination at the expedited trial and were addressed in the expert reports and oral evidence, does not mean that it is appropriate for declarations to be made and, as noted above, the judgment left this issue to be determined at to the consequential hearing.

29. In relation to paragraph 6.2 of the draft order, JPM submitted that it would serve a useful purpose so that there can be no room for doubt as to the scope of permitted activities under Regulation K, and the valuation experts can see clearly what they are being told to disregard.

30. In my view, the proposed language of paragraph 6.2 serves no useful purpose. It merely sets out the law in general terms, and can therefore provide no real utility to the valuation experts.

31. In relation to paragraph 6.3, the 5% carve-out, JPM submitted that the court accepted Mr Newell's evidence on this issue, and found as a matter of fact that the relevant eligible investment standard is to be applied to each indirect subsidiary, and not simply to the top-tier acquired subsidiary on a consolidated basis. It was submitted for JPM that it was helpful and appropriate for the court's finding to be reflected in a formal declaration.

32. As already stated, in my view, merely because it was included in the list of issues does not mean that a declaration is appropriate, and I refer again to the passage in *FSA v Rourke*. I am not satisfied as to the purpose of this declaration and, its relevance to the dispute before the court given the court's findings as to the correct approach to valuation. If it does turn out to be a matter on which the valuation experts need guidance, then they can refer to the detailed judgment.

33. In relation to the declarations sought in paragraphs 6.4 and 6.5, the joint ventures and portfolio investments, JPM acknowledged that on joint ventures the dispute between the parties was limited by the time of trial. However, it was submitted that the court has resolved the dispute in JPM's favour and "accurately records the court's findings on the point". On portfolio investments, it was submitted for JPM that it was appropriate to make the declaration to "formally resolve the dispute between the parties".

34. I am not satisfied as to the utility of these declarations. To the extent that any dispute remained by the time of trial, the judgment is clear. I therefore decline to make those declarations.

35. Turning, then, to the other declarations sought by JPM in the draft order which were not the US law questions, paragraph 1 is agreed, and paragraph 3 leads on from paragraph 1. Paragraph 3 is, however, opposed by WRL, and in my view paragraph 3 should not be included because it risks creating confusion and lacks clarity. Paragraph 3 is, in my view, a shorthand summary of some of the provisions of paragraph 3 of schedule 1, and on that basis, in my view it is unhelpful and unnecessary to include it by way of a declaration.

36. In relation to paragraph 2, the dispute between the parties was whether to include the words, "It is an implied term of the SHA that ...". It seems to me that, for completeness, and to properly reflect the judgment, the words, "It is an implied term of the SHA that ..." should be included in the declaration.

37. Turning, then, to paragraphs 4 and 5 of the draft order, which relate to the appointment of the third valuation expert, these do reflect the findings in the judgment on the questions that were put to the court. In relation to paragraph 4 dealing with manifest error, I am satisfied that there is a utility, in the sense that this is a matter which has been ongoing before the ICC in relation to the First Option Exercise Period. In relation to paragraph 5, subject to the

rewording of the language to refer specifically to the fact that the conditions referred to in paragraph 4.1(ii) are not met, then I am content that the second declaration on the issue of the third valuation expert is also of utility and should therefore be made.

38. In relation to paragraph 7 and 8 of the draft order, as indicated in the course of the submissions, the language should, in my view, not refer to a party not being entitled declarations, but should refer to the claims for declarations being dismissed.

Dame Clare Moulder DBE **Thursday, 27 June 2024**
(**13:19** pm)

Ruling on Costs

1. Dealing, then, with the issue of costs. Under CPR 44.2(1) the court has a discretion as to whether costs are payable by one party to another. CPR 44.2(2) provides:

> "(2) If the court decides to make an order about costs -
>
> "(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
>
> (b) the court may make a different order."

2. WRL submitted that it was the successful party in the litigation. Accordingly, costs should follow the event, and JPM should pay WRL's costs of the proceedings, save that WRL accepted that it should pay the costs of the One Shot Issue.

3. It was submitted for WRL that the appropriate order therefore was an order that JPM pay WRL the costs of the proceedings, subject to a percentage discount to reflect JPM's success on the One Shot Issue. In support of its submissions, WRL relied (inter alia) on *Kidson v Lloyd's Underwriters* [2007] EWHC 2699 (Comm) at paragraphs [10] and [11]:

> "... the question of who is the "successful party" for the purposes of the general rule must be determined by reference to the litigation as a whole; ...The court may, of course, depart from the general rule, but it remains appropriate to give "real weight" to the overall success of the winning party... it is important to identify at the outset who is the "successful party". Only then is the court likely to approach costs from the right perspective. The question of who is the successful party "is a matter for the exercise of common sense"...Success, for the purposes of the CPR, is "not a technical term but a result in real life" ... The matter must be looked at "in a realistic … and … commercially sensible way"..."

4. For JPM it was submitted that each party has won on some issues on which it was seeking declarations, and lost on others, and this is not a case where one party has been successful overall. It was therefore submitted for JPM that the court should exercise its discretion to make a proportionate costs order, requiring WRL to pay two thirds of JPM's costs of the proceedings, and JPM to pay one third of WRL's costs of the same.

5. In relation to the issue of success, JPM in its written submissions referred the court to the decision of the Court of Appeal in *Atlasjet Havacilik v Kupeli* [2018] EWCA Civ 1264. From the judgment of Hickinbottom LJ I note the following passages which encapsulate the approach to be taken:

> [5] "... several points are worthy of note.
>
> "(i) In considering orders for costs, the court is of course bound to pursue the overriding objective ... i.e. it must make an order that deals justly with the issue of

costs as between the parties. Therefore, when considering whether to make a costs order -- and, if so, the order it makes -- the court has to make an evaluative judgment as to where justice lies, on the facts and circumstances as it has found them to be."

[8] "It is well-established that the question of who is the 'successful party' for CPR purposes requires a fact-specific evaluation by reference to the litigation as a whole..."

[9] In the context of private law claims, in BCCI v Ali (No. 4), …Lightman J said that:

"For the purposes of the CPR success is not a technical term, but a result in real life, and the question as to who has succeeded is a matter for the exercise of common sense."

[11] …"In deciding who is the successful party the most important thing is to identify the party who is to pay money to the other…"

6. This is not a case where one can decide the question of success by reference to who writes the cheque at the end of the day. JPM referred to the observations of the court in *Kupeli* on how to assess success in the context of group claims, but that, it seems to me, provides little assistance to the circumstances of this case.

7. On the expedited trial, both parties sought declaratory relief, and in the case of JPM injunctions. The relief which has been granted is in the form of declarations. No one writes the cheque. The court therefore has to evaluate success by reference to the litigation as a whole, and on a common sense basis.

8. In my view, the valuation dispute, issue 2, was up until trial the principal dispute: see [19] of the judgment. WRL won on the issue of valuation, [87], [90], and [104] of the judgment, encompassed by issues 2 and 3. In my view, although the court needs to consider the issues on which JPM was successful, and notably the issues of Regulation K and the One Shot Issue, this does not affect the overall characterisation that WRL was successful at trial.

9. The One Shot Issue was a major issue in terms of its potential consequences for the exercise of the JPM call option, but it did not affect the main issue of the determination of the Call Option Fair Market Value, which would have remained irrespective of the outcome of the One Shot Issue.

10. As to the US law questions, whilst JPM submitted that they were issues in dispute between the parties on which they have been successful, the court ruled that they should be included in the expedited trial, primarily on the basis that they would be relevant if WRL was wrong on its construction of the Call Option Fair Market Value. They were, therefore, a subsidiary, or next step in the determination of the value depending on the outcome of the construction issue.

11. Overall, therefore, in my view, WRL was the successful party on the expedited trial. The question for the court is, therefore, whether the general rule should be disapplied.

12. CPR 44.2(4) provides:

"In deciding what order (if any) to make about costs, the court will have regard to all the circumstances including -

"(a) the conduct of all the parties;

"(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful ..."

13. CPR 44.5(5) provides:

"The conduct of the parties includes –

"(a) …

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue…."

14. JPM submitted that WRL refused to concede that Viva was a subsidiary of JPM for the purposes of Regulation K, and refused to concede that JPM was correct in relation to the remainder of the Regulation K issues, despite the fact that there proved to be little between the experts on the majority of the points. It was submitted for JPM that the conduct should be reflected in the ultimate costs order.

15. WRL submitted that JPM has only obtained a declaration in relation to Viva's status as a subsidiary, and WRL proposed a percentage discount of 5% reflecting the limited time and expense which it said the One Shot Issue actually occupied.

16. In my view, looking at the question of partial success, in addition to the valuation issue, WRL was also successful on a number of issues that were ancillary to the principal dispute, namely: those relating to the appointment of the Third Valuation Expert, Issue 5(a), and (in part) Issue 5(b); the powers of the ICC, Issues 6 and 7; Issue 8(a), not to hinder the third valuation expert appointment; Issue 9, whether WRL was in breach by objecting to the appointment of the third valuation expert, and Issue 10, extension of the option period.

17. However, JPM was successful on the One Shot Issue, and on the majority of the US law issues, which remained in dispute at trial. In relation to the US law issues, they were issues in dispute, and were not render irrelevant by the determination of the construction issue in WRL's favour. See the judgment at [130].

18. Declaratory relief has been granted in relation to the question of whether or not Viva was a subsidiary for the purposes of Regulation K. In my view, however, the court should take into account in deciding the appropriate order for costs those issues on which JPM was successful, as reflected by the findings in the judgment, and irrespective of whether declarations have been deemed to be appropriate and granted.

19. I am of the view that JPM was not acting unreasonably in pursuing the Regulation K issues. Had JPM succeeded on the issue of construction, the US law questions would have needed

to be determined, and it was for that reason that the court took the view in furtherance of the overriding objective that the US law questions should be part of the expedited trial.

20. As to the conduct of WRL in pursuing the issue of whether Viva was a subsidiary, I note that WRL did not accept that Viva was a subsidiary, even though it appeared that Viva had accepted this (outside of the proceedings). However, WRL had a reputable expert who held a contrary view to JPM, and thus, although ultimately the weight which the court gave to the evidence of Professor Awrey was adversely affected by his approach in his oral evidence, WRL cannot, in my view, be said to have acted unreasonably in this regard.

21. CPR 44.2(6) sets out the orders which the court may make under the rule, but subparagraph (7) provides that before the court considers making an order as to a distinct part of the proceedings it will consider whether it is practical to make an order under paragraph 6(a), a proportion of the costs, or (c) costs from a certain date.

22. In my view, the appropriate costs order is not merely a reflection of the time spent, but as referred to in the course of submissions, has to reflect all the circumstances including the matters referred to in CPR 44.2(4) and (5).

23. The One Shot Issue was a very significant issue in terms of the call option, even though it was only raised at the last minute, and this is reflected in the amount of text devoted to this issue in the judgment.

24. The US law issues were very significant in terms of evidence, requiring US law written and oral evidence from the US bank regulatory experts, and even though the issues narrowed at trial, it still took up a substantial amount of time at the trial.

25. I refer back to Gloster J, as she then was, in *Kidson* at [10]:

> "The court's discretion as to costs is a wide one. The aim always is to 'make an order that reflects the overall justice of the case'."

26. In my view, in all the circumstances, the appropriate order is that JPM should pay 45% of WRL's costs.

Dame Clare Moulder DBE **Thursday, 27 June 2024**
(**13:50** pm)

Ruling on Claimant's Application for Permission to Appeal

1. JPM applies for permission to appeal in relation to the court's conclusions on issues 2, 3(a) and (b), and 5-11 of the Trial List of Issues.

2. I have considered the written and oral submissions and the draft grounds of appeal.

3. CPR 52.6(1) states that:

> "... permission to appeal may be given only where:
>
> "(a) the court considers that the appeal would have a real prospect of success; or
>
> "(b) there is some other compelling reason for the appeal to be heard."

4. I note that there is no requirement to demonstrate that success is probable, or more likely than not, and the test is the same as that which the courts apply when considering summary judgment, namely a realistic prospect of success.

5. In relation to the valuation dispute, issue 2, and issue 3, the submissions for permission to appeal on these issues repeat arguments which were before the court, and fail to grapple satisfactorily with the language of the Schedule, and in particular 3.7, which is clear beyond any doubt:

   - 3.7(a) sets out the fundamental basis for the valuation of the Group by its clear language that the business is to be valued for an arm's length sale and by reference to its open market value and not its value to any particular purchaser negotiated in a private sale. See [59] of the judgment.

   - 3.7(a) is reinforced by subparagraphs (c) and (d) which expressly require the valuation experts to determine the value by making no allowance for and disregarding any financial impact that may be expected as a result of JPM exercising the call option. See [60] of the judgment.

6. This interpretation is consistent with commercial common sense [85].

7. JPM's argument that the valuation cannot be prepared in time was not evidenced, and cannot outweigh the clear language [86].

8. The emphasis placed by JPM on the distinction between "*data inputs*" and the valuation is an emphasis which is not supported by the language of the Schedule. JPM seeks to create a structure which was not created by the agreement.

9. JPM's purported conclusion did not follow from the fact that there are two stages to the valuation process. As set out in paragraphs [100]-[102], the conclusion advanced for JPM

was contrary to the clear language. Paragraph 3.7 has to be read as a whole: [52] of the judgment. JPM's argument, in effect, ignored the language of 3.6 and 3.7: [89] and [100].

10. JPM could not overcome the clear language of the provisions read in context. Accordingly, in my view there is no realistic prospect of success on an appeal, and permission on issues 2 and 3 is refused.

11. Turning to Issue 5(a), condition precedent for the appointment of the third valuation expert, JPM submitted that:

> "Given the acknowledged lack of clarity in the drafting, JPM ... has a real prospect of establishing on appeal ... that its construction is to be preferred ..."

12. The court accepted in its judgment that the text is not coherent, ([226]), and thus the language cannot be interpreted solely by textual analysis. Commercial common sense does not provide real assistance in the competing interpretations: [230]. The context is, however, significant ([231]) notably the appointment of the original valuation experts at the outset.

13. JPM did not and does not have an argument with a realistic prospect of success to counter the contextual interpretation. Accordingly, in my view, there is no realistic prospect of succeeding on an appeal on Issue 5(a), and permission on this issue is refused.

14. As so Issue 5(b), whether manifest error is a condition precedent, JPM advances no real basis for their interpretation of the language as to how it interacts with the language of "*binding*". This ground also in my view therefore lacks any realistic prospect of success.

15. Issues 6 and 7 concerning the appointment by ICC of a third valuation expert and the alleged breach by WRL, Issue 9, all flow from Issue 5, and thus equally have no realistic prospect of success.

16. In relation to Issue 10, the extension of the option period, JPM submitted that the call option process would be left in a state of uncertainty if WRL could wrongly prevent the appointment of the third valuation expert, such that the valuation process is not completed within each option exercise period.

17. However, the uncertainty is not enough on the authorities to allow the court to imply the term for which JPM contend, see [276]-[278] of the judgment. The test is fact-specific, not one that can be answered by reference to what are said by JPM to be "analogous" authorities.

18. In my view, there is no realistic prospect of success on this issue.

19. For all these reasons, I find there is no real prospect of success on JPM's appeal, and permission is refused. JPM has, of course, the right to renew its application directly to the Court of Appeal.

Dame Clare Moulder DBE **Thursday, 27 June 2024**
(**13:57** pm)

Ruling on Respondent's Application for Permission to Appeal

1. Dealing, then, with the application for permission to appeal by WRL. I have set out the relevant test in CPR 52.6 above. WRL seeks permission to appeal the One Shot Issue. WRL also seek permission to appeal the declarations in respect of the Regulation K issues.

2. As I have indicated, I have read carefully the written submissions and the draft grounds of appeal and do not propose to set them out in detail now.

3. Dealing with the One Shot Issue, in its written submissions for permission to appeal, WRL repeats its arguments on the meaning of the word "exercise", which arguments were set out in the judgment, [305]-[313], and addressed in the judgment.

4. Standing back, it is clear that the approach of WRL is to take the words out of context, and not to consider the structure of the relevant provisions of Schedule 1, and thus the meaning of the relevant provisions in context.

5. Further, in its written submission, WRL misstates the court's approach to the wider context of the shareholders' agreement, [391]-[394], suggesting in their submissions that they were used to "trump" the provisions of the Schedule, and thus seeks to ignore the support which is undoubtedly derived from those provisions.

6. WRL's submissions in setting out the findings of the court on commercial common sense also appeared to go further than the judgment, in that WRL stated:

> "... would appeared to have held that the Multi Shot Construction reflected business common sense and the One Shot Shot Construction did not do so ..."

WRL then submit that the court has fallen into error.

7. It is clear that what the court actually held was that the One Shot Construction does not accord with the clear structure of Schedule 1: [401] of the judgment.

8. In my view, there is no realistic prospect of a successful appeal on the One Shot Issue, and permission to appeal is refused.

9. WRL also seeks permission to appeal the court's decision to grant a declaration that Viva is a subsidiary of JPM for the purposes of Regulation K. WRL submitted that the English court should not grant a declaration, either because such a declaration would serve no useful purpose, or on the ground of comity.

10. It was submitted that a declaration by the English court would be a thing "writ in water", since it is only the decision of the regulator which counts. It was submitted for WRL that the foreign regulator could have been asked by the party seeking the declaration to resolve the issue, and there was, and is, no necessity for the English court to rule on the issue.

11. The court in its judgment dealt with WRL's submissions on the position of the Federal Reserve and the absence of Viva by reference to the authorities: [116]-[135]. As set out in the judgment, the dispute arises out of an arrangement between shareholders under an agreement governed by English law, and the purpose of the proceedings in the expedited trial is to enable the dispute between shareholders as to how the valuation exercise is to be carried out to proceed within the prescribed timetable. A declaration does, therefore, serve a useful purpose. It is not intended to obtain an advisory opinion to be used in foreign proceedings or for the foreign regulator, and thus no concern based on comity precludes a declaration.

12. WRL have not identified any authority which requires the court not to make a declaration in the circumstances of this case, and it is a fact-specific exercise of the court's discretion. In my view, there is no realistic prospect of the court's exercise of discretion being overturned in the circumstances. Permission to appeal on this basis is, therefore, refused.

13. In the alternative, WRL submitted that there is a compelling reason for the appeal to be heard: guidance can be provided as to whether, and if so in what circumstances, the English court should rule as to matters that are exclusively governed by foreign regulators. It was submitted that the decision on this aspect of the instant case is without precedent: no English decision addresses whether and when it is appropriate to grant a declaration as to what a foreign regulator would determine in a particular case. Further, the court distinguished what is said to be the relevant English authority, *Milebush Properties v Tameside*.

14. It is clear on the authorities that declarations are discretionary and fact-specific. The Court of Appeal could not, therefore, provide guidance as to whether and in what circumstances the English court should grant a declaration, even where there are matters which are arguably the preserve of the foreign regulator.

15. Permission to appeal, therefore, on the basis of "some other compelling reason" is therefore also refused.

16. WRL has the right to renew its application directly to the Court of Appeal.