Neutral Citation Number: [2022] EWHC 481 (Ch)

Claim No: BL-2021-001153

Date: 7 March 2022

Before :

Mr George Bompas QC sitting as a Deputy Judge of the High Court

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

Between:

GARNET COMMERCE LIMITED

Claimant

- and -

(1) VRFB HOLDINGS LIMITED

(2) ENEROX HOLDINGS LIMITED

Defendants

- and -

2289609 ALBERTA LIMITED

Third Party

- -
- -

Alan Gourgey QC & Thomas Robinson (instructed by Quinn Emanuel Urquhart & Sullivan UK LLP) for the Claimant and the Third Party
Anna Boase QC & Patrick Harty (instructed by Gowling WLG (UK) LLP) for the First Defendant

Hearing dates: 18 to 21, 24 & 25 January 2022

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APPROVED JUDGMENT

Mr George Bompas QC:

Introduction and Parties

1. In this action I have to decide whether, as claimed by the Claimant (Garnet Commerce Ltd ("Garnet")), the First Defendant (VRFB Holdings Ltd ("VRFB")) is in material breach of their Joint Venture Agreement ("the JVA") dated 11 December 2020. I have also to decide whether, as VRFB claims, Garnet is in material breach of the JVA.

2. The JVA concerns these parties' venture in relation to the Second Defendant, Enerox Holdings Ltd ("EHL") of which they were, at the time the JVA was made, the only shareholders, each holding 50% of the EHL issued share capital. EHL is itself the 100% holding company of an Austrian company called Enerox GmbH ("Enerox"), EHL having been formed to acquire shares in that company. Enerox was itself formed to acquire and develop an already existing business producing industrial vanadium redox flow batteries.

3. EHL is a party to this action. Although represented, with solicitors on the record, EHL has not participated in the trial before me.

4. Garnet is a company incorporated in Alberta. It belongs to Mr Dean Peterson, its sole shareholder. He is a Canadian businessman. There is no evidence before the Court as to the identity of any of the appointed officers of Garnet, although it appears to be common ground that Mr Peterson must have authority to manage it, quite possibly as sole director. Garnet has a wholly-owned subsidiary, 2289609 Alberta Ltd ("Alberta"), of which Mr Peterson is sole director. Alberta's involvement I explain later.

5. The genesis of VRFB is a little more complicated. It is a Guernsey-registered company formed on 3 December 2020, with a Guernsey corporate director, Oak Directors Ltd. It is unlikely that Oak Directors Ltd ever did anything as VRFB's director without being instructed by someone on behalf of VRFB's parent: there is very little evidence of Oak Directors Ltd having played a material part in the events described in this judgment, other than as signatory of formal documents to which VRFB was party. On the other hand Mr Mikhail Nikomarov, referred to below, appears to have stood as a practical matter in the position of VRFB director.

6. At the time the JVA was made VRFB was largely owned by a company called Bushveld Energy Ltd ("BEL"), a company incorporated in Mauritius. Mr Nikomarov is a significant shareholder in BEL. However, BEL is a subsidiary of an AIM-listed company called Bushveld Minerals Ltd ("BML"), another Guernsey registered company. BML owns mines in South-Africa producing vanadium. In this judgment I use the expression "Bushveld" to refer indifferently to BML and BEL.

7. Until late April 2021 VRFB had only two shareholders, the second being a company called Acacia Resources Ltd ("Acacia"). Acacia had come into the picture, it appears, in 2020 in circumstances described below, when it gave assistance to BEL in providing VRFB with the resources then needed to support investment into EHL.

8. In addition it appears that both the Garnet and the Bushveld representatives considered various sources of funding for EHL in the second half of 2020. In this context the Bushveld side had been in touch with an entity called Mustang Energy plc ("Mustang").

9. The impetus for the present proceedings was Mustang's US$7.5 million subscription of a 22 % shareholding in VRFB on 26 April 2021 to join with BEL and Acacia by becoming VRFB's third shareholder. This subscription was made in the context of, and to enable VRFB to complete the following day, VRFB's $15 million participation in EHL's raising of $30 million by an offer of shares for subscription by its shareholders ("the 2021 Funding Round").

10. Pursuant to the JVA, EHL was to have three directors. For meetings of the Board there must be a quorum comprising the appointees of Garnet and VRFB. In general the JVA entrusts management of EHL to the Board, with board decisions requiring a simple majority. Of the three directors:

    i) One was (and is) Mr Edward Otto, chairman of EHL's Board. He was Garnet's appointee. Mr Otto's connection with Garnet and Alberta is, he says, as "advisor". He is an investment professional with an engineering qualification and background. At all times he was in close contact with Mr Peterson in relation to EHL.

    ii) Another EHL director was (and is) Mr Nikomarov. He was the appointee of VRFB. Although not formally appointed an officer of VRFB, he frequently spoke on behalf of VRFB and for the purposes of these proceedings VRFB accepts that his knowledge is to be attributed to VRFB.

    iii) The third director of EHL was Mr Prince. He was appointed with the agreement of Garnet and VRFB to be the Independent Director as defined in the JVA (that is, a director appointed by the incumbent directors with shareholder approval, who is "*independent from and in no manner, directly or indirectly, an affiliate to any of the Shareholders and/or to any Director"*, and who has relevant sector experience).

11. The JVA itself came to be made after a sequence of previous agreements between the principal protagonists. Indeed, the JVA has lengthy recitals concerning the origin and evolution of EHL, in particular describing various agreements and steps by which Enerox shares were acquired: EHL's involvement started in March 2020 with EHL's formation; but the JVA recites

matters occurring even before then. They explain that EHL was established to acquire and hold at least 90% of the registered share capital of Enerox. Clause 2.1 of the JVA supplements this by explaining that "*The JVC has been incorporated for the purpose of acquiring 100% … of the entire share capital of Enerox*".

12. The reason for the difference between the 90% and the 100% appearing in the JVA appears in the narrative later in this judgment, when I will need to explain somewhat more of the way EHL was formed and how it functioned during 2020: this is part of the background to the making of the JVA, as well as to the development of the matters complained of by Garnet in its claim against VRFB.

13. Funding for Enerox was plainly a significant issue from the very outset of the parties' interest in Enerox and EHL: investment to develop the Enerox business needed to be decided on and arranged. This was also a difficult issue for the parties throughout, their attitude being quite different and with Garnet being constantly dissatisfied with the Bushveld side over the provision of funding. Indeed, the immediate cause of the present dispute is the way in which VRFB funded itself in order to provide its half share of the US$ 30 million provided to EHL in the 2021 Funding Round. This was an initial funding round following the making of the JVA. While the JVA contemplated a listing to be aimed for by the end of 2021, if possible, it also made provision for further EHL funding to be secured before then.

14. The 2021 Funding Round raised the EHL issued share capital by 38,830 new shares from its previous total of 22,246 shares of £1 each held equally by Garnet and VRFB. Of the 38,830 shares half were issued to VRFB, and the other half were in the event issued to Alberta rather than Garnet. The $30 million issue price was arrived at by a formula, set out in the JVA and linked to amounts previously invested by the EHL shareholders, and not by any process of negotiation or assessment of value.

15. Garnet's claim against VRFB may be summarised as being:

    i) that VRFB's issue of the shares to Mustang for the $7.5 million subscription price was seriously damaging to EHL's future prospects of raising funding or securing a listing, and

    ii) that what made this a breach of the JVA was:

        a) that to VRFB's knowledge it involved Mustang in a breach of contract with EHL arising from an agreement of 28 January 2021 ("the Agreement"), or

        b) that VRFB knowingly made false representations to Garnet and EHL that funds for its own contribution to the 2021 Funding

Round would not derive from new shareholders in VRFB "*but rather from the existing consortium of investors in [EHL], and in particular by [BEL] selling assets and by Acacia Resources Limited committing to fund* ", these representations being made by Mr Nikomarov by an email of 16 March 2021 and at a Board meeting of EHL on 1 April 2021, or

c) that VRFB failed to use powers in relation to EHL to procure provisions of the JVA to be given full force and effect according to the spirit and intention of the JVA, with the consequence that VRFB maintained its proportionate shareholding in EHL with Mustang as a VRFB shareholder.

16. I shall return later to the detail of Garnet's claim as stated in its Re-amended Particulars of Claim, its Response to VRFB's Request for Further Information and its Amended Reply. I say at once that Garnet is not claiming to have rights under the JVA by reason of want of good faith on the part of VRFB. Serious criticisms are made of VRFB's conduct in relation to EHL and the joint venture with Garnet; but the claim rests simply on alleged breach of two clauses of the JVA.

17. A striking feature of the Garnet claim is that its core lies, not in what is summarised as particulars of VRFB's allegedly wrongful conduct giving rise to the breach of the JVA (para 15(ii) above), but rather in the fact of the Mustang share subscription with its attendant implications for EHL's future (para 15(i) above). Yet Garnet's pleaded case is <u>not</u> that Garnet's claim can be sufficiently established without Garnet having succeeded in proving at least one of the elements of the alleged breach (that is, one of the matters in para 15(ii))). I return to this at various places in this judgment.

18. Another feature is that the false representations relied on by Garnet (para 15(ii)(b) above) are not alleged to have been made dishonestly. Garnet is not making any claim in fraud or deceit.

19. Further, Garnet's claim treats the Mustang $7.5 million investment into VRFB as objectionable (para 15(i) above), while giving little explicit credit for the fact that it enabled VRFB to complete the 2021 Funding Round so that EHL secured the full $30 million which Mr Otto and Mr Prince had regarded as desirable, if not necessary, for EHL and had caused EHL to call for. However, the counterfactual, the absence of the Mustang investment into VRFB, is addressed in two ways by Garnet, suggesting that EHL's having the $30 million as it came to be provided to EHL was better than EHL's having only $22.5 million.

i) One plea, linked to VRFB's failure to use powers in relation to EHL (see para 43(d) of the Re-Amended Particulars of Claim, a paragraph which refers to "*the spirit and intention of clause 7 of the JVA [being] complied with*") is that had the Mustang investment not been made, VRFB would

not have been able to contribute its full $15 million share, with the result that VRFB's "*control of EHL would have been reduced as the shortfall would have been taken up by Garnet and/or a third party*". This is premised, therefore, on a conclusion as a matter of fact that the $7.5 million shortfall would indeed have been made good by either Garnet or a third party or both. (Presumably, having regard to clause 7.11 of the JVA, discussed below, the third party is contemplated as coming into the picture only if Garnet would not or could not have taken up the whole of the shortfall.)

ii) Another plea, linked to Mustang's alleged breach of the Agreement in investing in VRFB, is that VRFB should have instead required Mustang "*to invest as a third party into [EHL] as envisaged by clause 7.11 of the JVA*". It may be, however, that this contention is no more than an aspect of the previous plea, with the proposition being that Mustang should have been refused by VRFB, unless as a candidate to be a third party investor taking up any shortfall from shareholders in the 2021 Funding Round, there being no case that in fact there would ever have been a Mustang investment in EHL if VRFB had refused Mustang. (I should say here that Ms Boase QC, Leading Counsel for VRFB, submitted in her closing address – and I accept – that there was no prospect of Mustang being accepted by EHL as a direct investor into EHL. If, in the 2021 Funding Round, any outside investment were to be taken by EHL, it would not have come from Mustang.)

20. A key aspect of Garnet's claim is the Agreement of 28 January 2021, to which I have referred already. The Agreement described itself as a "*non-disclosure and non-circumvention agreement*". By its terms it was made in connection with, and to assist the parties in exploring, an acquisition of EHL shares by Mustang from EHL: this follows from the word, "*Purpose*", used in the Agreement with a defined meaning, namely the purpose, and exclusively that, of enabling one party (relevantly Mustang) "*to consider a potential transaction with*" the other (that is EHL) "*in terms of which [Mustang] may acquire shares in EHL*". The words used in the definition of "Purpose" are, in my judgment, quite explicit as to parties to and nature of the potential transaction there described.

21. In these proceedings Garnet contends that Mustang was in breach of the Agreement when it subscribed for and thereby acquired from VRFB shares in VRFB, an EHL shareholder, and not EHL shares from EHL, and that by reason of this breach VRFB was in breach of the JVA when it issued shares to Mustang in return for Mustang's subscription (para 15(ii)(a) above). Mustang is not a party to these proceedings and is not being sued by EHL for any breach of the Agreement. But still Garnet relies on an alleged breach as a cornerstone for its claim against VRFB.

22. The immediate cause of VRFB's claim against Garnet, and Alberta as additional defendant, is the action of Garnet on 29 June 2021 in declaring that VRFB was in material breach of the JVA, serving a Default Notice to require a mandatory

sale of VRFB's shares in EHL, and attempting to remove Mr Nikomarov as an EHL director (this attempt being in exercise of rights claimed to have been given by the JVA by reason of VRFB's material breach of the JVA and the service of the Default Notice). VRFB contends that Garnet was itself in material breach of the JVA by what it did. VRFB further alleged, but without putting forward any particulars, evidence or argument in support of the allegation, that "*Garnet acted in breach of clause 2.2 in that it sought to promote its own interests at the expense of those of EHL and Enerox*".

23. The questions for decision are:

i) Was Mustang in breach of the Agreement?

ii) Was VRFB in breach of the JVA, by reason of any of the matters in paragraph 15.ii) above?

iii) Was any VRFB breach of the JVA material and capable of supporting the relief claimed by Garnet alone?

iv) Conversely, was Garnet in breach of the JVA by what it did in response to the claimed VRFB breach, and, if so, was the breach material and capable of supporting the relief claimed by VRFB against both Garnet and Alberta?

24. The answers to these various questions require detailed consideration of the terms of the JVA and the Agreement with a view to the interpretation of these two contracts. For this purpose I have been helpfully reminded by both Mr Alan Gourgey QC, Leading Counsel for Garnet and Alberta, and Ms Boase of the applicable principles of interpretation. Save in relation to a couple of provisions of the JVA, where there is some elaboration needed (see later), the essential principles need no detailed exposition in this judgment: they are entirely familiar and also are common ground between the parties. In their written arguments I have been referred to passages from the judgments in Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] AC 1173, Arnold v Britton [2015] UKSC 36, [2015] AC 1619, Rainy Sky v Kookmin Bank [2011] UKSC 50, [2011] 1 WLR 2900, and Nord Naptha Ltd v New Stream Trading AG [2021] EWCA Civ 1829 at [31-33].

25. With these passages in mind, I would summarise the object of the interpretation exercise in the present case as being to determine the meaning the parties to the relevant contracts would be thought by a reasonable reader, with an understanding of the context, to have intended their language to convey.

26. At the trial there was written and oral evidence from each of Mr Otto, Mr Peterson and Mr Nikomarov. As appears from what I say later, I am not able to accept that the evidence of each of these witnesses of fact was always given

with absolute accuracy, although I accept (subject to my comments in the next paragraph) that all were trying to be truthful. Mr Otto and Mr Nikomarov exaggerated in part, unsurprisingly being somewhat partisan; while I think Mr Peterson (and this is no way intended as a criticism) was less carefully prepared and his memory not always perfect.

27. Mr Nikomarov's evidence on two issues, issues on which his veracity is central, needs particularly careful assessment. These issues are directed at his understanding of the Agreement, and what he might have thought concerning a Mustang breach of the Agreement by its investing in VRFB, and as to his state of mind when he made statements complained of by Garnet as being false.

28. There was evidence from two experts, Dr Marc Zenner and Mr Scott Baxter, who were cross-examined on their reports. I comment later on their evidence.

29. In what follows:

i) I first set out events leading, and providing the background, to the making of the JVA and the facts relevant to the issues in the case.

ii) I describe the material provisions of the JVA.

iii) I then I continue with a narrative of the facts leading up to the making of the Agreement on 28 January 2021.

iv) I then describe the Agreement and give my conclusions on Garnet's claims concerning Mustang's alleged breaches.

v) From early February 2021 down to the end of April 2021, the 2021 Funding Round was going forward as a simple contribution of $30 million to be found by the two parties, Garnet and VRFB, each subscribing for shares in EHL and without any outside investment into EHL. I describe the events of this period, as well as of the following couple of months, in the course of which I give my conclusions concerning the misrepresentations said to have been made by Mr Nikomarov.

vi) I then set out my conclusions concerning the breaches of the JVA contended for by both sides.

vii) Finally, I consider the impacts of the Mustang investment and the contentions that these were such as to cause VRFB's beaches of the JVA to have placed VRFB in material breach of the JVA.

The background to the JVA

30. As mentioned, BML is a producer of vanadium. Vanadium has various industrial applications, but relevantly for present purposes can be used for making rechargeable industrial-scale batteries with characteristics said to be well-suited to present day needs for sustainable energy and thus offering business opportunities. These batteries, vanadium redox flow batteries, are a relatively modern development.

31. BEL was formed in 2015 as a BML subsidiary to promote the use of vanadium in power applications. From BML's perspective, the wider the use of vanadium in industrial applications, the greater the demand for BML's vanadium and the greater the stability in vanadium pricing.

32. Mr Nikomarov, BEL's minority shareholder, is its CEO. He has connections in the field of energy storage and applications of vanadium. His evidence, which I accept on this point, is that BEL's strategy was to take minority interests in VRF battery manufacturers, aiming to be able to supply to them vanadium electrolyte and other battery components. One aspect of BEL's strategy was to make initial investment into the manufacturers which would assist their growth and their raising of further funding. The first manufacturer in which BEL invested in this way was a company which came to be Invinity Energy Systems plc ("Invinity").

33. It is clear that BEL has been throughout well-integrated into the group of companies of which BML is the holding company; and VRFB has been in much the same position as a BEL subsidiary.

34. A key Bushveld officer, who was fully engaged in the Bushveld (and VRFB) involvement with EHL and Garnet, is Mr Fortune Mojapelo. He is BML's CEO. He had many dealings with Mr Peterson about EHL and Enerox. Mr Peterson regarded him as being able to speak for VRFB as well as for Bushveld; and I have no doubt that Mr Peterson was right to do so. To make an obvious point, when Mr Nikomarov was absent on leave after about the first week of April 2021 Mr Mojapelo will have been the VRFB decision maker.

35. Another individual within Bushveld who was involved with EHL matters is Mr Ken Greve: his expertise was corporate development, including mergers and acquisitions. Other Bushveld individuals are referred to elsewhere in this judgment.

36. By about 2014 a VRF battery manufacturing business had been started in Austria. In the first half of 2018 it had come to be owned by Enerox, with some €4 million of raw materials and consumables, work in progress and finished goods, according to a balance sheet as at 30 June 2018. Enerox's audited accounts for the year to 30 June 2019 record that Alexander Schoenfeld had been appointed managing director starting on 1 July 2018. The audit certificate

on these accounts is dated 16 March 2020. It was expressed as giving a "Negative Opinion" as a result of the risk of illiquidity. This was expressed as follows:

> "*The preparation of the annual financial statements was based on the going concern assumption. Due to the reported annual loss as of June 30, 2019 amounting to EUR 4,734,042.96 the Company is at risk of illiquidity. The Company's going concern can only be ensured by contribution of liquid funds. A relevant binding financing commitment is not given at the date of issue of this negative opinion*".

37. By early 2019, at the latest, Enerox had come to be owned by a Canadian company called Cellcube Energy Storage Systems Inc. Also, early in 2019 (as I accept) BEL received a proposal from this business for a battery for a mini-grid project then under consideration; and this led to BEL considering an investment into Enerox.

38. On 12 November 2019, BML announced that it had signed a term sheet for the purchase of the entire issued share capital of Enerox by a consortium led by BEL, with an initial purchase of 24.9% of Enerox's shares for €1.65 million followed by the subsequent purchase of the remaining 75.1% for €10.85m, subject to technical, legal and financial due diligence. This same announcement noted that Enerox had installed batteries at over 130 sites globally. It also explained that BML and Enerox were to enter into an agreement for BML to have a right of first refusal to supply vanadium products to Enerox on the same material terms as any other supplier.

39. The "consortium" referred to in the 12 November 2019 announcement included Bushveld and Garnet. The recitals to the JVA suggest that at this time the parties dealing with Cellcube in the acquisition of shares in Enerox were only Bushveld and Garnet. Also, the principal individuals on the purchaser's side were Mr Mojapelo, Mr Peterson and Mr Otto. According to Mr Otto's written evidence, it was agreed at the time between Mr Mojapelo and Mr Peterson that Garnet and BEL would initially "*own the business on a 50/50 basis, and would seek to bring in third party investors down the line*". I have no doubt that Mr Otto's reference to "the business" is simply shorthand for the company owning the business.

40. Initially 25% of Enerox was purchased by BML and Garnet. EHL was incorporated on 24 March 2020, with BEL and Garnet each holding half the issued share capital, and thereafter by about the end of July 2020 EHL acquired further shares in Enerox, along with the original 25% stake, so that EHL then held some 90% of the Enerox capital.

41. It is apparent from the 12 November 2019 announcement that a feature of the consortium acquisition of Enerox shares was to be the provision of working capital to Enerox. Mr Otto's evidence, which I accept, is that even in 2019 and continuing thereafter Bushveld and Garnet saw that Enerox would require

capital to ramp up the Enerox production and business. By the middle of 2020 the pressure for further capital for Enerox was intensifying. The negative opinion on Enerox's audited accounts speaks volumes: quite plainly any outsider giving consideration to Enerox as an investment opportunity or as a business counter-party would not find comfort from such accounts. The pressure to provide support for Enerox coincided with the onset of the Covid-19 Pandemic, which evidently placed Bushveld under its own financial stresses.

42. I have already drawn attention to the audit opinion given on Enerox's accounts to 30 June 2019. In the events which followed after the middle of 2020 until May 2021 the question whether a similar opinion could be avoided for the audited accounts to 30 June 2020 was a matter which loomed large. Avoiding such an opinion underpinned much of the activity. As it turned out the audit report, dated 6 May 2021, did not give a negative opinion. So far as illiquidity was concerned, the report explained: "*… Due to the net loss of EUR 4,734,042.96 reported as of June 30, 2019, the company was threatened with insolvency. Due to payments of the shareholders into the equity of Enerox GmbH for the financial year ending on June 30, 2020 and additional financing commitments, the company's ability to continue as a going concern was secured.*" The date of this report was shortly after the receipt by EHL, on 27 April 2021, of the final $20 million of the $30 million total raised in the 2021 Funding Round.

43. An email of 20 August 2020, captioned "*Project E Budget/monthly breakdown*" and passing from Mr Nikomarov to Mr Schoenfeld, with copies to Mr Peterson, Mr Mojapelo and Mr Otto, explained that "*The shareholders of EHL are committing USD $10m to be funded to Enerox over the next roughly 6 months, ramping up as follows …*". This email appears to be the culmination of a budget setting discussion with Enerox and its management. In the email there followed, after the quoted text, a list of months, starting with September and finishing with February, with amounts starting at $1m and finishing with $2m. The email indicated that this could be adjusted to fund faster, as there was $1m in hand. It went on to say that Mr Schoenfeld should work towards a $18m spend "*as per the overall spending plan for 2021 for Enerox"* which could be funded by additional shareholder contributions "*as a backstop*", but with Enerox being encouraged to pursue working capital facilities for Q4 2021 as much as possible. The email concluded by saying the next tranche of funding of $1m was expected to be wired by the end of August 2020.

44. Also in August, on 2 August 2020, Bushveld entered into an agreement with a company called Acacia Resources Ltd ("Acacia") for the latter to contribute to Bushveld's meeting of its share of the Enerox capital requirement. Garnet was told of this not long after, and made no objection to Mr Nikomarov or Mr Mojapelo.

45. However, it is clear that even by the middle of August 2020 the Bushveld side and the Garnet side were ceasing to be aligned. Illustrative is an email of 18 August 2020 from Mr Otto to Mr Mojapelo and Mr Peterson. This, sent after an email of the same day from Mr Nikomarov, reads as follows:

> "*Mikhail's email is not progress, it's reiterating his confusion and obstruction from a week ago. I can not waste another month listening to Mikhail say, 'That's wrong', while proposing no path forward. If he disagrees, please point out what's wrong and propose a fix. Please confirm you are going to get the budget and fund plan sorted by Friday, so that we can fund September 1st*."

46. Mr Otto has in his written evidence referred to this email as having been sent in circumstances where Mr Mojapelo and Mr Peterson had, in July 2020, agreed each to provide Enerox monthly funding of a total of up to $10 million (that is some $20 million in all), this being sufficient to fund the Enerox business for 12 to 18 months (and so to from July to December 2021), and where Mr Nikomarov was now denying the monthly funding commitment. Mr Peterson's evidence is similar concerning the provision by each of $10 million. Yet Mr Otto sent Mr Mojapelo an email on 1 September 2020 referring to an agreement of the end of July 2020 for Bushveld and Garnet together to provide $10 million, and for a further $10 million to be provided by way of third party financing that Bushveld and Garnet would seek out.

47. It is apparent that, whatever may have been the rights or wrongs of what transpired in July and August 2020, only shortly after the email of 20 August 2020 to which I have referred the fracture in the relationship between the parties widened, with the increasing stress in relation to financing. Mr Peterson's email conveys that from Garnet's perspective Bushveld, doubtless as a result of its own financial difficulties, was failing to honour its commitment. Further, Bushveld was causing frustration to Garnet by refusing to let Garnet have a greater interest in Enerox in return for Garnet's meeting of its commitment and keeping Enerox funded.

48. Bushveld's involving Acacia was in the course of a search which was being carried on by Bushveld, starting earlier in the Summer of 2020, to find outside investors to join in the Enerox venture. To this end Bushveld enlisted the help of a financial advisor called Iridis AG with whom it entered into a non-disclosure agreement provided by Mr Nikomarov. The idea appears to have been that the non-disclosure agreement covered information to be provided by Bushveld to Idris for the latter to use in soliciting investment into Enerox or Bushveld. This form of non-disclosure agreement became a template used on other occasions by Mr Nikomarov, including with Mustang in September 2020.

49. Also, in August 2020 Mr Mojapelo began discussions with Mustang, as appears from a WhatsApp chat of that time between Mr Mojapelo and Mr Nikomarov. Mustang was a special purpose acquisition vehicle, a SPAC, with a listing on the Standard List of the London Stock Exchange's Main Market. Its capitalisation was just £750,000. Its managing director was Mr Dean Gallegos. The CVs of its directors suggest that they were experienced in mining, minerals and energy industries, among other things. Its stated purpose was to seek an acquisition in the energy or natural resources sector. That said, a Mustang IPO Presentation of July 2019 conveys distinctly that its focus was to be on oil and gas projects, aiming to acquire "*working interests in low-risk, proven oil and*

gas properties". An issue, on which I shall have to make findings, concerns Mustang's qualities as an investor, direct or indirect, in EHL.

50. On 3 September 2020 BEL, Acacia and Mustang entered into a non-disclosure agreement in a similar form, albeit with numerous material differences, to the Agreement (below). This agreement, so it has been submitted on behalf of Garnet, demonstrates that "*Bushveld wished to keep control of Mustang as a source of investment*". However, it did not contain a non-circumvention provision, and seems to have been concerned to give BEL and Acacia the right to restrict the use which could be made by Mustang of information provided to it by BEL or Acacia.

51. Thereafter, on 6 September 2020, Mr Mojapelo sent Mustang a variety of materials concerning Enerox and VRF batteries. These included a Bushveld presentation document describing itself as an abridged information memorandum dated 14 May 2020, and a Bushveld teaser document dated 27 May 2020, both being described as being "*of Enerox GmbH*". These described Enerox and its product. One page of the information memorandum contained a detailed income statement and selected cash flow items for Enerox over the period from 2018 to 2029. This statement was based on a Bushveld produced model, described later, but plainly derived from Enerox information, as was other information (for example Enerox's "pipeline" of supply opportunities for its products).

52. At this point it is convenient to deal with a submission made by Mr Gourgey on behalf of Garnet. Neither Mr Mojapelo nor Mr Gallegos was called as a witness to give evidence at the trial. Mr Gourgey suggested that this should be a ground for making, or supporting the making, of certain findings relating to Mustang and its involvement. Adverse inferences, according to Mr Gourgey, should be drawn from missing evidence.

53. Ms Boase drew to my attention the judgment of Cockerill J in Magdeev v Tsvetkov [2020] EWHC 887 (Comm) at [154] in which there was a succinct statement of principles relating to the drawing of inferences from missing evidence. Ms Boase's submission was that applying these principles the present case was certainly not one in which conclusions should be based on the absence of direct evidence concerning Mustang's involvement. I agree with this, subject to one point which I address later. This concerns the question of the use made by Mustang of certain information concerning Enerox which (it is common ground) had been provided to it and whether therefore there was a breach of the Agreement. My conclusions on the use made of the information are not arrived at on the basis that a relevant witness has not been called so that adverse inferences are to be drawn, but by reference to the probabilities on the basis of the evidence before the Court.

54. Among the EHL consortium there was an aspiration to find a way for EHL to become publicly listed, albeit Garnet and Bushveld differed as to the time this should happen. A route for a listing would be to have a SPAC such as Mustang

acquire the issued share capital of EHL in a reverse takeover and IPO of Mustang shares. On 16 September 2020 Mr Mojapelo sent an internal Bushveld email describing such a route. According to Mr Nikomarov other structures involving a Mustang investment were considered as time passed.

55. Meanwhile matters continued with Mustang. On 1 October 2020 Mr Mojapelo sent to Mr Gallegos a document which he described as "*the Enerox-Invinity comparison as promised*". This document contained some information which had previously been provided to Mustang and which is not complained of by Garnet, and some which came to be published later. But while the information in itself may be bland, that does resolve the question which I have just referred to. That question I address later.

56. On 8 October 2020 Mr Mojapelo introduced to Mr Otto the reverse takeover and IPO suggestion involving Mustang. This email explained, "*We have recently discussed the potential listing of EHL in the shorter term to assist in sourcing the significant additional funding Enerox will require going into 2021 as well as to take advantage of the strong investor interest in energy transition plays.*" It went on to explain positive features said to be enjoyed by Mustang and to set out detailed suggestions for the proposed transaction. Mr Otto's reply was terse: "*Fortune, Post conclusion of the JVA and Board ramp up we can discuss when an IPO should be pursued. What is the latest on Bushveld's missing October payment?*"

57. The reference in Mr Otto's email to conclusion of the JVA was because the parties were at the time in the process of negotiating and concluding the terms of the JVA. Also, as is apparent from Mr Otto's question, Garnet continued to believe that Bushveld was failing to honour its funding commitments to EHL.

58. Also, at this time there were other matters unfolding.

i) First, it was being planned to keep Acacia's investment alongside BEL's by having a new company, a company which turned out to be VRFB, formed to take BEL's shares in EHL and to have BEL and Acacia as shareholders in the new company. In the event VRFB was formed on 3 December 2020, shortly before the making of the JVA.

ii) Second, Mr Nikomarov had learnt that Alberta had acquired from Cellcube the final 10% of EHL's share capital. On the Bushveld side it was believed that this acquisition should have included them, and that Garnet had failed to invite them to join. On the Garnet side it was said at the time, in an email of 6 October 2020 from Mr Peterson, that the acquisition had been by Garnet and had taken place after he had "*offered to both Mikhail and Fortune*" for them to take part. When the JVA came to be made it provided for the Garnet held 10% of Enerox to be passed over to EHL, thereby resolving this particular difference between the parties. However, it seems to be accepted that, after all, Mr Peterson had

not invited Bushveld to join in the purchase: on this point Garnet amended its Reply shortly before the trial to remove the allegation that "*At the point at which it became clear that Cellcube's 10% stake in Enerox could be acquired, Mr Peterson again contacted Mr Mojapelo to ask whether he was interested in jointly purchasing that stake*".

iii) Third, Bushveld gave consideration internally, in the first half of December 2020, to a proposal which could result in Mustang becoming majority owner of EHL with a direct shareholding, and taking over the shares of BEL and Acacia, or of VRFB, in return for Mustang shares, while "*an offer to Garnett (sic) to vend its shares in EHL into Mustang will be considered*". Mr Nikomarov was included in Bushveld emails concerning this plan, the "Orion Proposal", a plan which surfaced again the following year.

59. It might have been thought, from the narrative of events which I have given so far, that the impetus for further investors to join the initial consortium of Bushveld and Garnet pursuing the acquisition and development of Enerox was exclusively from the Bushveld side. In fact Bushveld's engagement with Iridis was part of an exploration of the possibility of outside investment in which both sides engaged. So, by way of example:

i) By mid-2020 a draft term sheet for a private placement and been prepared, and under cover of an email of 21 July 2020, was circulated to a Canadian vanadium producer called Largo Resources with whom the parties were in discussion.

ii) Again, during October 2020 Mr Otto was in contact with a Mr Richard Offer, the CEO of an equity capital markets brokers called Aetas Global Capital Ltd, and through Mr Offer was introduced to contacts at an intending SPAC called Pineapple Power Corporation plc ("Pineapple") of which Mr Offer and a Mr Clive de Larrabeiti, were both corporate finance advisors (according to the teaser document below): under cover of an email dated 29 October 2020 Mr Otto forwarded to Messrs Mojapelo, Greve and Peterson a pathfinder prospectus, key points and teaser for Pineapple, inviting consideration of "*another soon to be cash shell*", and explaining that he had had conversations with Messrs Offer and de Larrabeiti who "*believe the network behind the shell they are pulling together would be interested in reviewing a private round opportunity, and subsequent go public strategy with this shell".* Mr Otto in his written evidence explained that Pineapple appeared to him to have a better capitalization and more experienced investors behind it than Mustang, and that he sought to show Mr Mojapelo that if a public listing of EHL through a SPAC were to be considered at all at that stage (and Mr Otto was clear that this was premature) there were better options than Mustang.

iii) Besides having contact with Aetas, Mr Otto sought to interest other investors. So, by emails of 27 October 2020 he sent to contacts at Bacchus Capital and Bradshaw Capital Partners, among others, information about Enerox and explained that "*The plan is to complete a financing in the next ~3 months, likely a private round before seeking to IPO/RTO in the next 6-12 months.*"

60. A point made on behalf of VRFB in the course of submission was that Mr Otto was frequently willing to provide Enerox confidential information to brokers and others without having a confidentiality agreement in place. Part of the argument appears to be directed to a contention that information provided to Mustang and said to have involved Mustang in breach of the Agreement through misuse of the information was not genuinely confidential and perhaps was in the public domain by what Mr Otto did. I return to this later when giving further consideration to the Garnet claims based on the Agreement. For reasons there explained, I reject this argument of VRFB's.

61. By early November 2020 the parties were engaged in settling the terms of an agreement between them which came to be the JVA. Their discussions about the JVA terms were bound up with, and continued in parallel with, discussions concerning the funding requirement for Enerox, and an expectation that one way or another the parties would be assisted in meeting this requirement with finance from additional investors. To this end there were iterations of an investment term sheet passing between the parties reflecting the Enerox funding requirement and the stages over which this would be met, and also suggesting steps to raise external financing. An email of 4 November 2020 from Mr Greve explained that during a call a little earlier on the JVA, Bushveld had been requested to prepare a funding term sheet for the funding of EHL over the following 14 months; and a draft for comment was attached to the email. Also going forward was correspondence about the development of a data room for prospective Enerox investors: there had been one, but it contents were now out of date.

62. The JVA came to be made on 11 December 2020. Given the strain in the parties' relationship, it is impressive that they were able to commit to the JVA.

<u>The JVA</u>

63. As Garnet's claim is founded on alleged breaches of clauses 2.2 and 20.1 of the JVA, and these clauses have been central to the parties detailed submissions, I set these out in full. Other than that, I describe the principal provisions of the JVA as briefly as possible.

64. The parties to the JVA were VRFB, Garnet and EHL. In July 2021 Alberta executed an accession agreement to join as a party as well, but in my description below I leave this complication to one side.

65. After the Recitals, to which I have already made reference, concerning the way in which the first two parties, VRFB and Garnet, had come to have their equal shareholdings in EHL and were to exercise their powers in relation to EHL, the JVA continues with a clause, clause 1, setting out numerous defined terms along with a lengthy but unremarkable code for interpreting the JVA.

66. Clause 2 comprises two sub-clauses.

i) The first, clause 2.1 explains that EHL "*has been incorporated for the purpose of acquiring 100% … of the entire share capital of Enerox, in particular pursuant to*" certain of the recited agreements, and also to a clause of the JVA, clause 7.13(a), which made provision for the transfer to EHL of the final 10% Enerox shareholding acquired from Cellcube.

ii) The second, a critical provision for present purposes, is clause 2.2. This provides that "*Each party shall use its reasonable endeavours to promote and develop the Business to the best advantage of Enerox and [EHL]*".

67. The expression "*the Business*", used in clause 2.2 means:

> "*the business of Enerox, being the business of a service provider in the renewable energy and storage sector, including the development, construction and operation of large turnkey energy storage systems (utility scale and microgrid) and the provision of comprehensive energy solutions for industrial applications to increase energy efficiency.*"

68. An important issue between the parties concerns the precise scope of clause 2.2. This issue does not involve the meaning of the words "*promote and develop the Business*". For present purposes these may be understood as being directed to having the Business (that is, the defined business of Enerox) prosper and grow, so that the clause sets out a very broad desired objective, or perhaps ambition, without any obvious guide as to the steps which might be taken to further the objective. Further, by its nature the objective is one which will never be completely achieved, as further promotion or development of the Business will theoretically always be possible, so long as the Enerox remains carrying on the defined business.

69. What is in issue, rather, is the precise effect of the last nine words of the clause, namely the concluding words starting, "*to the best advantage …* ":

i) On the VRFB side it is submitted that these words leave the focus of the clause on the advancement of the Business (namely the Enerox-owned business) as the desired objective. On this basis the concluding words of the clause are little more than further exegesis, indicating that what promotes and develops the Business may be expected to be, broadly

speaking, to the advantage of its owner (Enerox) and that company's holding company (EHL). But if the words do have weight, they can only be restrictive: the efforts required to be made towards the Business' promotion and development need not include any towards the Business purely as an end in itself, but are limited to those calculated to benefit the immediate owner and its holding company. Conversely, something which has an effect on EHL's shareholders, or indeed on EHL or Enerox, without having any effect on the Business, is outside the scope of clause 2.2.

ii) On the Garnet side it is submitted that the clause 2.2 desired objective includes the way in which VRFB and Garnet must meet their obligations to fund, or assist the EHL Board in funding, the Business through Enerox and EHL, in that "*If the way in which EHL or its shareholders raised capital negatively impacted EHL's future attempts to raise money for Enerox, that would fall within the scope of clause 2.2 because of the nature of the business*" (para 198 of Garnet's Opening Skeleton). In other words, anything a party does which might have a harmful effect on EHL or Enerox is prohibited by clause 2.2, whether or not it has any direct impact on the Business. (This submission, I note, appears to make Garnet's case concerning the Agreement and its breach redundant so far as concerns any breach of clause 2.2, looking instead only at the implications of Mustang having become a holder of VRFB shares; but that is not in fact the pleaded Garnet case.)

70. The Garnet submission, as I have just summarized it, draws out another issue concerning clause 2.2. In form it is expressed as imposing the reasonable endeavours obligation on "Each party", that is each of VRFB, Garnet and EHL as a positive obligation. On a literal reading of the provision, it will be an omission to act which will constitute a breach, namely a failure to use reasonable endeavours to achieve the desired objective. Therefore, some step taken without reference to the desired objective, but because it is required by a different provision of the JVA, would not itself involve a failure to use the required endeavours. Thus, VRFB argues, where a party is providing funds in accordance with clause 7 of the JVA, that will be outside the scope of clause 2.2.

71. In my judgment clause 2.2 can indeed preclude a party from doing things which disadvantage the Business, things which are contrary to its promotion and development. I therefore reject VRFB's argument which I have just described. That is to say, I regard clause 2.2 as setting out the parties' ambition for their joint venture though the joint venture company. The very fact that the clause is expressed with such generality, leaving quite at large what in practice anyone is to do to achieve the desired objective, one of great generality in itself (that is the promotion and development of the Business), suggests that the clause is designed to inform the parties' conduct and approach towards their venture concerning the Business.

72. Given this, where a party has various possible ways open to it of performing some required task, and alights upon one way which will obviously disadvantage the Business, the party's taking that way may very well involve a failure, contrary to clause 2.2, to use reasonable endeavours to promote and develop the Business. In this regard, it matters not that the JVA requires, for example by clause 7 of the JVA as regards the provision of funding, the performance of the particular task. If the task can reasonably be performed without harming the Business, it should be and should not be performed in a way which does.

73. There is a final comment on the effect of clause 2.2, as I see it. A consequence of the width of the clause, used as it is in a business context, means that if there can be reasonable differences of opinion as to the effects on the Business of various ways of performing tasks, it will not necessarily be a breach of the clause if a party reasonably chooses a way which may not in fact be the best or which turns out not to advantage the Business quite as some other might have done.

74. Related to this is that the clause, as Mr Gourgey accepted on behalf of Garnet, does not require a party to sacrifice its own commercial interests in the pursuit of the clause's desired objective: this follows from the fact that the clause qualifies the endeavours required to be made towards the desired objective. These are to be reasonable endeavours.

75. Clauses 3 to 6 of the JVA deal with, respectively, immediate completion arrangements following the making of the JVA (clause 3), reserved matters requiring shareholder consent (clause 4), the directors and board arrangements of EHL (clause 5), and arrangements for the management of Enerox including the giving of reports for EHL board approval of such matters as Enerox budgeting, capital expenditure etc (clause 6).

76. Clause 5, to which I have just referred, is the clause of the JVA invoked by VRFB in its claim against Garnet. In a little more detail, this gives VRFB and Garnet the right to equal numbers of nominated directors of EHL, so long as those two parties are the only two EHL shareholders, and regulates the calling of meetings of EHL's Board, entrusting responsibility for EHL's supervision and management to the Board, and stipulates that a quorum for any Board meeting will include a nominee of each party.

77. Clause 7 is a lengthy clause concerned with EHL's financing.

    i) By clause 7.1 there was to be paid in short order the final part of up to €3.7 million previously agreed to be provided for Enerox, to the extent not so far provided. This was described as "DPSA Funding". Also, clause 7.6 explained that failure on the part of Garnet or VRFB to provide its portion of the DPSA Funding would, if unremedied for a

period, cause the relevant party to become a "Defaulting Shareholder" within clause 18 (referred to below).

ii) By clause 7.2 it was noted that according to the Business Plan (a defined expression) Enerox was to have from EHL monthly sums in accordance with the Schedule 5 Business Plan Funding Requirements (referred to below, but broadly amounting to approximately $2m per month to mid-2021), with VRFB and Garnet providing what would be needed by EHL.

iii) Once the DPSA Funding requirements described above were completed, there was to be either by 2 March 2021"*as required under the Business Plan Funding Requirements*", or if required earlier by EHL's Board by 15 February 2021, an additional $2.5 million from each of Garnet and BEL (clause 7.3(b)).

iv) By clause 7.3(d) it was stipulated that $5 million at least should be paid by each of Garnet and VRFB towards Enerox's ongoing funding requirements, this being inclusive of all other requirements.

v) Clause 7.3(e) contains an acknowledgment of an intention by each of Garnet and BEL to fund $10 million "at least" (inclusive of all other requirements) of Enerox's ongoing funding requirements, but without obligation to do so, this intended funding being named "Intended Minimum Funding Commitment". However, clause 7.7 states that a shareholder choosing not to provide its share of the Intended Minimum Funding Commitment was to become a "Non-participating Shareholder", and this would allow the other shareholders to subscribe in that shareholder's place and thus to dilute that shareholder's proportionate share in EHL.

vi) Clause 7.5 provides for the subscription price for shares issued to the parties "*up to the Minimum Funding Commitment*" to be arrived at on the basis of a formula, named the Historical Spend Valuation reflecting the price at which previously the parties had subscribed, and without any valuation of EHL or its assets or historic or projected income or profits.

vii) Clauses 7.11 and 7.12 provide that the EHL Board is to seek third party financing to meet a "Third Party Funding Requirement". This is to arise where there is to be a shortfall in the meeting of an Intended Minimum Funding Commitment by shareholders or in their meeting any further funding called for over and above the Minimum Funding Commitment. These clauses are curious: clause 7.11 requires the shareholders to procure the Board to make various investigations and negotiations, and leads in clause 7.12 to the Board having to lay before shareholders options open to them, without it being explicit whether the decision to issue shares to third party funders lies with the Board or (having regard to Schedule 8, below) with the majority shareholders.

viii) Clause 7.13 contains a variety of provisions.

a) First, there is a provision dealing with arrangements for the acquisition of the final 10% Enerox shareholding.

b) Second, clauses 7.13(b) and (c) allow for the possibility of the two existing members of VRFB at the time of the JVA receiving the VRFB shares in EHL and becoming direct shareholders, and for a similar arrangement for Garnet should Garnet take a "*co-investor in a member of the Garnet Group (as Acacia has done with BEL in relation to [VRFB])".*

c) Third, there is a provision (clause 7.13(d)) that "*notwithstanding the provisions of clause 7.3(c)*" (as to which, see below), the Shareholders are at the direction of the EHL Board to use reasonable endeavours to procure that EHL or Enerox is to be admitted to trading on the AIM "*or any other suitable Exchange*", meaning a recognised investment exchange as defined in the Financial Services and Markets Act 2000, "*by 31 December 2021, subject always to market conditions*".

78. In describing clause 7 I have passed over clause 7.3(c). This is because the function of the clause is not easy to see. There may have been a possibility kept alive for an immediate first funding round after the making of the JVA, the round which became the 2021 Funding Round, to involve an outside investment into EHL, that investment supplementing the specific contributions to be made by the parties as prescribed by clauses 7.1 to 7.3. That at least is how the parties went forward in January 2021. Clause 7.3(c) provides for the EHL Board to use reasonable endeavours in the first quarter of 2021 to find third party investors for either a private or public fundraising, and to this end to produce a term sheet as soon as possible to provide to potential investors. Additionally, by clause 7.3(c) VRFB is to be allowed, subject to various conditions, to "*advance documentation in preparation for a public Fundraising for*" EHL. This part of clause 7.3(c), at any rate, would seem to be directed at allowing VRFB the possibility of bringing forward a listing for EHL. However, by early February 2021 the parties had been advised, and accepted, that the priority at the time was for them to be given first refusal for the EHL investment required in the 2021 Funding Round.

79. There follow after clause 7 various typical clauses dealing with share transfers, competition restrictions, corruption, accounting, dividends, deadlock, termination, confidentiality and so forth. One of these clauses required VRFB to seek to have a third party purchase an Enerox battery for a Bushveld plant, while another requires the Enerox management to prepare Business Plans in a scheduled form, the first being for the year starting 1 January 2021 but to include a five-year funding plan.

80. Clause 18 requires special mention. This is a provision dealing with defaults under the JVA. So far as relevant:

i) There is to be a trigger on the occurrence of various events, for example a shareholder's failure to provide committed funding or insolvency, or suffering a Change of Control with the new controller being "*subject to any financial sanctions imposed by any government or its agencies*". Immediately relevant for present purposes is the trigger (in clause 18.2(f)) where a shareholder is "*in material breach*" of the JVA unremedied for 20 days after service of a notice given by "*one or more of the other Shareholders and/or [EHL] requiring the breach to be remedied*".

ii) On the occurrence of the triggering event, if an unremedied and material breach, the shareholder in breach becomes a Defaulting Shareholder and "*the other Shareholders (Non-Defaulting Shareholders) may, if they agree to do so … serve a written notice on the Defaulting Shareholder … requiring the Defaulting Shareholder immediately to*" offer all of its "*Shareholder Interest for the Mandatory Sale Price to each of the Non-Defaulting Shareholders … and in that case the Defaulting Shareholder is deemed to have served a Mandatory Transfer Notice on the Board as at the date of the Default Notice … in respect of the whole but not some only of its Shares to be sold at the Mandatory Sale Price in accordance with the provisions of part 3 of Schedule 2".* Schedule 2 sets out machinery for the implementation of a compulsory offer and share transfer following the deemed giving of a Mandatory Transfer Notice.

iii) The notice to be served on the Defaulting Shareholder, is also to require the shareholder to procure the immediate resignation of its nominated EHL director.

iv) Each of the Shareholders appoints the other Shareholders to be its attorney to execute any necessary documents for the performance of its obligations under the clause.

81. There are three features of clause 18 to be emphasised. The first of these gives rise to a mixed question of interpretation and fact, if in the present case either VRFB or Garnet is found to have been in breach of the JVA. The second and third concern the machinery where there is a change in the shareholders and the issued share capital of EHL following a material breach: how does the machinery apply where there are new shareholders or new shares?

i) First, breach of the JVA is not a triggering event unless the shareholder guilty of the breach is "*in material breach*" of the JVA. I consider later the parties' submissions concerning the meaning of this expression and the application to the facts of the present case.

ii) Second, in contrast with the notice to require a material breach to be remedied, the Default Notice to instigate a mandatory share transfer offer is one to be given by "*the other Shareholders … if they agree*". In principle, where there are several shareholders only one of which is the Defaulting Shareholder by reason of its breach, a literal reading of clause 18 requires all the others to join in giving the Default Notice.

iii) Third, what is to be offered to each of those others is to be the Defaulting Shareholder's "Shareholder Interest", the offer being deemed to have been triggered by a deemed Mandatory Transfer Notice served at the time of the Default Notice, and with a price being fixed (according to Schedule 2 to the JVA) by valuers instructed immediately following the deemed notice. The price is to be arrived at is a function (that is 50% of) the Fair Value of each share to be sold on an assumed "*sale taking place on the date the Valuers were requested to determine the fair value*".

82. The present proceedings involve Garnet on the one side and VRFB on the other claiming orders for specific performance of obligations arising under clause 18. Other than enabling the immediate removal of the other's appointed director, any such order would be the starting gun for a process involving the appointment of a share valuer, the determination of value, and the offer for sale and completion.

83. Another provision requiring special mention is clause 20.1, one of the two provisions Garnet relies upon for its claim against VRFB of material breach of the JVA, is one of three sub-clauses. The last two of these sub-clauses are entirely unremarkable in a shareholder agreement such as the JVA, but serve to give context to clause 20.1. Of these two sub-clauses:

i) The one, clause 20.2, provides that where there is any inconsistency between the JVA and EHL's articles, the former is to prevail as between the parties.

ii) The other, clause 20.3 directs the parties to exercise "*their powers of voting and any other rights and powers they have*" to bring any provision in the Articles which conflicts with the JVA into line with the JVA "*to the extent necessary to permit [EHL] and its Business to be administered as provided in this agreement.*

84. Clause 20.1 reads:

> "*Each party shall, to the extent that it is able to do so, exercise all its voting rights and other powers in relation to [EHL] to procure the provisions of this agreement are properly and promptly observed and given full force and effect according to the spirit and intention of the parties*."

85. This clause is relied on by Garnet as founding an obligation on the part of VRFB to act in ways which are not explicitly required by the Agreement, and (it may be) not to act in ways which are not explicitly prohibited. The contention, in summary, is that clause 20.1 engaged to ensure that VRFB prevented, or was not allowed to progress, the issue of its shares to Mustang. On the other hand VRFB denies that clause 20.1 can add anything material to what is elsewhere stated in the JVA, and did not have the impact contended for by Garnet.

86. The parties have made detailed submissions as to the meaning and effect of clause 20.1, in particular by reference to the judgment of Arden LJ in Re Coroin [2013] 2 BCLC 583 at [52]ff. As it seems to me the question in the present case is whether the final nine words, starting with the words "*according to ...*", expand in any material way on the direction to ensure that the terms (express or implied) of the JVA are given effect, where the exercise of rights or powers in relation to EHL is required.

87. In my judgment, the answer to this question is that the words do have some function. They remind the reader of the JVA that, what is to qualify as proper and prompt observation of the provisions of the agreement and their being given full force and effect, is to be found in the shared aims of the parties identified through the process of interpretation of the JVA. Thus, insofar as the nine words add at all to what has gone before, it is to provide a description which, depending on the particular provisions of the JVA under consideration, may assist in arriving at a view as to what is prompt and full observation and effect.

88. Later in this judgment I say a little more about clause 20.1 of the JVA. For now I summarise my conclusion as being that Garnet is seeking to stretch clause 20.1 far beyond its actual area of operation. It is part of a larger clause aimed at making the JVA paramount in relation to EHL over and above EHL's own constitution. Unless Garnet can point to a term of the JVA, express or implied, with which VRFB has failed to comply and which an exercise by VRFB of a shareholder right or power in relation to EHL could have secured, clause 20.1 cannot be relied on as giving rise to a free-standing obligation imposed on VRFB which the latter has breached.

89. There are several schedules supplementing the JVA, a couple of which I have referred to already. Of note:

    i) Schedule 1 contains a form of Deed of Adherence.

    ii) Schedule 2 contains provisions dealing with share transfers, in particular provisions relevant for mandatory transfers, while Schedule 4 has a form of Mandatory Transfer Notice which (by clause 18) is to be deemed to be served on EHL by a Defaulting Shareholder This last has two operative paragraphs, one constituting the EHL the Defaulting Shareholder's agent for sale, the other explaining "*We require you to sell all of our Shares (including those Shares held by members of our Group) in accordance with the relevant provisions of the [JVA]*".

iii) Schedule 5 sets out the Business Plan Funding Requirements down to June 2021.

iv) There is a scheduled draft of the right of first refusal agreement to be made with BEL concerning the supply of vanadium products to Enerox or the latter's manufacturing partners or end users.

v) Schedule 7 sets out "Historical Spend", showing the development of EHL's capital, while including two prospective items showing some €14.5 million being raised from existing shareholders by 15 February 2021 (a "Pre-Private Round financing"), and €22.7 million being raised from "New Investor/s"in a "Private Round Financing (Indicative)".

vi) Schedule 8 sets out reserved matters requiring majority shareholder approval. One of these is that unless permitted by the JVA there is to be no decision to "*increase the amount of [EHL's] share capital, or grant any option or other interest (in the form of convertible securities or in any other form) over its share capital*". This would appear to capture issuing shares, as well as granting rights to have shares issued.

vii) Schedule 9, referred to in clause 5, identified Mr Otto as having immediate executive responsibility for equity capital raising during the last quarter of 2020 and first quarter of 2021, and Mr Otto and Mr Prince as having immediate executive responsibility for arranging working capital in the first half of 2021. This was of course subject to the direction of EHL's Board.

viii) Schedule 10 sets out a form of detailed business plan for Enerox, this seemingly being a pdf version of what was to be an iteration of an Excel model, by clause 13 to be updated monthly, showing projections for Enerox, including a five-year funding plan.

90. A feature of the JVA, which VRFB stressed at the trial, is that there is no express provision aimed at restricting the ways in which Garnet or VRFB put themselves in funds to meet their own funding obligations, whether towards EHL or for any other reason, and in particular aimed at restricting future issues of their own share capital. This liberty left to the parties is subject to two express limits imposed by the JVA. First, there are restrictions on dealings with their respective shares in EHL (clause 8). Second, there is the provision making a party's change of control, in certain circumstances, an Event of Default so that the other can require a mandatory sale. VRFB's submission is that this litigation involves an attempt to by Garnet to develop such a restriction on the raising of finance in order to use Mustang's share subscription to force an undervalue sale to Garnet of VRFB's shareholding in EHL.

Events following the making of the JVA

91. The making of the JVA did not interrupt efforts to involve outside potential investors. As an example of this, Mr Otto on 12 January 2021 sent an email (enclosing an Enerox information memorandum) to a financial services firm, Canaccord Genuity, saying "*I wanted to catch up with you regarding business in the energy storage sector*." The email explained that Mr Otto was on the Board of a very similar company to Invinity, for which Canaccord had recently completed a financing, and that "*We're pursuing a private placement financing for Enerox now (pre-IPO round) following which we'll being examining the best path to pursue a listing, likely in the UK*".

92. During January 2021 onwards, EHL's Board discussed its funding requirements. Garnet was dissatisfied with what Mr Otto and Mr Peterson perceived to be the Bushveld's side's prevarication in the provision of finance, seeing Bushveld as being reluctant to agree and then being unable or unwilling to provide on time what had been agreed. Certainly, there was a need for EHL and Enerox to be financed properly, not least of all because (as noted in minutes of a meeting of EHL's Board on 14 January 2021) a clear audit opinion on the Enerox financial report and accounts to the end of June 2020 would require support for Enerox from EHL.

93. At about this time an Information Memorandum was developed for deployment for fund raising for EHL. It was described as "strictly confidential", and included information about EHL, Enerox and the Enerox business. One of the pages was a summary term sheet which indicated there was to be a private placement of EHL shares for up to $15 million of which existing shareholders were to take $5 million and with the proceeds to be used "*to fund ongoing monthly Enerox business plan, to support a contemplated IPO/RTO process, and for working capital purposes*".

94. As to this, I have no doubt, and find, that Garnet saw that there could be an opportunity to diminish VRFB's proportionate interest in EHL and that latter's relative dependence on VRFB and Bushveld, if VRFB were unable to match Garnet in what was to be contributed, or if a third party could be introduced into the picture as a counter-weight.

95. My conclusion at the end of the previous paragraph is supported by a WhatsApp message of 26 October 2020 and two emails, one of 2 December 2020 sent by Mr Otto to Mr Peterson, and an email of 12 January 2021 sent by Mr Otto, in advance of an EHL Board meeting, to an associate, Mr Mark Crocker, who was (according to the parties' agreed dramatis personae) an advisor to the EHL Board on governance and operating procedures introduced by Garnet and (according to Mr Otto's oral evidence) "*a Garnet individual … assisting the board*". These three documents speak for themselves. I accept, as Mr Otto has said, that Garnet perceived Bushveld to be prioritising its ability to fund over the Enerox operating requirements. But it is also plain that Garnet saw

Bushveld's own financial constraints as being a tool which could be used to diminish the VRFB interest in EHL.

96. In the first of the emails to which I have just referred Mr Otto was clear, in my judgment, that he was looking for ways to "*dig ourselves out from this mess with Bushveld*", either by out-funding and taking control or by having third party investors introduced in a private placement.

97. In the second of these emails Mr Otto directed Mr Crocker that:

> "*3) Board needs to agree and send out a request for shareholder approval to bring in a new investor(s) for $10-15 million at the valuation level previously discussed, effectively waiving their shareholder pro rata rights on this portion of the financing. Potential for Garnet and Bushveld to participate in a raise greater than $10-15 million, but a new investor needs to be brought in.*
>
> *4) If shareholders won't agree to directly waiving their pro rata rights on the $10-15 million, then we need to provide notice for a larger financing, circa $25-30 million, and leave them to provide notice for how much they will participate for.*
>
> *Lastly, for Thursday's call, please discuss with Alex [the Enerox CEO] ahead of time. He needs to be very firm, zero flexibility, informing the EHL Board that the January funding has to be in by the end of next week. This will be critical for the meeting.*"

98. In cross-examination Mr Otto accepted that the $25-30 million figure in his email of 12 January 2021 had come from conversation with Mr Schoenfeldt, and that previously what had been required for Enerox was $18 million for the period from August 2020. The table, headed "Business Plan Funding Requirements", in Schedule 5 to the JVA, contemplated a total contribution of $18 million (of which by January 2021 $13 million remained) through June 2021 with a further $1 million possible.

99. On the other hand, the Bushveld side was continuing to explore its own ways in which the provision of funding for EHL might be linked with some Mustang involvement, both to assist in meeting the EHL funding requirement without losing influence in EHL and possibly also to assist Bushveld's prospects of gaining control of EHL. Specifically, on 15 January 2021 Mr Mojapelo circulated to various individuals, including Mr Nikomarov, those board papers for a BML board meeting which concerned the EHL investment. These made reference to the Orion proposal from December 2020 which I have described already.

100. Further, concerning the Bushveld activity, Mr Gourgey for Garnet drew attention to an email chain starting on 14 January 2021 and concluding on 16 January 2021.

i) The first email was from Mr Otto to Mr Nikomarov and Mr Prince and headed "EHL Board Meeting Follow Up Items". This followed a Board meeting of that day at which the Board had discussed the Enerox funding requirements and fund raising in a placement of EHL shares, with Mr Nikomarov pushing for listed entities to be allowed to participate and Mr Otto expressing scepticism that any would be able to participate within the timescale. In his email Mr Otto, among other things, reported how a broker, Aetas Global, previously engaged to help seek third party equity financing for EHL, seemed likely to be able to find up to $20 million; and Mr Otto proposed to have the EHL shareholders waive participation rights on the first $15 million to be raised and express any interest in participating in a financing of more than $15 million.

ii) The next two emails involved an internal Bushveld dialogue among Mr Nikomarov, Mr Mojapelo and Mr Greve. In the first of these Mr Nikomarov, forwarding Mr Otto's email, commented concerning what Mr Otto had said about existing shareholder participation rights: he noted "*If we are a shareholder in Mustang, would this preclude Mustang from participating?*". Mr Greve, in the second of these, remarked, among other things, "*... given the Mustang strategy, VRFB waiving its rights would seem to be a non-starter*".

101. The internal email dialogue, to which I have just referred, illustrates a matter on which Mr Nikomarov's evidence was, I regret, unsatisfactory. It is obvious that from before 2021 and down to the time, on about 8 April 2021, when he went on leave, Mr Nikomarov was not only well informed about developing plans within Bushveld for involving Mustang in some form of participation in or in relation to EHL but involved in assisting with those plans. In this regard he had numerous exchanges with Mr Mojapelo and Mr Greve, and also had contact with Mr Gallegos. I return to this later.

102. This is a convenient point for me to give my conclusions on a contention raised by VRFB. By reference to various contemporaneous materials, some of which are referred to below, Mr Otto was cross-examined by Ms Boase on the basis that Mr Otto came to have Mr Prince "in his pocket": the suggestion was that Mr Otto on behalf of Garnet had compromised Mr Prince's independence to the extent that Mr Prince would act at Mr Otto's and Garnet's behest. Mr Otto denied having done so.

103. The position is, I conclude, rather more nuanced. Mr Otto did have frequent communications with Mr Prince without involving Mr Nikomarov. Mr Otto, as I find, did make an effort to cultivate Mr Prince. There was frequently a dialogue between these two about matters and decisions confronting EHL, often before discussion with Mr Nikomarov or at meetings of EHL's Board; and in

this dialogue Mr Otto encouraged Mr Prince towards the views which Mr Otto and Garnet held as to the best way forward for EHL. VRFB, meanwhile, was hampered by the financial stresses within Bushveld, and by more cumbersome upstream decision-making than Garnet, so that its contribution of funds was slow and reluctant. It would be natural for Mr Prince's patience to be tested and for his sympathies come to lie with Garnet. Meanwhile, there is no sign that Mr Nikomarov made any effort to cultivate Mr Prince in the way that Mr Otto did.

104. As issues unfolded during the first half of 2021, Mr Prince sided with Mr Otto, leaving Mr Nikomarov in the minority at EHL Board meetings, and with Mr Prince and Mr Otto consulting together privately as to ways to respond to Mr Nikomarov. Illustrative is an email of 6 February 2021 from Mr Otto to Mr Prince commenting on an email sent to them by Mr Nikomarov and raising questions about funding of EHL and the shareholders' rights and obligations in that regard. Mr Otto explained to Mr Prince, "*My notes on the email. I don't suggest to detail all of this to Mikhail, but here are some data points and context to pick from*".

105. Returning to the narrative, on 20 January 2021 Mr Otto sent a message to Mr Peterson saying:

> "*Making progress with Stephen Prince to advance board matters. Mikhail and Fortune making noise that they want to push the board to pursue an immediate listing. Stephen is fine to bluntly vote no, but I have suggested continuing to make progress on the things we want, and telling Bushveld to send us a written proposal.*"

106. The following day Mr Otto reported to Mr Peterson on a call he had attended with Mr Nikomarov and a SPAC specialist, a Mr Greenberg, saying:

> "*Got Mikhail on a call with a specialist in SPAC listing. Mikhail asked lots of dumb questions. The specialist provided lots smart answers, and very effectively shot down any idea of an immediate listing.*"

107. The conversation Mr Otto reported to Mr Peterson was one he had described that day in an email to Mr Prince.

i) Mr Prince had said that he had received a text message from Mr Peterson concerning a conversation Mr Otto and Mr Nikomarov had had with a "SPAC expert", that "*You were given some guidance consistent with my perspective*", and asking "*if we could do a quite true up before our call tomorrow … It would be helpful to understand the message before we get on the call with Fortune [Mojapelo] and Dean [Peterson]*".

ii) Mr Otto by email replied to Mr Prince in a little detail concerning the conversation with Mr Greenberg. His reply included the following:

Mikhail peppered them with questions on routes to go public immediately and received the following responses

- Enerox does not look ready yet

- Enerox is too small for the US SPAC market right now

- Any listing process will take 4-6 months minimum

- Cash shells in Canada / UK will achieve a listing but won't get exposure to the market valuation frenzie that is happening in the US right now, will still take 4-6 months

- You only get one shot at listing; listing in Canada / UK provides a market price, you can't subsequently try to list in the US and achieve a higher valuation

- Listing a portion of Enerox by having a cash shell buy a minority stake in Enerox would be much worse than staying private; locking in a listed market price at a valuation that reflects a company that is not ready to be public

- Even if there is a market correction, a 50% pull back in valuations still implies ridiculously high valuations; don't worry about timing just get the process right

- Market demand will remain strong; energy transition is not going to stop, it's still got years left to accelerate

The broker pitched that a private placement financing should be pursued. They offered to help on the raise, saying they know a number of parties that would be interested. Subsequent to completing the private placement financing they offered to work with Enerox to see if the story can be evolved to something that would be a better fit for the US SPAC market.

I think Mikhail knows these realities, he's just under tremendous pressure from Fortune to do what Fortune wants (a listing so Fortune's friends can participate and allow him to keep control / gain majority control of the company).

108. The first five and the eighth bullet points in Mr Otto's email suggest that Mr Greenberg's advice was supportive of the pursuit of a listing for EHL or Enerox being deferred for some little time, certainly if there was any continuing ambition for a US listing through a US SPAC. The sixth bullet point, dealing with "listing a portion of Enerox", was (taking Mr Otto's summary as a fair reflection of what was said) directed at a SPAC's acquisition of an EHL (or Enerox) shareholding, and not at the acquisition of a shareholding in an EHL shareholder.

109. Mr Nikomarov was cross-examined about the conversation with Mr Greenberg reflected in Mr Otto's email. It was put to him that advice, of which he was aware, had been given concerning "*the dangers of going into a listing or even the partial acquisition by a cash shell at such an early stage in the company's life*". Mr Nikomarov accepted that Mr Greenberg had offered advice. It was then put to him that he was aware of "*the risks created by the involvement of Mustang in VRFB*", from Mr Greenberg's advice and also an EHL meeting to which I refer in a moment. Mr Nikomarov said that "risks" was not the right way to explain it. He went on to say that he relied on other sources of information, other expertise, and weighing pros and cons the investment by Mustang was a net positive. He was not asked to clarify what the other sources were, or what he saw as the pros and cons.

110. Mr Nikomarov's belief was, I accept, as he stated in his oral evidence. By the JVA, he said, "*how shareholders fund themselves is the prerogative of each of the shareholders in EHL*". His evidence, in relation to various occasions when he was careful not to tell Mr Prince or Mr Otto or Mr Peterson (not only this occasion in January 2021, but later in March and April 2021), that VRFB, BEL or BML might be working on having funding for VRFB from new shareholders, was that VRFB was under no obligation to give this information.

111. This approach, of keeping the Bushveld side's hand concealed, has no doubt been found objectionable by the Garnet side and has led to the claim based on failure to use powers contrary to clause 20.1 of the JVA. Whatever the rights and wrongs, which I consider later, Mr Nikomarov must have considered that broadly it was in Bushveld's interests to have EHL and Enerox successful, and that he wanted that. Further I accept that Mr Nikomarov did not believe that having Mustang invest as it did in VRFB was harmful to EHL and Enerox. The investment allowed the successful completion of the 2021 Funding Round, with the full $30 million for EHL, so that certainly was an advantage for the Business, and thus for Enerox and EHL, of which Mr Nikomarov was aware. I would accept that he did not see this process as leading to a sacrifice of or harm to the EHL shareholders' prospects of benefitting from a future listing of EHL. For example, in an email of 26 February 2021 to Mr Mojapelo, at a time when the Mustang investment into VRFB was a possible arrangement, he was referring to an EHL listing by October 2021 as planned. It is likely that he thought that, were Bushveld to show its hand, the Garnet side would seek ways to obstruct the Bushveld fund raising efforts. But, that said, he must also have known that Garnet's learning of Bushveld's secrecy would shred what might remain of any possible trust between the principals.

112. On 22 January 2021 there was an EHL "Working Capital Meeting". In advance of the meeting Mr Nikomarov circulated a note setting out a proposal for using a listed cash shell to participate in a private EHL placement and invest $10 million in EHL, the $10 million being raised from "*a select number of highly interested institutional investors*". This participation was to involve the shell taking a minority EHL stake. The note contemplated that the cash shell would need a prospectus or admission document, as the participation in the EHL placing would involve a reverse takeover for the shell.

113. What had happened, before this note was sent, was that an earlier draft had been prepared by Mr Nikomarov and, having been sent to Mr Mojapelo for consideration, had been "sanitised" to remove the name Mustang.

114. The 22 January 2021 EHL meeting was attended by, among others, the EHL directors as well as Messrs Peterson and Mojapelo. It may very well have been that the meeting Mr Prince was referring to in his email which I have just mentioned. Financing for EHL, both source and amount, featured in the discussion. While the Bushveld and Garnet sides seemed agreed that new third party investment into EHL could be acceptable, they had different visions for this, with the Bushveld side advocating for the cash-shell approach outlined in the note referred to above, the Garnet side rejecting this and contending for any third party EHL share subscription to come from private investors. In the meeting there was discussion about the Enerox data room, and its updating, as well as about having non-disclosure agreements in place with potential EHL investors.

115. Also on 22 January 2021 Mr Mojapelo sent to Mr Gallegos of Mustang a draft non-disclosure agreement "for your review", saying "*We will need to execute this to give you access to the data room*", and suggesting that a draft subscription agreement would be sent a few days later. The draft agreement was signed by Mustang and returned the following day, with Mr Gallegos saying that a timeline with tasks to complete would be prepared and circulated in the next few days and also that "*I look forward to getting access to the data room and receipt of the Subscription Agreement so we can progress as soon as possible*".

116. Then, on 25 January 2021 Mr Mojapelo emailed to Mr Dean Gallegos of Mustang a copy of "*the IM presentation for Enerox*" (this being the information memorandum referred to above), said in Mr Mojapelo's email to be "*on the back of your signed NDA*".

117. At the time EHL had not yet signed the document which Mustang had signed. This incomplete document was almost identical to the Agreement (which was signed a few days later) but differed materially in an important respect. It contained a different definition of "Purpose", this being: "*the purpose for which the Confidential Information is disclosed to the Receiving Party, namely, to enable the Receiving Party to consider the feasibility of entering into a potential transaction with the Disclosing Party in terms of which Company (sic) (or one of its Affiliates) may acquire shares in an Affiliate of EHL and/or may enter into another mutually beneficial, strategic relationship with EHL".* In other words, the contemplated transaction was either an acquisition of shares in an Affiliate of EHL (and not therefore of EHL itself) from EHL, or the establishing of some other relationship between EHL and Mustang.

118. On 27 January 2021 there was an EHL Board meeting. It appears that at this meeting Mr Otto and Mr Prince were agreed that there should be further funding sought. The suggestion, according to the minutes, was that this should be at a minimum of some $16 million or so to cover the following 13 months; but Mr

Prince and Mr Otto supported $25-30 million. For his part Mr Nikomarov seems to have considered that third party funding would not be required for this if it was available from shareholders, and also that shareholder approval was required for anything more than $10 million. According to the minutes, Mr Otto "*stated that if this is the case the test will be the Board call for the $25-30mm from the existing shareholders, see what level is taken up and determine what balance is left to be funded upon which the documentation would be re-drafted*"; and Mr Nikomarov agreed.

119. The following day Mr Nikomarov forwarded to Mr Otto and Mr Prince the email of 23 January 2021 from Mr Gallegos along with the attached signed document, saying "*please find the first of what I expect will be several NDA's for EHL to execute*". Mr Otto's emailed reply, also of 28 January 2021, was that "*The NDA provided will need to be modified, as the Purpose is not correct. Mustang can only be provided Confidential Information for the purpose of considering an investment in EHL and nothing else*".

120. To this Mr Nikomarov replied the same day, enclosing the unsigned Agreement, saying he had now made edits to the term "Purpose", and inviting one or other of Mr Otto or Mr Prince to sign so that he could get Mustang to sign again. Mr Otto signed, and forwarded the document to Mr Prince saying "*This NDA conforms to what we have been using, and the purpose has been adjusted to fit with Mustang*". Mr Prince signed; and then so did Mr Gallegos. In this way the Agreement of 28 January 2021 came to be made.

121. Mr Nikomarov stated in his written evidence that he did not intend the change he made to the form of the agreement first signed by Mustang to cause Mustang to be prevented from acquiring shares in VRFB and did not believe that that was the effect of his change. This evidence I accept. As appears from what I say below, I think that he was correct on this point, so far as concerns the non-circumvention provision in clause 3 of the Agreement. The change did not in fact bring about any such restriction. But on the other hand, the restriction to the use which might be made of Confidential Information within the Agreement, following from the changed definition of "Purpose", would affect what might be done towards a Mustang acquisition of VRFB shares. I accept, however, Mr Nikomarov's oral evidence, that at the time he did not give this much thought. This is supported by the fact that the revision to the JVA was made very rapidly in response to Mr Otto's email.

122. At the time, that is during the last week or so of January 2021, the data room relating to Enerox had not yet been repopulated from what it had been long before. It is not clear whether or when it was repopulated and used: Mr Otto did not know, although he believed it had been updated, and explained that that was likely to have happened in view of the fact that a number of non-disclosure agreements, besides the Riverfort one, were made at this time with EHL. However, it is not Garnet's case that the data room was ever accessed by any of VRFB, Bushveld or Mustang for the purpose of any investment decision, whether or not the data was subsequently updated

123. After the first week or two of February 2021 the data room ceased for the time being to have any immediate purpose. On 11 February 2021 Mr Nikomarov circulated to Messrs Otto and Prince a draft non-disclosure agreement, in much the form of the Agreement, to be made by EHL with an entity called Riverfort Capital (an entity which had invested in Invinity, possibly a competitor of Enerox). This led to a private exchange between Messrs Prince and Otto in which the former asked "*Does this concern you at all if they are also investors in Invinity?"* and Mr Otto replied "*No … Worst case scenario, the learn a bit more about a competitor. The data room is pretty tame, ex- maybe the pipeline book*".

124. A week or so later Mr Otto pointed out in an email that having been through the data room he found it to be "*a dump of materials from the 2019/2020 diligence process*".

The Agreement

125. The Agreement was, as mentioned above, made before the resolution of the parties' disagreement about the JVA giving the parties preference as to EHL funding. It is convenient here to consider the Agreement, and the parties' submissions about the Agreement's effect and Mustang's suggested breaches. Ultimately, though, my conclusion is that the Agreement gives Garnet no assistance in its claims against VRFB.

126. The interpretation of the Agreement is not affected by the exchanges, referred to above and involving a change to the definition of "Purpose", over the period from 22 January 2021 to the final making of the Agreement on 28 January 2021. This is not to say that they might not be relevant when considering what Mr Nikomarov understood about the Agreement; but for the purposes of interpretation the actual intentions of the parties to the Agreement and their beliefs as to its meaning and effect are immaterial.

127. So far as concerns the Agreement, Garnet claims that Mustang was in breach when (a) it subscribed for shares in VRFB (clause 3), and (b) when it used (if it did) certain information about EHL and Enerox in deciding on that subscription (clause 4). The information just referred to was provided to it on three occasions earlier than the making of the Agreement (namely 6 September and 1 October 2020 and 23 January 2021: see paragraphs 51, 55 and 116 above); and there was a fourth occasion following the making of the Agreement when a further document containing information about EHL or Enerox was provided to Mustang (29 March 2021: see paragraph 185 below).

128. The context of the Agreement was EHL's search for further funding, with there being on foot a plan to refresh EHL's data room with information for prospective investors, and with Mustang considering an investment involving EHL and wanting access to the data room. Mustang's committing to the Agreement, and the restrictions it imposed, was to be its key to the data room.

129. The material provisions of the Agreement may for present purposes be explained as follows:

i) Clause 1.3 sets out various definitions, of which those for "Affiliate", "Confidential Information", "Disclosing Party" and "Receiving Party", and "Purpose" are most significant.

a) Affiliates are, among other persons, shareholders, subsidiaries, mandated advisors and agents (among others), as well as directors and employees "*of any of the aforesaid entities*".

b) Confidential Information is, it may be, any information, including information exchanged between the parties or acquired pursuant to implementation of the Agreement and "*any subsequent information with respect to the Purpose*". There is an exclusion for information which is designated as non-confidential by the Disclosing Party or its advisers, which "*hereafter, becomes part of the public domain*" without breach of the Agreement, or which "*can be shown to have been in the possession of the Receiving Party at the time of its disclosure hereunder*".

c) Disclosing Party means "*the Party disclosing its Confidential Information to the other Party*", while the Receiving Party means the party receiving the other's Confidential Information. These expressions are then used elsewhere in the Agreement. In principle either party to the Agreement may be a Disclosing Party or a Receiving Party, depending on the direction of travel of Confidential Information being disclosed and received; but I have no doubt that only EHL and Mustang can qualify as being either a Disclosing Party or a Receiving Party.

d) Purpose "*means the purpose for which the Confidential Information is disclosed to the Receiving Party, namely to enable the Receiving Party to consider a potential transaction with the Disclosing Party in terms of which [Mustang] may acquire shares in EHL and for no other reason*". This definition is clear, in my judgment: linked to the disclosure of information by one to another, the Purpose is directed at a transaction between the two parties to the Agreement, that is EHL and Mustang, by which Mustang may acquire EHL shares.

ii) Clause 2 of the Agreement explains that the parties each wish to disclose to the other their Confidential Information "for the Purpose", and that the Agreement is to govern disclosure by each (and the Affiliates of each) to the other (and the other's Affiliates).

iii) Clause 3 of the Agreement, set out below, has two parts, both protecting "*opportunities to which the Purpose relates*". Garnet's case as to this is that Mustang bound itself to EHL not to pursue, or enter into, an agreement with VRFB to subscribe for shares in the latter, at any rate without EHL's agreement. Succinctly, the case is that taking shares in VRFB "circumvents" EHL "*with respect to opportunities to which the Purpose relate*s". VRFB's case is that shares in VRFB are not shares in EHL, and that Mustang's acquiring shares in VRFB from VRFB does not circumvent EHL with respect to any opportunity to which the Purpose (that is, acquisition of EHL shares from EHL) relates.

iv) Clause 4 of the Agreement is to give protection for a party's Confidential Information. Sub-clause 4.1 contains a general prohibition concerning use and disclosure of Confidential Information by the Receiving Party. Sub-clause 4.4 permits "the Receiving Party" to use the Confidential Information only for the Purpose or otherwise with the consent of the Disclosing Party, but prohibits its use for any other purpose whatsoever. Garnet claims that the information provided to Mustang, whether before or after the making of the Agreement, qualifies as Confidential Information, and Mustang must have used it contrary to the Agreement. VRFB denies this claim.

v) Clause 5 of the Agreement is relied on by Garnet to give the Agreement retrospective effect so that it covers Confidential Information provided before the date of the Agreement. This clause reads "*This Agreement shall be deemed to have commenced on the date upon which the Disclosing Party first divulged Confidential Information to the Receiving Party and shall remain in force for 2 (two) years thereafter*".

130. According to Garnet it would, in summary, be a breach of clause 3 of the Agreement for Mustang to take shares of any company other than EHL as a way of acquiring an interest in EHL shares, so that Mustang's VRFB share subscription was prohibited because it was a prohibited circumvention of a possible EHL share acquisition from EHL.

131. Specifically as to clause 3.1, the circumvention prohibition, Mr Gourgey for Garnet submitted that the expression "circumvent" bears the natural meaning of that word in ordinary English usage; that is, Mustang's promise was not to "evade", or "work around", or perhaps "by-pass", EHL. Thus far I agree.

132. Where I disagree concerns the width of clause 3.1. In the context, where there is to be an exchange of information "for the Purpose" (clause 2), and the imposition of restrictions as to the use of the information "for the Purpose" (clause 4), the clause 3 prohibition is designed to protect EHL against Mustang taking advantage of an "*opportunity*" to do something with EHL, that something being expressed and defined as being "*with respect to the Purpose*", by doing that same thing with someone else. The Purpose is limited in scope. It is explicit in that it is the acquisition of EHL shares in a dealing with EHL. It follows, as

it seems to me, that the prohibition is against acquiring EHL shares from someone other than EHL. Such an acquisition would be one that by-passes EHL with respect to opportunities to which the Purpose relates.

133. Mr Gourgey submits that the word "relates" is in the context wide in meaning, so that an acquisition of shares in an EHL shareholder is prohibited as involving something to which the Purpose relates; and he supports this by pointing out that a pursuit with an EHL shareholder (an Affiliate) of an opportunity to which the Purpose relates is expressly prohibited. But this does not necessarily lead to the conclusion that an acquisition of shares from an Affiliate will still be prohibited if it is anything other than the acquisition of EHL shares. In my judgment it gives no warrant for concluding that the Purpose relates to an acquisition of shares in an Affiliate.

134. What Mr Gourgey's submission misses, as I see it, is that although Mustang's acquisition of shares in VRFB may have given Mustang an economic interest in that entity and hence in that entity's assets, Mustang did not thereby make any acquisition of EHL shares or even any legal interest in the shares. More than that, bearing in mind that the Agreement is to last for two years, giving it such a wide application as Mr Gourgey contends for would place very significant restriction on Mustang, not only in time but in level of application: not merely would it impact on an acquisition of shares in an EHL shareholder, but also on shares in such a shareholder or a shareholder in that shareholder, and so on.

135. Clause 3.2 of the Agreement, also relied on by Garnet, supplements clause 3.1 by restricting the capacity in which Mustang may deal and the dealings it may have with any one or in any way "*in relation to the opportunities to which the Purpose relates*". But in my judgment the provision gives Garnet no assistance in the present case, if Garnet's interpretation of clause 3.1 is rejected, for the simple reason that Garnet's submission concerning the extent of clause 3.2 depends on the opportunities there referred to being wider than those which are protected by clause 3.1. I see no reason for giving the expression I have just quoted any different meaning from that in clause 3.1. In my judgment what clause 3.2 does is to add to, and amplify, what qualifies as a prohibited pursuit of an opportunity of the same nature as that specified in clause 3.1: clause 3.2 establishes that Mustang cannot escape the clause 3.1 prohibition by contending that some contract or business arrangement entered into by Mustang itself, or by someone related, and in whatever capacity, cannot after all be capable of being described as involving Mustang in doing any relevant "*pursuing*". Still, though, to be prohibited by clause 3.2 the contract or business arrangement must be one fitting within the quoted words, being one in relation to relevant opportunities.

136. The clause 4 breaches which Garnet contends for concern suggested misuse of material provided to Mustang on four occasions, these being on 6 September and 1 October 2020, and 25 January and 29 March 2021. Garnet's claim is that Mustang used information in this material in breach of the prohibition in clause 4.4 of the Agreement. There is no evidence from Mustang and no direct

documentary record as to what its officers and advisors took into consideration on the journey to the investment in VRFB; but still Mustang did receive the material in circumstances where the material was likely to looked at so as to have some influence on Mustang's decisions. Indeed, the material provided on 29 March 2021 was in response to a request from Mr Gallegos to Mr Mojapelo. I am satisfied that the material provided to Mustang was indeed used by Mustang for its $7.5 million share subscription within the meaning of the word "*use*" in clause 4.4. In particular, I am satisfied that information can be used so as to come within the clause 4.4 prohibition without the information being decisive in whatever Mustang does.

137. VRFB's response is that the first three of the three items just referred to had come into Mustang's possession before the making of the Agreement, and therefore could not be subject to any restriction imposed by the Agreement. As to this, Mr Gourgey has submitted that:

i) by the terms of clause 5 the Agreement was to be taken to have become operative on the communication of material to Mustang on 6 September 2020 so as to capture all information provided on any of the four identified occasions; and

ii) whenever any information was provided it would qualify as "Confidential Information", given the width of the definition, unless only it fell within one of the three expressly excepted cases.

138. The submission made by Ms Boase on behalf of VRFB is that information is only Confidential Information if it is disclosed "*hereunder*", that is in pursuance of the information exchange contemplated by the Agreement, and that this will necessarily be information provided after the date of the Agreement when first information is so provided. I prefer this argument to that made on behalf of Garnet.

139. Mr Gourgey's submission concerning clause 5 of the Agreement depends on the future perfect tense used in clause 5 of the Agreement having a literal, and potentially retrospective, effect. Taken with the last part of the clause, which gives the Agreement two years' operation after the deemed commencement, the upshot is that the Agreement could be taken to have lapsed even before the date on which it was made: this would be in circumstances where Confidential Information had been "*divulged*" to Mustang more than two years earlier. Conversely, if there never were any Confidential Information divulged to Mustang, the Agreement would seemingly never become operative. In this connection it is significant that clause 5 centres upon the divulging of Confidential Information by the Disclosing Party to the Receiving Party. While it is perfectly possible that either party to the Agreement may receive in any number of ways information about the other which could be non-public, clause 5 is expressed to deem the Agreement as having commenced upon the disclosing and receiving of information between the actual parties to the Agreement, not between anyone else.

140. As I see it, the important part of clause 5 is the phrase "*shall remain in force for 2 (two) years thereafter*"; the first part of clause 5 referring to the deemed commencement marks the point, following the making of the Agreement, from which the termination of the Agreement's operation is to be measured. In other words, the function of clause 5 is to cause the Agreement to expire no earlier than two years after its making: the end date will be postponed to two years after the first time information is divulged by EHL under the Agreement.

141. The clause does not have the effect, it follows, which underpins a further submission made on behalf of VRFB. This is the effect of precluding the operation of the Agreement at all in the absence of any imparting of confidential information by EHL to Mustang relative to an EHL share acquisition. This further submission is that the Agreement fell away once Mustang ceased to be interested in acquiring EHL shares and instead focussed on acquiring VRFB shares. But if the submission were correct, the Agreement would never have taken effect as there never was any provision of information about EHL by EHL to Mustang: on each of the four occasions relied on by Garnet and to which I have referred already, and in particular those imparted before the Agreement was made, information was provided to Mustang by Bushveld and not EHL and for Bushveld's own purposes.

142. Ms Boase, in the course of her submissions, highlighted the fact that the definition of "Confidential Information" in the Agreement expressly excludes information which "*can be shown to have been in the possession of the Receiving Party at the time of its disclosure hereunder"* (emphasis added). Her point was that the Agreement cannot have been intended to cause information which one party had received before the making of the Agreement to become Confidential Information. Such information might already be in the possession of the Receiving Party before the provision to it by the Disclosing Party; but, giving the word "hereunder" a natural reading, it would not be possible to describe the further provision before the making of the Agreement as being under the Agreement. I accept this submission.

143. I would add that an important feature of the text at the end of the definition of Confidential Information, the text referring to "*disclosure hereunder*", is that it confirms that the focus of the Agreement, so far as concerns regulation of the parties' conduct in relation to information, is on information disclosed "*hereunder*"; that is, information disclosed in pursuance of the Agreement.

144. Accordingly, in my judgment, the complaints by Garnet concerning alleged misuse by Mustang of information in breach of the Agreement cannot encompass that information which had been provided to Mustang before 28 January 2021.

145. A related point, as it seems to me, is that information can only qualify as Confidential Information within the clause 5 triggering provision where it moves from one party to the Agreement to the other. It is certainly the case that various of the paragraphs of the definition of Confidential Information refer to

a wider range of information (paragraphs 1.3.3.2 to 1.3.3.4); but even where these paragraphs indicate information passing otherwise than from one party to the other (for example involving Affiliates), that information is limited to information connected with "the discussions", the outcome of the discussions, or "*pursuant to the implementation of this Agreement and any subsequent agreement with respect to the Purpose*". In this context "the discussions" must be discussions between the parties in pursuance of the Purpose.

146. Here, what had been done by the time the Agreement was made was that information had been provided by Bushveld to Mustang, and not by EHL: EHL had not disclosed any information to Mustang.

147. I explain later my reasons for concluding that the information provided on 29 March 2021 was not captured by the Agreement as Confidential Information.

Events of February, March and April 2021

148. In early February 2021 there was activity in arranging further non-disclosure agreements to be entered into by EHL with possible investors and brokers. Both sides were involved in this.

149. At this time, however, the parties received advice from Baker & McKenzie concerning the terms of the JVA and the shareholders' rights to priority in any offers of EHL shares for subscription. This advice resolved the disagreement between the parties as to whether in the 2021 Funding Round the JVA left it open to EHL to take third party funding, if the existing shareholders were themselves willing to provide the funding: as mentioned, Garnet claimed that it would be, and VRFB denied that. On the advice of EHL's solicitors, VRFB's views prevailed.

150. With the resolution of this particular disagreement, on 9 February 2021 Mr Prince circulated a notice to the EHL shareholders to explain that EHL had resolved to call for the shareholders to provide between $25 million and $30 million of funding for EHL with rights for one to take up the shortfall in the other's contribution and, subject to that, for third-party finance to be sought to complete the funding. By early March 2021 Garnet and VRFB both had responded to Mr Prince's notice committing to take up whatever was available to it in the funding round.

151. At this time, I have no doubt, Mr Otto had seen the call on VRFB to put forward as much as $15 million in the 2021 Funding Round as putting pressure on VRFB and the Bushveld side and providing an opportunity for Garnet to put VRFB into a minority in EHL; and once VRFB had committed to providing $15 million calling for the $15 million to be provided in short order might furnish such an opportunity. Meanwhile, in an email of 6 March 2021 Mr Peterson pointed out to Mr Otto "*We did not anticipate this amount of money being put in by Bushveld and Garnet. If I would have thought that Garnet was going to have to put in the*

full 15 million without a shotgun arrangement in the SHA, there is no way if (sic) would have went forward with the purchase at any time." He also commented, after Mr Otto had responded, "*I really don't think anyone will invest in Enerox with Bushveld as the 50% partner. That I my problem also*".

152. The reference to the shotgun arrangement needs a little explanation, as the possibility of negotiating such an arrangement came up later in March and April 2021 in discussions between Mr Mojapelo and Mr Peterson, referred to below. In summary, the reference was to a device to allow one party to buy out the other's interest in EHL where for some reason the parties were not agreed on a way forward. Mr Peterson explained to Mr Otto, "*On the shotgun clause I would approach it as a clause designed to keep the company moving forward. Therefore it we don't agree on something the company doesn't stall, the purchaser will take it his desired way*". Mr Peterson added that he would "*use trust to get the shotgun agreement in place*". I believe that this view informed Mr Peterson's decision when he agreed, as he did, to allow Bushveld time to arrange VRFB's contributions to the 2021 Funding Round in return for negotiation of the shotgun clause.

153. On 9 March 2021 Mr Prince sent out an email calling on the EHL shareholders to provide their $15 million each by 31 March 2021, along with a share subscription application form.

154. On 13 March 2021 Mr Peterson sent to Mr Mojapelo an email referring to Alberta and explaining that he was minded to transfer Garnet's shares to Alberta, but that this "*doesn't change anything with regard to funding*".

155. At this time, during February and March 2021, Bushveld had continuing discussions with Mustang about proposals for Mustang to become involved with arrangements surrounding the 2021 Funding Round. The detail of these does not matter for present purposes. They were unknown to Garnet and EHL. What was under discussion between Mustang and Bushveld were proposals for the Bushveld side (that is Bushveld or contacts including Acacia) to invest in Mustang, and for Mustang to subscribe for shares in VRFB. What did become public, although there is no evidence to show that Garnet became aware or appreciated what might be in prospect, was an announcement by Mustang on 12 March 2021 that it had issued shares to Acacia for working capital and to undertake due diligence on future acquisitions. By mid-March 2021 the proposals for Mustang to be involved with the VRFB meeting of its commitment to EHL were well-developed.

156. This is the background to Garnet's claim that VRFB was in breach of the JVA by reason of Mr Nikomarov having made knowingly two false representations, one in mid-March 2021 and the second at a meeting of EHL's Board on 1 April 2021. These are discussed below, and are pleaded as being "*that VRFB's investment in the Company would not derive from new shareholders in VRFB but rather from the existing consortium of investors in [EHL], and in particular*

by [BEL] selling assets and by [Acacia] committing to fund." It should be noted that Garnet disclaims any case that Mr Nikomarov was dishonest.

157. The claim described in the previous paragraph is to be contrasted with that in Garnet's notice of 17 May 2021, referred to below, which asserted that "*VRFB and Mr Nikomarov made the Representation to [EHL] deliberately and dishonestly*", the Representation in this notice being "*that VRFB's investment would not derive from new shareholders coming in under VRFB but from VRFB selling assets*".

158. In mid-March 2021 Mr Peterson was clearly concerned to know how VRFB was expecting to fund its share of the 2021 Funding Round. In an email of 15 March 2021 he drew Mr Otto's attention to a broker report on BML in the light of its results for Q4 2020 indicating that Bushveld had sold some $4 million of stock in Invinity; and he remarked "*They are funding Enerox by selling Invinity*". Mr Otto replied to say that the results commented on by the broker were historic, and "*I can't yet tell if they've sold any more since then*".

159. On the same day Mr Nikomarov sent an email to Mr Peterson with the text of a Bushveld proposed regulatory announcement which he said "*Bushveld is planning to issue*". The draft text of the announcement had a description of Enerox (that is, Enerox GmbH) into which a "consortium" had invested, the consortium comprising Garnet, BEL and Acacia was said to have invested. It continued with three paragraphs headed "Enerox Update".

i) The first of these explained something about Enerox and how it had been acquired "*as part of a consortium, Enerox Holdings Ltd ('EHL')*".

ii) The second of the three paragraphs contained two sentences, which, read literally, convey that the Bushveld interest in EHL was held directly by BEL (and not, therefore, VRFB) and amounted to a 25.25% interest in EHL. But, having regard to the reference to the BEL 25.25% "underlying interest" in Enerox made earlier in the announcement, it can be seen that strictly BEL is not an EHL shareholder at all and that the expression "shareholder" is being used loosely to describe someone with an indirect interest. The second paragraph reads:

> "*EHL holds a 100 per cent interest in Enerox, with Bushveld Energy a 25.25 per cent shareholder in EHL. To date the consortium has invested US$14.6 million into Enerox to fund acquisition consideration, transaction costs and working capital requirements.*"

iii) The third of the three paragraphs reads as follows:

> "*The EHL shareholders and Enerox management have determined that the growth capital required by Enerox is US$30 million, which will provide sufficient funding for Enerox ... .. The US$30 million will be funded from existing shareholders and new shareholders*."

160. Mr Peterson on 15 March 2021, sent an emailed reply to Mr Nikomarov asking why Acacia had been mentioned and not VRFB, and forwarded the messages to Mr Otto. Mr Otto responded by noting "*The last line says the money will be funded from existing shareholders and news (sic) shareholders. Who are the new shareholders?*". And a little later Mr Peterson emailed Mr Nikomarov referring to the last line of the draft announcement, and asking *"are all new shareholders coming in under VRFB?"*. This last question is somewhat ambiguous. The expression "under VRFB" could be referring to shareholders taking shares in VRFB, or to shareholders taking shares in EHL.

161. In answer to Mr Peterson's first question Mr Nikomarov sent an email to say that VRFB would be added into the announcement, and that *"We wanted to disclose the "end shareholders" for transparency and especially Acacia, as an existing BMN shareholder*".

162. In answer to the second question Mr Nikomarov sent an email on 16 March 2021 to say, "*We will remove that sentence. I think it may be from when we started putting together a draft of the announcement back in February*."

163. In giving his answer to the second question Mr Nikomarov had had an email exchange with Mr Mojapelo on 16 March 2021. The former had commented that he had noted that the last sentence in the release was going to create some concern from Garnet, and asked whether it was needed. Mr Mojapelo said we should just state that the capital is from existing shareholders, and to explain to Mr Peterson that the sentence was a relic from "*when we (EHL) were going to raise third party capital*". The suggestion, therefore, was that the sentence was drafted when the possibility was that part of the 2021 Funding Round would be provided by a third party investor subscribing directly into EHL.

164. There is no evidence of there having been any February draft of the Bushveld regulatory announcement. On the contrary, on 12 March 2021 an internal Bushveld email from Chika Edeh (the BML head of investor relations), copied to both Mr Mojapelo and Mr Nikomarov, explained "*Please find attached a first draft of the BE update, I have used information from the recent Board pack*". The attached draft contained, in its last relevant sentence, the same text concerning funding being "*from existing and new shareholders*". Mr Mojapelo had then sent in reply a longer document, a draft "capital raise script" dated February 2021, on which Mr Nikomarov had commented in an email in reply "*... it is possible that there may be an outcry from Ed over the statement 'VRFB Holdings anticipates to fund the US$15m from its shareholders (Bushveld Minerals and Acacia) as well as possible third party investors*". This was a statement in the capital raise script document.

165. The next email exchange between Mr Nikomarov and Mr Peterson involved Mr Nikomarov saying "*We will remove that sentence. I think it may be from when we started putting together a draft of the announcement back in February*". Mr Peterson answered Mr Nikomarov to say, "*I was just wondering if it is still all under VRFB. I don't think it matters*".

166. I have no doubt all, and find, that Mr Nikomarov knew that Mr Peterson, and hence Garnet, would have wished to know that Bushveld was planning to have VRFB funded for its EHL share subscription by means of an outside investor joining with Bushveld. This is apparent from Mr Nikomarov's own comment to Mr Mojapelo in his email of 16 March 2021 concerning the last sentence of the draft.

167. Further, I have no doubt, and find, that Mr Nikomarov was anxious not to tell Mr Peterson that Bushveld was looking at taking an outside investor into VRFB, lest Garnet started looking for ways to derail Bushveld's arrangements. Mr Nikomarov's oral evidence, to the effect that he had anticipated outcry from Garnet because there was outcry over everything at that point, does nothing to diminish the force of Garnet's complaint concerning intentional dissembling on the part of Mr Nikomarov. As I explain, that is just what Mr Nikomarov's message to Mr Peterson was.

168. In particular, the reference to "*new shareholders*" in the last sentence of the draft announcement was not a mistake perpetuated from an earlier draft of the announcement, contrary to Mr Nikomarov's email to Mr Peterson: Mr Nikomarov's own written evidence is that the words used in the draft had come from a BML Board update, dated 12 February 2021, which he had produced. Importantly, by March 2021, when used in the draft presentation which Mr Nikomarov had commented on on 12 March 2021, the words were directed at outside investors joining Bushveld's consortium in VRFB.

169. I have no doubt, and find, that Mr Nikomarov thought that the "*new shareholders*" reference in the last sentence of the draft announcement could be read in the same way. While the last paragraph of the announcement, if the paragraph had stood by itself, might possibly have been concerned only with the direct shareholders in EHL (this following from a natural reading of the first words "*The EHL shareholders …*"), the previous paragraph explaining that BEL was a 25.25% shareholder in EHL, could naturally be taken to show that the first words (that is, "*The EHL Shareholders*") were referring to "*end shareholders*", to quote Mr Nikomarov, and thus included BEL and Acacia described in the announcement as comprising the EHL consortium. Read in that way, "*new shareholders*" in the last sentence could perfectly well be understood as new investors joining with those others.

170. Finally, I am satisfied, and find, that Mr Nikomarov appreciated that Mr Peterson might understand the draft announcement as indicating that there was to be new outside investment into or above VRFB, and also that Mr Nikomarov's reply to Mr Peterson was aimed at leading Mr Peterson away from

any belief about that, albeit – so far as Mr Nikomarov could do so - without positively lying and instead being evasive.

171. Mr Peterson was cross-examined about his emailed question to Mr Nikomarov concerning the reference to "*new shareholders*", and what he understood from Mr Nikomarov's response. He said, and I accept, that he was asking about new shareholders in VRFB. It is difficult to know, though, what Mr Peterson made of Mr Nikomarov's response. His oral evidence was that on the same day as Mr Nikomarov emailed him, as I have just described, he had a message from Mr Mojapelo stating that the only funders would be Bushveld and Acacia. When he was giving this evidence he was being challenged on the way in which the exchange between him and Mr Nikomarov was naturally to be understood and had been understood by him. I conclude, as to this, that Mr Peterson's evidence was that it was not what was said by Mr Nikomarov, in view of Mr Peterson's suspicions concerning VRFB, but the message from Mr Mojapelo that made the position explicit to him concerning there being no new shareholders in VRFB.

172. My difficulty with Mr Peterson's oral evidence on this issue is that there is nothing before the Court in the way of a document, whether emailed, WhatsApp, SMS text message or the like, from Mr Mojapelo to Mr Peterson containing the representation described by him. There is no mention of such a communication in any of the statements of case or in Mr Peterson's written evidence, which states that he understood Mr Nikomarov to be saying that "*VRFB's share of the March Funding would be funded by its existing shareholders, Acacia and Bushveld Energy, and that no new shareholders would be coming in (whether above or below VRFB)*". Insofar as this evidence refers to "March Funding" there was, in fact nothing which falsified the statement: Mustang only came into the funding provided in April. More fundamentally, though, I do not accept that Mr Nikomarov's emails gave Mr Peterson a mistaken understanding. Rather, they left him confused and suspicious, but not inclined to press the point further. I conclude that he is mistaken in now thinking that there was an exchange with Mr Mojapelo which gave him clarity on the point.

173. Mr Otto's evidence was that, although he did not at the time see Mr Nikomarov's replies to Mr Peterson's questions, he had learnt of them in some way and understood from these that there were "*to be no new shareholders coming in above or below VRFB and that the funding sought by EHL would all be funded by existing investors, namely Garnet, Bushveld Energy and Acacia*". However, I am not satisfied that at the time Mr Otto did draw any such conclusion: I think it more likely that Mr Otto has persuaded himself that he drew more from Mr Nikomarov's prevarication than he did. Mr Nikomarov's point in his emails was that the last sentence in the draft announcement was a mistaken reference to new shareholders at the direct EHL level. Even accepting that that point was false, it does not follow that Mr Nikomarov was saying anything at all about Bushveld's or VRFB's plans for new shareholders at the VRFB level or above. Rather, he was trying to avoid doing that.

174. The second claimed misrepresentation is said to have been in comments made by Mr Nikomarov at a meeting of EHL's Board on 1 April 2021.

175. Relevant to the claimed misrepresentation is what took place in relation to Mustang during the second half of March 2021. Bushveld's - and VRFB's - discussions with Mustang had continued in March.

176. It is necessary to say something of Mr Nikomarov's evidence about his involvement. But an email of 22 March 2021 from Mr Charles Bond of VRFB's solicitors (that is, its solicitors on the record in these proceedings and also the legal adviser to BML and VRFB for Mustang's investment into VRFB) to numerous individuals within BML (including Messrs Mojapelo and Greve) along with Mr Gallegos is indicative. This commented "*I am progressing the drafting of the Investment Agreement so that it is ready should the heads be signed*". A little earlier in the same email chain Mr Bond had explained "*Assuming we are able to get the FCA on side, here are VRFB's final amends to the terms sheet. Fortune [Mojapelo] has asked that the 'guarantee' be deleted from the terms sheet at this stage, but that instead it be dealt with in the Investment Agreement once both parties have agreed the final mechanics*".

177. Although Mr Bond's emails were not addressed to Mr Nikomarov, he was copied in on a later email in the chain, this sent to Mr Bond and others by Viki Rapelas, the Bushveld director of legal, governance and compliance, asking for confirmation that she had the final term sheet for her to arrange to have signed by BEL and VRFB, and asking Mr Nikomarov "*who do I contact to arrange for signature on behalf of Acacia*".

178. The reference to the "guarantee" in Mr Bond's email needs a little further explanation. What was going on in the discussions with Mustang concerned not only Mustang investing into VRFB, but also Mustang itself receiving investment from Acacia and others. An email of 18 March 2021 from Mr Mojapelo to Mr Gallegos and headed "MUST term sheet" set out in tabular form an outline of investment terms which Mr Mojapelo understood Mustang to be discussing with Acacia alongside other potential investors. Mr Mojapelo commented:

> "*To the extent that there is a proposed guarantee from the company (BMN) in the unlikely event that MUST is unable to resume trading post suspension, we would want to please see the proposed term sheet. We would also want to discuss with MUST the terms for such guarantee*".

179. The point here is that, on Mustang raising several million dollars and subscribing that sort of amount on VRFB shares, Mustang's listing would be suspended on the basis that the transaction involved a reverse takeover of Mustang by reason of Mustang's transformation from a cash shell. Re-listing of Mustang's existing and new shares would require publication of a Mustang prospectus, that in turn requiring considerable detailed and current information

concerning VRFB, EHL and of course Enerox. Mr Mojapelo's email in the previous paragraph was noting the possibility of Mustang failing to obtain a fresh listing. And the 'guarantee' was to be a device which would allow the fresh Mustang investors security against the risk of being trapped as investors in an unlisted vehicle rather than a listed one. This device was to involve the investors subscribing for convertible loan notes issued by Mustang as part of its fund raising, those loan notes giving their holders a right to take Mustang shares or, in the event of there being no relisting by a date, a right to be recompensed by Bushveld.

180. In his oral evidence Mr Nikomarov relied on the fact that Mustang's own raising of several million dollars for the VRFB investment was backed by the "guarantee" as the explanation for Mustang's investors, and Mustang, not requiring any detailed due diligence into Enerox. What he explained was that the investors were assured of an investment into BML, with the possibility of an investment in Mustang on it becoming listed. Further, he explained that investors did follow Bushveld, relying on its stamp of approval as it were. The relevance of this evidence was to explain how Mustang came to invest in VRFB, raising money to do so from its own investors, without misusing EHL confidential information.

181. I describe later what came to pass at the end of April 2021, when the Mustang fund raising and investment into VRFB completed. What is before the Court about this comprises little more than Mustang's regulatory announcement on 27 April 2021. But, until the agreement reached between Mr Mojapelo and Mr Peterson referred to in the next paragraph, the target in March for completion of the 2021 Funding Round was to be the end of March, and that was the target for the Mustang fund raising and subscription: this appears from a draft term sheet of 18 March 2021 to which the parties were to be VRFB, Acacia, Mustang and BEL.

182. On 19 March 2021, as evidenced by a WhatsApp message of that date (saying "*10 million by March 31st and 20 million by the 21st of April*"), Mr Peterson and Mr Mojapelo had agreed that payment of the final $20 million by the EHL shareholders in the 2021 Funding Round should be postponed to April 2021, with the initial $10 million being paid by the end of March 2021. This agreement must have taken away some of the time pressure on VRFB and hence Bushveld, Acacia and Mustang. Mr Peterson's willingness to agree this extension, an agreement Mr Otto found frustrating, was because Mr Peterson was hoping to negotiate with Mr Mojapelo to have from VRFB the shotgun provision introduced into the JVA.

183. As I have already pointed out, the reason, from Garnet's point of view, why there was a perceived advantage of keeping up pressure on having the full $30 million contributed to EHL as soon as possible was because that might give Garnet an opportunity to bring about a diminution in VRFB's proportionate shareholding in EHL and hence in its influence.

184. As indicated by the emails of 22 March 2021 which I have already described, discussions involving Bushveld, Acacia and Mustang continued after the agreement reached between Mr Peterson and Mr Mojapelo. So, on 29 March 2021, Mr Nikomarov emailed to Acacia, VRFB, Viki Rapelas and Mr Mojapelo "*the Mustang Investment Agreement for your review*" and added, "*I'll send the signed one between Acacia and BEL shortly (the one we already agreed on).*"

185. It was in the course of these discussions that Mr Mojapelo sent to Mr Gallegos an email of 29 March 2021 which, according to Garnet, came to involve Mustang in a breach of clause 4.4 of Agreement. This email attached an Excel file, Enerox Model_For DD Report_VF.xlsx, "*as requested*". The trial bundle version of this Excel model is now named "GOW_00001097.xlsx". However, the model was generated within Bushveld. Further, it is accepted by Garnet that, while the model uses information originally from Enerox, the information from that source was provided before 28 January 2021. It is fair to say that the properties, when the model is opened, are consistent with this; and one of the spreadsheets, the "Projections & Valuation" spreadsheet, appears to record anything after July 2020 as a projection, and concludes with a "*DCF as at 1 July 2020*", this seemingly being a valuation for the Enerox business which would have been completely historic by March 2021.

186. The email sent by Mr Mojapelo was in response to one from Mr Gallegos explaining:

> "*I need to get Enerox's financial model so I can answer a number of questions in respect to expected cash flow over the next few years until the business is cash flow positive. Really should be getting this model as part of our own DD anyway*".

187. For reasons I have previously given I am not satisfied that the information from Enerox used in the model sent on 29 March 2021 qualified as "Confidential Information" for the purposes of the Agreement. The information had been in the hands of Bushveld before the making of the Agreement.

188. The parties agree that the minutes of the 1 April 2021 Board meeting may be relied on as an accurate summary. From these it is clear that, unsurprisingly, there was a discussion concerning the need for funding for Enerox: by the end of March 2021 the EHL shareholders had provided $10 million of the $30 million requested, but $20 million remained to be found during April.

189. The minutes of the meeting record comments by Mr Prince concerning "*questions around funding, going concerns (sic) and shareholder alignment"* as being "*critical elements in securing a strategic partnership …*", and the need to resolve the funding and going concern issue as a matter of urgency. For Enerox "going concern" connects directly to the signing off of its audited accounts with a suitable auditor's opinion, that in turn being dependent on EHL's ability to provide Enerox with working capital. The minutes then record

a series of remarks by Mr Nikomarov concerning the VRFB side's provision of funding. These remarks give the clear impression that Bushveld's commitment remained firm, that it had means to honour its commitment and was setting about availing itself of those means. These included the realisation of the Invinity investment and contribution from Acacia. Absent from what is recorded is any reference to Mustang or to plans for VRFB or the Bushveld side to raise capital by the issue of any new shares to new parties.

190. I am satisfied that Mr Nikomarov was careful at the 1 April 2021 Board meeting to avoid giving any suggestion that there might be any new investors joining with BEL and Acacia in VRFB.

191. I am satisfied, further, that discussions involving Mustang as an investor in VRFB to provide funds for that company's subscription of EHL shares were far advanced and that, as Mr Nikomarov knew, there was a good prospect (although, I accept, no absolute certainty) of a significant proportion of VRFB's contribution, that is the $10 million remaining to be provided in April 2021, being funded by Mustang investing in VRFB.

192. Garnet's pleaded claim is that Mr Nikomarov by his remarks represented that "*no new shareholders would be coming in whether under or above VRFB …*". This claim can only be established, however, if Mr Nikomarov's remarks led, and were intended to lead, to the belief that Mr Nikomarov was giving an exhaustive description of the way in which VRFB was planned to be put into a position to pay the $15 million it had promised to pay EHL in subscribing new shares.

193. I do not accept this claim. Rather, the clear impression to be obtained from the minutes of the meeting is that Mr Nikomarov was trying to bolster his assertion as to Bushveld's commitment and means by giving examples he believed to be definite. While I have no doubt that Mr Nikomarov was careful to avoid giving any indication of the prospect of Mustang joining in the financing, I do not believe that he crossed the line and went so far as to make the representation claimed by Garnet.

194. Mr Otto was asked in cross-examination about what had been said by Mr Nikomarov at the Board meeting, and what he thought. In his answers he overstated, as I conclude, what was recorded in the minutes. For example, when it was pointed out to him that Mr Nikomarov had not represented that the whole of the Bushveld side's $15 million was to come from the sale of the Invinity investment, Mr Otto responded by asking *"Does he not say 'and the other funding is coming from Acacia'?"*. In fact Mr Otto's question is to be answered in the negative: the minutes do not record Mr Nikomarov as saying what Mr Otto suggests. What they do record is a remark that Acacia, referred to as "*the other partner*", had "*also committed to fund*" (as indeed it appears they had, with an agreement of 31 March 2021); and Mr Nikomarov is then reported as having "*reiterated that the shareholders have proven their commitment to date by funding the amounts agreed*".

195. Mr Otto commented, in his oral evidence concerning the 1 April Board meeting, "*Mr Nikomarov was frequently evasive in what he says as a way to dodge direct lines of question*". Given this, I cannot accept that Mr Otto believed Mr Nikomarov's remarks to have amounted to a positive representation (as Mr Otto said it did) that the VRFB funding of its $15 million subscription money would come exclusively from the proceeds of the Invinity investment and from Acacia. Mr Otto agreed in his oral evidence that he himself never asked VRFB directly where its funding was coming from. Here was an obvious occasion to ask the question, pinning Mr Nikomarov to specific detail as to what was planned to be provided, when and by whom. But Mr Nikomarov was allowed to speak in generality.

196. I would, however, reject Mr Nikomarov's evidence, in cross-examination, that he said nothing about the prospect of VRFB obtaining funding from Mustang because he did not know that funding would be provided by Mustang and that there were other options for raising the funding still being pursued, nothing having been finalized. This was similar to evidence he had given about the position in mid-March 2021, when he explained that there were multiple plans of which involving Mustang was just one.

197. He also sought to distance himself from involvement with, or knowledge of, plans concerning Mustang, by stating in his final witness statement that "*I was peripheral to the Mustang transaction throughout*". He explained in cross-examination that his statement was correct because "*The role of the other members of the Exco were greater than mine, significantly*". Accepting that other Bushveld personnel had greater involvement than he did, still what he had deposed to in his statement (the truth of which he affirmed) was an exaggeration. It was, after all, the company of which he was CEO and a major shareholder that owned the Bushveld shareholding in VRFB, and the documentary record for this trial demonstrates convincingly his connection with all the internal Bushveld discussions concerning the Mustang involvement. This Mr Nikomarov was clear about in his oral evidence. He was peripheral only in the sense that he was not the person leading the negotiation with Mr Gallegos, and was on leave in April 2021.

198. By the middle of April 2021 the Mustang involvement in the 2021 Funding Round had not yet been finalised between Mustang and Bushveld. To judge from emails of 20 April 2021, matters with Mustang were very close to being finalised.

199. Meanwhile on 7 April 2021 Mr Prince had sent out letters to the EHL shareholders stating that the the final $20 million tranche of the 2021 Funding Round was required by 27 April 2021, that on 30 April 2021 EHL would "*proceed with the share issuance*" and, in the event of either having failed to provide the $10 required from it, would consider other ways of raising the remainder of the funding.

200. The minutes of the 1 April 2021 meeting record the Board reaching a decision for the sending of Mr Prince's letter, but make no reference to the due date for the completion of the 2021 Funding Round being moved to the end of April. Rather, the minutes contain references to difficulties if 22 April 2021 should arrive without the promised funding.

201. At all events by 20 April 2021 it was clear that the deadline had been put back to 27 April 2021. On 20 April 2021 there was a conversation between Mr Peterson and Mr Mojapelo. Mr Peterson explained in his oral evidence that the call was supposed to be one addressing the question of the introduction of a shotgun provision into the JVA, and he noted that time was short for completing agreement by 27 April when they were to be funded.

202. Garnet's pleaded case is that "*Neither Garnet nor the members of the board of [EHL] (other than Mr Nikomarov) had any knowledge of Mustang's involvement in VRFB's US$15 million commitment to [EHL] before*" about 27 April 2021, when both BML and Mustang made regulatory announcements. While I accept that this case is correct, insofar as it refers specifically to Mustang, I do not accept that Garnet, at any rate, had no suspicion that VRFB might obtain funding from new investors outside Bushveld and Acacia, and might indeed obtain funding from a public entity including a SPAC.

203. As to this, it is to be noted that on 20 April 2021, there was then a conversation between Mr Mojapelo and Mr Peterson, to which I have just referred,. This gave rise to a WhatsApp message from Mr Peterson to Mr Otto saying "*We can't let a public entity in here to fund. Also if we push back on the listing it might make them a bit more hesitant.*" For his part Mr Peterson appears to have sent at least one WhatsApp message to Mr Otto while his conversation with Mr Mojapelo was going on, with Mr Otto replying. One of Mr Otto's messages to Mr Peterson was, "*Understood, I'd avoid agreeing or committing to anything. If Acacia can't fund that could hand you control*".

204. There is no evidence from Mr Mojapelo as to what he discussed with Mr Peterson. Mr Peterson's written evidence is that Mr Mojapelo had told him that Acacia wanted VRFB's funding to include funding from a public cash shell, and Mr Peterson said he would need to discuss with Mr Otto before agreeing to anything. In his oral evidence Mr Peterson agreed that he knew, from what he was told by Mr Mojapelo, that VRFB was considering funding from a public cash shell. He also agreed that he did nothing about what he had been told.

205. I have noted above Mr Otto's evidence about his never having asked VRFB directly where its funding was coming from. Also, he knew from his communications with Mr Peterson in relation to the conversation on 20 April 2021 that work was going on the VRFB side to assemble the VRFB contribution to the 2021 Funding Round, and in this context VRFB was looking at involving a "public entity".

206. On 26 April 2021 Mr Mojapelo sent Mr Peterson an email attaching what he described as "*the announcement in respect of Bushveld's investment in EHL that I mentioned in our call a few days ago.*" He also said that he had sent though proposed edits to the proposed deadlock-breaking provisions. The announcement explained, among other things, Mustang's subscription of $7.5 million for a 22% shareholding in VRFB.

207. When it became clear to Garnet and Mr Otto that VRFB had indeed involved a public entity in its funding, it cannot have been a complete surprise. What may have been a surprise is that VRFB managed to come up with the $10m and that it did so using Mustang, a cash shell, subscribing for VRFB shares rather than some other established public entity.

208. Mr Peterson explained in his oral evidence that he thought the remaining time for VRFB's funding to be put together when he spoke to Mr Mojapelo on 20 April 2021 to be too short for a shell be become involved. But in an email of 27 April 2021 Mr Peterson remarked "*They have been busy*". That said, I accept that Mr Peterson felt let down by Mr Mojapelo, as he explained in his witness statement. The Bushveld side had behaved secretively. They must have made a decision that the way to maintain their participation in EHL required Garnet to be kept in the dark concerning the possibility of a SPAC taking shares in VRFB. And Mr Peterson had agreed to VRFB having extra time to put in place the last $10 million of its 2021 Funding Round contribution in the expectation of a negotiation of the shotgun provision for the JVA, a negotiation which had yet to be fruitful.

209. Mr Otto in his written evidence linked what he described as his shock on learning of Mustang's involvement in the VRFB funding of its $10 million tranche of the 2021 Funding Round with his belief that this is what his "*amendments to the [Agreement] had been intended to prevent*". He also explained that involving Mustang was in spite of warnings that Enerox and EHL were not ready for public investment, and that VRFB (in particular Mr Nikomarov and Mr Mojapelo) had deliberately kept quiet about Mustang's planned involvement with VRFB.

210. I am sure that, like Mr Peterson, Mr Otto felt that the Bushveld side had been secretive and deceptive. I would also accept that the last Mr Otto had heard of Mustang having any proposed involvement was with the making of the Agreement in what had been directed at seemingly a direct investment in EHL. But equally I cannot see either Mr Peterson or Mr Otto as having placed any trust in the Bushveld side as regards its financing of the 2021 Funding Round, however much Mr Peterson may have hoped that there was scope for him and Mr Mojapelo to trust each other.

211. In arriving at this point in this judgment I have dealt in some detail with the misrepresentations said to have been made by Mr Nikomarov. These are relied on to support Garnet's claim that VRFB was in breach of the JVA. But Garnet does not plead that any step was induced to be taken by Garnet or EHL in

reliance on the truth of either of the misrepresentations. Taken at face value, the case advanced by Garnet is that the bare making of untrue statements about the source of VRFB's funding was, by itself and without any more, a material breach in that it "*frustrated the purpose of the scheme under which members of [EHL] invested*".

212. Separately there is a claim that VRFB failed to exercise powers in relation to EHL "*to procure the provisions of the JVA were properly and promptly observed and given full force and effect according to the spirit and intention of the JVA*", this failure being pleaded as a breach of clause 20.1 of the JVA. The breach is said to be because the result of the failure was that EHL sought funding from Garnet and VRFB under the terms of clause 7 of the JVA, that in doing so it allowed the parties on 7 April 2021 further time for delivery of the funding, and that in consequence EHL did not seek third party funding, and ended up with VRFB continuing as a 50% shareholder. I consider later the question whether this claim has been established by Garnet. But the claim is <u>not</u> that VRFB misled Garnet or EHL.

213. My conclusion, so far as the misrepresentation case is concerned, is that VRFB has not been shown to have induced Garnet or EHL to take any course of action on the faith of any false representation by VRFB.

214. On 27 April 2021 EHL received the final $20 million of the 2021 Funding Round. On that same day BML and Mustang made public announcements required of them as listed companies. These referred to Mustang's $7.5 million subscription of VRFB shares, a subscription made the previous day. In Mustang's announcement it was explained, among other things, that Mustang's listing was suspended pending its application for an enlarged share capital to be admitted to trading, and that if that did not occur by 31 December 2021 BML had agreed to issue shares in it to holders of the Mustang loan notes in satisfaction of the Mustang obligation, in return for a transfer of the Mustang held shares in VRFB, but with holders of the loan notes having an option to take VRFB shares instead of BML shares.

215. The immediate sequence of events after this was as follows. Early on Tuesday 27 April 2021 Mr Crocker sought to summon a meeting of EHL's Board. Mr Nikomarov responded to say he could not attend; and Mr Otto responded to Mr Crocker to say "*There is going to be fireworks today. Mikhail has no idea what is coming* up". Mr Crocker replied saying, "*I will have a spare pen just in case* 😊".

216. Also on 27 April 2021 Mr Otto, Mr Prince and Mr Crocker had a remote meeting, which was presented as minutes of a meeting of EHL's Board although in Mr Nikomarov's absence it lacked the quorum specified in clause 5.16 of the JVA. It was resolved that "*No shares will be issued to VRFB … at this time*". That evening, when Mr Crocker circulated the minutes to Messrs Otto and Prince (but not to Mr Nikomarov) he said, "*Just for information, the two resolutions that we talked about currently look like this in draft: 1. The EHL*

Board agrees to issue 19,415 shares in EHL to Garnet Commerce Ltd via its subsidiary … Alberta Ltd commensurate with the level of funding committed and completed as at April 27th 2021…". It should be noted that a little earlier in April 2021 Mr Peterson had asked, and Mr Mojapelo had agreed, that the EHL shares which Garnet had promised to subscribe should instead be subscribed by Alberta.

217. The following day, Wednesday 28 April, Messrs Otto, Prince and Crocker were discussing the calling of an EHL a board meeting for Friday 30 April. Whether any meeting was held on 29 or 30 April is not apparent; but certainly there was no meeting which included Mr Nikomarov and so no quorate meeting in terms of clause 5.16 of the JVA.

218. The following day, Thursday 29 April, Mr Otto sent, attached to an email, a letter expressed to be from EHL and so described in his email, and addressed to VRFB and Mustang. The email was directed to Messrs Nikomarov, Mojapelo, Gallegos and Prince. Also, at the same time Mr Otto sent an email with a similar letter, this time only to VRFB. Both letters were signed by Messrs Otto and Prince.

219. The letter to both VRFB and Mustang complained that the Mustang investment into VRFB involved breach by Mustang, in which VRFB was knowingly complicit, of clause 3.1 of the Agreement. It explained that $7.5 million of the money received by EHL was held on trust to Mustang's order, that no shares in EHL would be issued in return for that amount, and that EHL required an undertaking "*that Mustang's investment in VRFB .. will be immediately unwound, so that Mustang is no longer an investor in VRFB .., so as to restore the position to what it would have been had Mustang complied with clause 3.1 of the [Agreement]*".

220. The letter to VRFB was expressed as requiring VRFB to come up with a different $7.5 million by midday on 30 April, failing which (as it was explained) EHL would issue to VRFB new shares in respect of VRBB's "*valid investment only*", issue shares to Garnet for Garnet's contributed funds, and "*pursue binding agreements with third party financiers and/or EHL's other existing shareholder for the remainder of the funding.*" This was expressed to be without prejudice any other rights EHL might have.

221. For some little while Enerox had been looking for a CFO. In early May 2021 Mr Otto met three candidates for the position and sent to Mr Schoenfeld his appraisal of each, at the same time ranking the three. One, however, withdrew shortly after. This one, whom I shall refer to as "G", was Mr Otto's third choice. I return to this later.

222. There was a meeting of EHL's Board on 6 May 2021. A stand-off then appears to have developed, with there being an issue as to whether VRFB should receive

the shares for which it had paid EHL $15 million, and whether, if not, shares could be issued to Alberta for the Garnet side's $15 million.

223. On 17 May 2021 Garnet served on VRFB a lengthy notice under clause 18.2 of the JVA claiming VRFB to be in material breach of the JVA by reason of the Mustang involvement with VRFB and the Representation which I have summarised above.

224. On 25 May 2021 VRFB made an offer to Garnet with proposals to extract the Mustang shareholding from VRFB and to substitute in its place various of the investors in Mustang who had furnished Mustang with the price for its shareholding. This offer, which would still have left VRFB to receive the EHL shares for which it had subscribed and for which EHL had received $15 million, Garnet rejected on 28 May 2021.

225. By late June 2021 the parties found a temporary way forward: on 27 June 2021 EHL's Board resolved on the issue of all the shares subscribed for by VRFB and Alberta. Of these, half (some 19,415) were issued to VRFB. The other half (again, 19,415) were issued to Alberta.

226. Almost immediately after this, on 29 June 2021 Garnet served a further notice under clause 18, this notice being one claiming that the VRFB breach had been an Event of Default, that this had not been remedied and that VRFB was bound now to offer its entire "Shareholder Interest" (this being a defined expression in the JVA) for sale to Garnet, and was to be deemed to have served a Mandatory Transfer Notice on the EHL Board as at the date of the notice, 29 June 2021. In addition VRFB sought on the same day to have Mr Nikomarov removed as an EHL director, to this end claiming to act as VRFB's attorney under power given by the JVA so as to have circulated and to pass a written resolution of EHL.

227. According to the JVA, a notice to trigger a mandatory sale in the event of an unremedied material breach of the JVA, a Default Notice, is be given by all the shareholders other than the Defaulting Shareholder. If, at the time of the notice of 29 June 2021, Alberta was a shareholder in EHL, the notice of 29 June 2021 was seemingly defective as having been given by only one of the two non-defaulting shareholders. Conversely, if the Alberta shareholding had not yet been issued on that date, so too VRFB cannot have had issued to it the shares for which it had paid $15 million, so that those were no part of its Shareholder Interest on that date when Garnet gave the Default Notice requiring a sale offer by VRFB of its EHL shares; and it is not immediately obvious how the provision in the JVA concerning mandatory transfer notices, valuation and compulsory sale would apply to them.

228. At the start of the trial I raised this matter with Counsel, having noted that Dr Zenner in his Report had described the share issue as having taken place on 28 June 2021; and an exhibit to Dr Zenner's Report was what appeared to be a copy of the EHL register of members dated 15 July 2021 and recording the new shares

had been issued on 28 June 2021. Further, a copy of the register, this time at 13 July 2021, shows Alberta to hold 19,415 shares, VRFB to hold 30,538, and Garnet to hold 11,123.

229. For Garnet and Alberta Mr Gourgey drew attention to an email dated 2 July 2021 from EHL's Guernsey administrators with an attached copy of the EHL share register as at that date, these documents pointing to a conclusion that the shares must have been issued after the end of June 2021. Mr Gourgey also submitted that this point had not previously been raised by VRFB, so that the entirety of the evidence at present available is that which I have just described.

230. I accept that the share issue to Alberta was only completed with entry into EHL's register of members, and Alberta only became an EHL shareholder, after the end of June 2021. What appears to have happened is that the share issue was discussed and agreed upon at an EHL Board meeting on 28 June 2021, with the documentation for the issue catching up over the next two or three days.

VRFB's claim against Garnet

231. This leads conveniently to consideration of VRFB's claim that Garnet was in material breach of the JVA by the steps it took on 29 June 2021, when it purported to bring about Mr Nikomarov's removal as an EHL director by, and before that when Garnet gave notice alleging VRFB to be in material breach of the JVA. This claim only arises if Garnet was not entitled to serve its Default Notice at the end of June 2021.

232. In answer to this claim Mr Gourgey relied on the same point as I have just described concerning the need for Alberta to have been involved in the giving of a Default Notice along with VRFB in response to Garnet's allegedly material breach of the JVA. He submitted that what VRFB had done when it was seeking to operate the clause 18.2 machinery was defective: VRFB could not have given effective notice under the JVA to trigger a mandatory sale of the shares of both Garnet and Alberta, when the notice was directed at breach of the JVA by Garnet alone, the breach having been at the end of June 2021, and when Alberta had not joined in giving the necessary clause 18.2 notices in July and August 2021.

233. Ms Boase submitted, in response, that as Garnet's wholly-owned subsidiary Alberta was to be treated to all intents and purposes as Garnet by another name, so that a Default Notice in respect of Garnet's breach could be served by VRFB without Alberta having to be joined in in the giving of the notice. I can see force in Ms Boase's submission. This is because (a) the JVA contemplated that there could be share transfers among group companies, and (b) the specimen mandatory transfer notice in Schedule 4 to the JVA is expressed as covering shares held by the giver of the notice while also containing an instruction to the Company to sell "*those shares held by members of our Group*".

234. Nevertheless there are difficulties with this submission.

i) First, it requires a generous reading of the words in clause 18.2 far beyond the actual text. The clause refers to the shareholder in material breach as the Defaulting Shareholder, "*the other Shareholders"* then being defined as the Non-Defaulting Shareholders who are (according to the clause) to act together if the mandatory transfer machinery is to be operated. Ms Boase's submission requires it to be understood that a company in the same Group as the Defaulting Shareholder is either (a) to be deemed to be a Defaulting Shareholder too, which would seemingly lead to a requirement for it to serve its own mandatory transfer notice, or (b) to be deemed to be in a separate class apart from the Non-Defaulting Shareholders, a class which is not referred to in the clause but which will nevertheless be one for which the Defaulting Shareholder will have authority as regards the sale of shares.

ii) Second, while the JVA does permit transfers among Group companies, and indeed contains a definition of the Garnet Group, the intra-group transfer provision in the JVA appears to require any transferring shareholders' shares to be transferred in whole, so that the single holding will not be divided and will pass within the Group. As to this, it might nevertheless be said that what took place with the Alberta subscription, that is a subscription by a wholly-owned subsidiary of one of the parties standing in the shoes of that party as if an original party, was not something contemplated by the JVA.

235. Had a decision on the point been necessary, I would have rejected Ms Boase's submission. Fortuitous as it may be that Alberta came to subscribe for shares in EHL, the words the parties used, and appear to have used carefully in the way that the JVA sought to divide the shareholders into two classes (namely the Defaulting Shareholder as the one in breach and all the others), cannot readily be read as carrying one of the more extended meanings suggested by Ms Boase.

236. The real objection to VRFB's claim, in my judgment, is that what Garnet did at the end of June 2021, when serving a Notice of Default to compel a sale of VRFB's shares and then attempting to remove Mr Nikomarov as an EHL director, was either justified (if VRFB was in material breach) or empty of content: VRFB not being in material breach of the JVA, Garnet had no power to do what it purported to do, and its actions achieved nothing. But there is no basis for a case that Garnet acted in bad faith and for an improper purpose, say, or pretended to use powers when knowing they were not available.

237. Further, since the end of June 2021 Mr Nikomarov has continued to act and be treated as holding office as an EHL director. On this basis the complaint against Garnet is no more than that it attempted something which would have been contrary to certain of the provisions of the JVA, such as interfering with the right of VRFB to have its appointee as an EHL director, but without achieving anything.

238. Finally, if, which I do not accept, such an attempted but abortive invocation of a power by Garnet could qualify as a breach of the JVA at all, as alleged by VRFB, in the present case the breach is not material for the purposes of clause 18.2. It was of no practical effect, save to complicate yet further the difficult relations between the parties.

239. VRFB's claim against Garnet and Alberta is therefore to be dismissed. It was, so far as I can see, without any substance or conviction.

Garnet's claim against VRFB

240. I now give my reasons for concluding that Garnet's claim is to be dismissed. First is the question whether VRFB was in breach of the JVA, and second is the question whether VRFB was in material breach (if, that is, in breach at all).

241. I have already pointed out that the JVA does not in terms lay down any restrictions on the way VRFB or Garnet might finance themselves, beyond restraining the making of unsanctioned dispositions of their shares in EHL and providing for sanction on certain changes of control. So, for example, they may not use their Shares as security for borrowing unless with the agreement of the other Shareholders. But there is nothing to stop VRFB or Garnet from issuing further shares, whether to any of their shareholders or to anyone else. Indeed, clause 7.13(c) gives express permission to Garnet to make distributions of EHL shares to a new investor in Garnet without being subject to the requirement of a global transfer of its whole shareholding as a unit. (Clause 7.13(b), applicable to VRFB, does not give the same permission, but neither does it prevent the addition of new investors alongside BEL and Acacia or any other holding company or investor.)

242. Garnet recognises that there is no such restriction on VRFB as mentioned in the previous paragraph. Indeed, its Amended Reply acknowledges as much, stating that the JVA did not seek to control the shareholders in VRFB.

243. Were there such a restriction, Garnet would have been able to avoid having to formulate its claim as it has, first with the complication of an alleged breach of the Agreement by VRFB as a foundation for the case that the issue of shares to Mustang knowing Mustang to be in breach of the Agreement was a breach of the JVA, either of clause 2.2 or 20.1, second with contention that the issue of shares to Mustang was contrary to the spirit and intention of the terms of the JVA in clause 7 and that VRFB failed to use powers to stop this.

244. I have explained already why I do not accept that there was a breach of the Agreement by Mustang.

245. Given this, conclusion, it is unnecessary to reach a conclusion as to what VRFB knew about any breach of the Agreement by Mustang. Mr Nikomarov denied

knowing that the Mustang investment involved a breach of the Agreement, his explanation being a belief that the Agreement did not apply at all because Mustang had an existing relationship with Bushveld and Acacia, and was not introduced by EHL. He also denied knowing what information Mustang had or used to make the investment into VRFB. While I can see that Mr Nikomarov's explanation would not be sufficient to answer a case that VRFB should have known of a breach of clause 3 of the Agreement, it would be sufficient to answer a case that VRFB did know of a breach of clause 4 of the Agreement.

246. Looking at clause 2.2 of the JVA, the difficulty ultimately for Garnet is that the Mustang investment in VRFB had the intended effect of assisting VRFB to pay its full $15 million called for by EHL in the 2021 Funding Round. It did nothing to harm the Business directly, but rather was calculated to be of immediate advantage to the Business by enabling EHL to provide substantial capital to Enerox and thus the Business. At any rate, I do not see that VRFB providing in full its promised $15 million in the 2021 Funding Round could ordinarily be considered to amount to a breach of clause 2.2 as having involved a failure to use reasonable endeavours to promote and develop the Business to the advantage of its owner and that company's parent.

247. Earlier in this judgment I have explained my conclusions concerning the operation of clause 2.2 of the JVA as imposing what is ostensibly a positive obligation, when it is relied on as instead having the negative effect of prohibiting something. In Garnet's Response to VRFB's Request for Further Information the proposition is that the duty to use reasonable endeavours could have been performed in different ways, for example by VRFB's refusing to take equity investment from Mustang where that investment was known or should have been known to entail a breach of Mustang's obligations under the Agreement, and by avoiding misrepresenting the sources of the investment it had committed to make into EHL in April 2021.

248. As it happens, I have rejected on the facts the two examples given in the Garnet Response. But had I not, it would still have been necessary for Garnet to establish that VRFB's involvement of Mustang and making of misrepresentations had in some fashion failed to advantage the Business as a different course of action would have, made as they were in conjunction with VRFB's performance of its commitment to provide $15 million to EHL to fund the Business through to 2022.

249. The alleged breach of the Agreement illustrates the difficulty with Garnet's case on clause 2.2 of the JVA. Apart from the Agreement, it does not cease to be a use of reasonable endeavours judgment for VRFB, in meeting its commitment to fund EHL, to fund itself by issuing shares to a third party, even one identical to Mustang. Garnet has not alleged that it does. This being so, the question whether there was a breach of the Agreement by Mustang when it subscribed, a breach which VRFB procured by taking the subscription, is beside the point so far as concerns clause 2.2. Ms Boase expressed this by submitting that there is no causal link between the Mustang breach of the Agreement and the alleged impacts of the Mustang subscription. But, additionally, as appears below, I do

not see the alleged impacts of the Mustang subscription as harming the Business.

250. In short, I do not see that the fact of the Agreement and the alleged breach by Mustang transformed VRFB's efforts to meet EHL's funding requirements into a failure to use reasonable endeavours within clause 2.2. The same is true of the alleged misrepresentations: if made, they had no adverse or disadvantaging impact on the Business.

251. Further, I consider that Garnet's reliance on the alleged breach of the Agreement as a relevant factor exposes the difficulty Garnet has in describing its complaints in a way to demonstrate VRFB to have been in breach of clause 20.1 of the JVA. To say, as Garnet has submitted, that "*The obtaining by a shareholder of an allotment of shares pursuant to clause 7 by virtue of breach of the contractual rights of EHL [that, is, by Mustang's breach of the Agreement] was not within the spirit and intention of the JVA*", assumes that something not provided for by the JVA is contrary to its spirit and intention. Even accepting Garnet's submission referred to earlier, a submission which I do not accept, that clause 20.1 is a further assurance clause (see below), it certainly cannot do the work suggested by the submission I have just quoted.

252. Garnet relies on clause 20.1 as providing, as I see it, some sort of pollyfiller to deal with gaps in the terms of the JVA: where something is not prohibited by any express or implied term, it is to be prohibited nevertheless if it is contrary to the spirit and intention of the agreement in that the parties are to do what they can to procure that the JVA's provisions are observed and given effect according to that spirit and intention. This, according to Mr Gourgey's written argument, is because "*Clause 20.1 is a further assurance clause, which the courts have interpreted as focussed on giving effect to the object or aim of the relevant agreement*". For this submission reference is made to the judgment of Arden LJ in the Coroin case to which I have referred already.

253. I do not accept that clause 20.1 has anything like the force which Garnet seeks to attribute to it.

i) First, the reference to "*voting rights and other powers in relation to*" EHL is to (a) those voting rights which a party has as a shareholder in EHL, and (b) the other powers which the EHL constitution together with the laws under which it is incorporated attribute to the party as a shareholder and member. That is obviously the way the corresponding expressions are used in clause 20.3; and there is no reason for the expressions, in particular the word "*powers*", to have a different meaning in clause 20.1

ii) Second, clause 20.1, taken in context with clauses 20.2 and 20.3, is directed at making sure that what is stated or provided for in the JVA, for example the rules concerning the appointment of officers or the

making of share transfers, is carried into effect and not hindered or blocked by any failure of a party to exercise its relevant rights or powers.

254. Insofar as Garnet attempts to identify any provisions of the JVA which might have required some exercise of rights or powers in relation to EHL to be given effect according to the JVA's spirit and intention, these are to be found in clause 7 of the JVA. Of these, the one provision invoked expressly by Garnet is clause 7.11 This requires the Shareholders in certain circumstances to have EHL's Board seek third party finance following which the Board is by clause 7.12 to communicate with shareholders: it is said that VRFB's failure to exercise powers had the result that the provisions of clause 7.11 were "circumvented".

255. In my judgment Garnet's contention concerning clause 20.1, and in particular clause 7.11, is to be rejected. The circumstance where clause 7.11 engages is where "*No Shareholder is able to provide its share of the Intended Minimum Funding Commitment, or the Board requires funding beyond the Intended Minimum Funding Commitment, and such funding is unavailable from Shareholders* ...". If the circumstance in clause 7.11 had arisen, the shareholders would have been required to procure the Board to do the things specified in paragraphs (a) to (c) of the clause. Clause 20.1 would have been relevant then to require the shareholders to exercise their rights and powers in relation to EHL to bring about what was to be procured.

256. I would add that a problem for Garnet is that the circumstances in clause 7.11 did not arise. It is alleged by Garnet that had Mr Otto known the true position with Mustang, he would have sought legal advice as to how to protect EHL's interests and continued discussions to obtain third party finance. But this leaves open the question whether the circumstances in clause 7.11 would then have arisen, when VRFB was still willing and able to provide its share of the $30 million.

257. In summary, I conclude that on its true construction clause 20.1 does no more than to require each of the parties to use the rights and powers which each has as a shareholder in EHL to make sure, so far as it can, that what is provided for in the agreement does not fail by reason of a failure of corporate machinery in EHL.

258. I am therefore not persuaded that VRFB has been in breach of the JVA as contended for by Garnet, whichever of clauses 2.2 and 20.1 is relied on.

259. Strictly, therefore, it is not necessary for me to consider whether, had VRFB been in breach, it was in material breach within clause 18.2(f) of the JVA. Nevertheless, given the effort the parties have put into addressing this particular question, I shall explain briefly my conclusion and reasons.

The result of Mustang's investment into VRFB: the impact and its materiality

260. The parties are agreed that in order to invoke the default machinery contained in clause 18.2(f) of the JVA the innocent party must show the other to be "in material breach". It is common ground that the parties to the JVA used the expression to exclude merely trivial breaches from qualifying an innocent party to invoke the machinery. Further, although I was referred to numerous reported and unreported cases in which the court had been concerned with contracts using such language, it is common ground between the parties that a party may only be found to be in material breach of the JVA where the breach is substantial and serious.

261. The use of these two adjectives as together providing a synonym for the single word, "material", is to illuminate two linked ideas. The first is directed at measuring the importance of the guilty party's breach in the context of the JVA, looking at the particular term broken and its significance for the parties' bargain. The second goes to the practical results of the breach. But reaching a decision on the question whether a party is in material breach of contract involves judgment. As to this, the parties agree that it is helpful to consider (as I do):

i) the consequences of holding that there either has or has not been a material breach relative to the term broken;

ii) the actual breaches complained of in the context of the agreement;

iii) the consequences of those breaches for the innocent party; and

iv) any explanation for the breaches.

262. As to the first of these considerations, Ms Boase for VRFB submitted that the materiality threshold requirement is because the consequences for the shareholder guilty of the breach are dramatic, and entail significant punishment, quite apart from any other remedy which might be claimed against the guilty party, with the innocent party being correspondingly benefitted: the guilty shareholder is not only liable to be forced to sell its shares, but the sale price will be just half the "Fair Value" determined in accordance with Schedule 2 to the JVA; that is, half the pro rata proportion of the arm's length willing seller – willing buyer sale price determined by the auditors or other independent valuers. In short, the submission is that the parties to the JVA must have envisaged that it would be only egregious misconduct which can qualify as a material breach, so that the expression "*in material breach*" must be interpreted as limiting the innocent party's right to invoke the clause 18.2 machinery to really significant cases.

263. I accept in principle Ms Boase's submission. In this regard I note that, by clause 8.4 of the JVA, a breach of clause 8.2 of the JVA leads automatically to the party in breach being treated as having served a mandatory transfer notice. Clause 8.2 concerns a Shareholder's failure to take prescribed steps to remedy an unsanctioned disposition of the Shareholder's Shares or interests in Shares

known to have amounted to a breach of the restrictions in clause 8.1. This provision, as it seems to me, helpfully illustrates a term of the JVA which the parties are to be taken to have considered sufficiently important that breach would result in the removal of the guilty party from membership of EHL at the disadvantageous price for its Shares: it is not the unsanctioned disposition alone which has the automatic effect, but the failure to remedy the disposition knowing it to have involved a breach of clause 8.1.

264. A similar inference may be drawn from clause 18.2 itself. The other matters, besides a party's being in unremedied material breach, which qualify as Events of Default without a party being in breach of the JVA have the appearance of events likely to undermine seriously the joint venture.

265. As to the second of the considerations, Ms Boase emphasises that the breaches of the JVA complained of by Garnet do not lie in any failure on the part of VRFB to comply with some immediately obvious express and key obligation imposed by or pursuant to the JVA. Further, she drew attention to what I would call the quality, or nature, of the breach itself, submitting that what is complained of (breach of the Agreement, and the misrepresentations) are extraneous to the JVA. Essentially the proposition is that the lengths to which Garnet has had to go to identify any breach of the JVA at all suggests that if indeed in breach VRFB is not in material breach. As she puts it, "*Garnet's complaints are, at best, about matters at the very edge of the parties' contractual obligations, deriving from broadly worded terms which, on Garnet's case, are of very uncertain ambit*".

266. I would not accept that a breach of clause 2.2 could be characterized as immaterial, simply because clause 2.2 imposes an obligation which is broad and wanting detailed mapping. On the contrary, it might be said that clause 2.2 is fundamental to the parties' joint venture.

267. However, it does seem to me that when looking at a claim that a breach of clause 2.2 (or, for that matter, of clause 20.1) has placed the guilty party "*in material breach*", it is still appropriate to consider the obviousness of the breach and its practical effects. In the present case the difficulty which Garnet has had in articulating a clear case suggests that if, after all, VRFB was in breach of the JVA the breach was unlikely to have qualified for an Event of Default.

268. Related to the characterization of Garnet's complaints which I have just quoted is Ms Boase's contention that from the perspective of EHL, or Enerox and the Business, the practical effects of the alleged breaches are that EHL became funded with all that it reasonably needed without suffering any or any noticeable harm. Any breach of the Agreement by Mustang was inconsequential so far as concerned EHL, in that it raised from a share issue all that it wanted so that there was no practical harm from any circumvention within clause 3 of the Agreement, and any information misused by Mustang was not likely to come to advantage competitors of Enerox or to damage EHL's ability in the future to raise finance.

269. The fourth of the considerations is linked to the second, in that it is looking at the quality of the breaches. Here Ms Boase submits that any breaches of the JVA were the result of mistaken appreciation by Mr Nikomarov of the scope of the Agreement and innocent misrepresentation.

270. That said, it seems to me that this fourth consideration would weigh heavily against VRFB. VRFB was dealing with Mustang more or less throughout the time when the 2021 Funding Round was decided on within EHL and then pursued, and yet was determined not to inform Garnet or EHL about the possibility of VRFB being funded by or through Mustang. Mr Nikomarov was clear in his evidence that VRFB was not obliged to say anything about its funding. But, conversely, VRFB ran the risk of finding that, not having been transparent, what it had done was complained of and later held to have crossed the line into breach. VRFB was not, after all, forced to do anything, and cannot point to anything Garnet or the EHL Board did to contribute to the breach. The Mustang investment was VRFB's solution to its need to find the $15 million required for the 2021 Funding Round if VRFB was to avoid the danger of dilution of its interest in EHL.

271. The third of the considerations has attracted the most detailed submissions. Fundamental to Garnet's claim against VRFB is that the latter's breach of the JVA was "material" in that it resulted in the Mustang investment in VRFB with attendant disadvantages. In submitting that VRFB was in material breach for the purposes of clause 18.2 of the JVA, Mr Gourgey concentrated his fire towards the effect of the Mustang investment on EHL as the party injured. Logically, as it seems to me, Garnet's interests too are relevant: breach of the JVA by VRFB might affect EHL (or Enerox and the Business) differently from the way it affects Garnet.

272. The evidence about the disadvantages has been provided almost as though time stood still at the end of April 2021, with the 2021 Funding Round and issue of new EHL shares having been completed then. The only area in which the lapse of several months has been acknowledged as having been accompanied by change is an acknowledgment that Mustang never published a prospectus or admission documents and its listing has not been restored, with the result that the backstop arrangements described in Mustang's announcement came into effect at the end of December 2021. Therefore the evidence concerning the disadvantages is directed, almost exclusively, to the predictions which would have been made on 27 April 2021. Save in one respect, the determination of the disadvantages is simply presented as a matter of probability.

273. The one respect in which it is said that the Mustang involvement caused some consequential event or failure concerns the withdrawal of one of three candidates then under consideration for the position of the Enerox CFO, a position which was to be filled to meet Enerox's requirements as it grew. There had been interviews with the candidates attended by Mr Otto, following which he had a conversation with Mr Schoenfeld to give his opinion and then, having been invited to provide a short summary of notes for the records, sent on 6 May 2021 an email to Mr Schoenfeld commenting on the three candidates. Of these,

the candidate who came to be engaged was one of Mr Otto's first two choices. Against his third choice, G, Mr Otto had only one positive matter to note, concluding after listing negative matters, "*Skeptical (sic) that he is right for the job, but maybe it was a less than ideal interview … maybe I missed something that would improve my views".* That same day G sent an email to Mr Schoenfeld to withdraw, saying that he had learnt from a press release of Mustang's investment and that "*The issue for me is that with the current capital structure it is too difficult for me to assess who the shareholders are and their intentions. …*"

274. Mr Otto's written evidence sought to convey that but for the third candidate's withdrawal he would likely have been the preferred choice and that his withdrawal had the result that the candidate chosen could not start for some months with the result that that there was delay in improving Enerox's accounting and reporting and increased pressure on Mr Schoenfeld. In his oral evidence Mr Otto described his conversation with Mr Schoenfeld, referred to above, explaining that the context was now a matter of shareholder dispute as VRFB was opposed to unwinding the Mustang investment, and continuing by saying that Mr Schoenfeld asked him:

> *"'How do I rank these three candidates?', and we discuss each one. The discussion focuses around what is the timeline to IPO EHL and, if the timeline to IPO EHL is immediate, Alexander is strongly of the view that [G] is the preferred candidate. I 'm looking at the situation and I believe it's unlikely we can IPO in the near term because of the ongoing matter of Mustang and so I prioritise operational considerations over that one and my response is framed as such*."

275. In other words Mr Otto's description of the three candidates in his email is his looking at the matter with there being no near-term IPO, and prioritising operational considerations. In that light, the third choice candidate, G, was considered by Mr Otto to be just that, according to Mr Otto's email. His email made no reference to any urgency in now having a CFO which would have placed the third choice candidate as a preferred candidate. Accordingly, I do not accept that Enerox was set back in its recruitment of an appropriate CFO by the making of the Mustang investment into VRFB.

276. The matter of the CFO's recruitment can readily be seen as something which could have had a direct impact on the Business, and thus EHL and Enerox, resulting from the Mustang investment. The remaining alleged impacts I consider below. As appears, I do not see these as impacts on EHL or Enerox, so much as on Garnet, for the simple reason that I do not see them as having harmed either the Business or the two companies themselves. To make an obvious point, there has been no evidence that these two companies may be at future risk of raising insufficient finance, or of having measurably increased cost of debt or finance. Before this Court Garnet's case aim has largely been directed at the better outcome for EHL shareholders (and therefore Garnet) in any future issues of EHL shares if the Mustang investment had not been made.

277. These other adverse impacts of the Mustang involvement contended for by Garnet are set out in paragraphs 42(a) and 43(d) of Garnet's Re-amended Particulars of Claim, and are said to be that the Mustang subscription of VRFB shares:

i) would adversely affect the value to be set on EHL in any future fund raising, that this would be because the price paid by Mustang would establish a "valuation marker" for future investment, and the fact that Mustang had invested via VRFB would provide a precedent for indirect investment into EHL and hence interfere with future direct EHL fund raising, whether through an IPO or a private placement (para 42(a)(i));

ii) would be damaging to any future IPO of the Company, by reason of (a) Mustang's market capitalisation itself proving a benchmark for the valuation of EHL, (b) the Mustang listing in the UK limiting the prospects of a successful IPO in the United States (said to offer better opportunities than the UK), and (c) its interest in EHL deterring other SPACs (para 42(a)(ii)); or

iii) enabled VRFB to maintain its proportionate shareholding in EHL, when otherwise the proportion would have been reduced, the maintenance of the proportion having the impacts in (i) or (ii) above (para 43(d)).

278. Before looking at the evidence put forward by the parties in respect of these suggested impacts, I should say at once that in my judgment the impacts do not touch the Enerox business.

i) The third, that in sub-para (iii) in the last paragraph, is stated as a consequence of VRFB's failure to exercise powers available to it (para 43 of the Re-amended Particulars of Claim), but then only leads back to the first and second suggested impacts. This, no doubt, is because in principle VRFB's maintaining its proportionate shareholding can hardly be objectionable as it is a right given by the JVA.

ii) There is no evidence, so far as concerns the first and second impacts in the last paragraph, that there would be any adverse effect on the Enerox Business itself. Mr Gourgey, in closing, argued the contrary, submitting that restriction on the fund raising ability in EHL could impact the business by being a drag on the ready provision of working capital. But I do not see this, considering what is said about the impacts. Fundamentally the Garnet argument is simply that on any future share issue in EHL to raise capital the number of shares needed to issue to new investors, and hence the dilution of existing shareholders, was likely to be increased compared to what it would have been had there never been such an investment. Further, there is no evidence that an impact of the Mustang investment was that EHL, and through EHL the Business, would, or would probably, or might possibly, be short of capital so as to

suffer any set back in its development. This was not a topic addressed by the two experts in their evidence, no doubt because there was no pleaded case on the topic.

279. With this I turn to the evidence of the parties' experts concerning the alleged impacts. In their Joint Report they agree that they have approached the assessment of the impacts from different perspectives. Dr Zenner's position is that the effect is to be judged relative to an optimised process in which EHL had sought to, and had in fact, obtained the full amount raised in the 2021 Funding Round without having VRFB obtain half of its subscription monies from an issue of shares to Mustang. Mr Baxter's position is that the issue for the experts is simply what is the effect of having the Mustang investment: will it be a drag on future fund raising?

280. Insofar as it is necessary to decide between these two approaches, I prefer that of Mr Baxter. Garnet's pleaded complaint is not that VRFB's breach lost EHL the chance of doing better than it did, but that what VRFB did had in itself the two impacts described in paragraph 42(1) of the Re-amended Particulars of Claim (see also paragraph 43(d)).

281. Ultimately Garnet's case concerning the supposed adverse impacts depends on Dr Zenner's evidence. In its Skeleton Argument VRFB summarised this as distilling itself to an assertion, having regard to various unquantified risks, that the Mustang investment may turn out to have had a substantial impact, a proposition denied by Mr Baxter who gave it as his opinion that there was no adverse impact. On this I prefer Mr Baxter's view, for reasons I explain below.

282. I set on one side two matters relied on by Dr Zenner. One is his conclusion that there was empirical evidence for the investment having had an adverse impact in the shape of the withdrawal of the CFO candidate. That withdrawal I have considered above.

283. The second is Dr Zenner's conclusion that the Mustang investment caused a damaging dispute between Garnet and VRFB. There two aspects to this.

i) The first is that any investor doing careful due diligence into EHL would see that a negative feature of EHL is the misalignment of its shareholders, quite apart from any dispute about the Mustang funding. It was agreed between the experts that even without the present litigation "*the shareholder discord … increases the potential risk and timing of future EHL financings, including a future IPO*".

ii) The second is that, if the Mustang investment did not otherwise qualify as having involved a material breach of the JVA, it should not be deemed to be one because Garnet took exception to the otherwise non-material breach and by its reaction caused the breach to be material.

284. Dr Zenner says that Mustang's investment into VRFB, and Mustang's characteristics, mean that:

> "*(1) future fundraising efforts are likely to be priced at lower valuation levels than would otherwise have been the case; (2) future fundraising efforts are likely to be delayed because it will take more time to identify investors, more time for the company to explain its situation, more time for potential investors to perform their due diligence to understand the opportunity, and more time to arrive at a valuation that is agreeable to both investors and the company*".

285. These future effects are, according to Dr Zenner, because the investment has increased the risk associated with EHL and Enerox, the particular factors increasing this risk being:

i) the Mustang investment in VRFB setting a "*valuation marker*" for future EHL raising of capital, this being as a result of an implied pricing of EHL derived from the price paid by Mustang for a 22% stake in VRFB;

ii) static, so to speak, generated by trading in Mustang's shares, with the indirect interest in EHL, providing confusing "*noise*" impacting on the pricing and public trading of EHL shares on an IPO (or those of a SPAC on an RTO); and

iii) Mustang's own corporate profile being a drag on EHL through Mustang's low capitalisation, lack of relevant experience in its directors, and UK listing.

286. It hardly needs stating that the passage of time following the Mustang investment will diminish its relevance for any future investment. The experts were agreed that the passage of time had this effect. The exception to this is if Mustang's own shares are listed and traded on a public market, with VRFB's only or principal investment continuing to be its EHL shares, and with Mustang's only or principal investment continuing to be its VRFB shareholding. The second and third of the factors mentioned in the previous paragraph involve this circumstance, as it seems to me. Only where Mustang's shares are so listed and traded will Mustang be anything more than a mere passive investor who happened to subscribe for shares in a shareholder at a disclosed price from which may be deduced an implied price for shares in EHL as at the end of April 2021. Only in that circumstance, where Mustang is listed, will its capitalisation or its directors be of any consequence.

287. As it happens, Mustang ceased to be listed with the making of its investment into VRFB at the end of April 2021, when its investment was made and was announced to the market along with the fact of the suspension of its listing. Mustang has never since been listed. Mustang's future listing and readmission of its securities to trading on the London Stock Exchange depends on

publication of a prospectus. Without the provision of detailed information from EHL concerning in particular Enerox and the Businesses, Mustang would be unable to provide a prospectus sufficient to secure readmission. There was no realistic chance of Mustang being able to relist without EHL's support, so that it was EHL's choice whether or not there should be a relisting. If a listed Mustang was viewed within EHL and its shareholders as a drag on EHL's own listing prospects, the relisting would not happen. Indeed, perhaps unsurprisingly, it had not happened by the end of the December 2021 deadline stated in the announcement for conversion of the Mustang loan notes and the time when BEL or the holders of the loan notes might take over Mustang's shares in VRFB.

288. The "valuation marker" point therefore distils itself into an issue as to whether a benchmark price has been set on EHL for future fund raising. As mentioned, Dr Zenner accepted that the marker is not permanent, that its impact diminishes with time and as subsequent events assume greater importance. He explained that the effect could be from six to twelve months.

289. There are, in my judgment, two reasons for not accepting that the setting of a valuation marker on 27 April 2021, if one was set then by the Mustang involvement in contributing to VRFB's share of the 2021 Funding Round, was to be predicted to an appreciable disadvantage to EHL itself, and much less to the Enerox business.

i) First, the completion of the 2021 Funding Round will have put EHL sufficiently in funds to satisfy the funding requirements of the Business for many months thereafter: the $30 million raised at the end of April 2021 was intended to cover the period into 2022. Garnet has not provided any evidence to show that EHL was likely to have a need for further funding for Enerox at a time when the valuation marker from 27 April 2021 was still of some consequence and likely to affect the fund raising adversely. Further, it was also to be predicted in April 2021 that within the space of the following few months the audit report for the Enerox accounts to the end of June 2020 would be signed off and those accounts approved, and then the next financial year would end with full year accounts being produced shortly thereafter. The information in those accounts, and perhaps in management accounts for the next few months after June 2021, would likely be of much greater significance to an investor than the price paid by Mustang for VRFB shares at a time when the 2020 accounts remained to be approved and the last audited accounts warned of insolvency.

ii) Second, the impact of the valuation marker is, as I have pointed out earlier, simply to increase the relative proportion of EHL which would need to be allocated to incoming shareholders on any new raising of share capital for EHL. It has not been suggested, and there is no evidence, that a probable result of the Mustang share subscription is that the Business will become financially disadvantaged through an inability in EHL or Enerox to secure funding for the Business, whether through

share issues or other financial arrangements, as and when such funding is needed.

290. I accept that if, after April 2021, EHL had been seeking to achieve a listing (whether an IPO or an RTO through a SPAC) by the end of December 2021, consideration would have had to be given by EHL and its advisers to the position of Mustang (a SPAC without a listing pending publication of a prospectus or admission document, and facing the December 2021 deadline for the unwinding of its VRFB shareholding on redemption of the convertible loan notes). There is no evidence, however, that even as late as April 2021 any real steps had been taken within EHL towards a listing being achieved before the year's end. Dr Zenner explained that a listing can take several months to organise and complete. I note that according to the minutes of the EHL Board meeting of 1 April 2021 a period of a year was mentioned. Further, what made a listing of EHL unrealistic within the 2021 year, once VRFB had taken Mustang's investment to assist its subscription of EHL shares in the 2021 Funding Round, was not Mustang's characteristics or particular identity as an investor in VRFB, but the fact that it was an outside investor at all joining with Bushveld and Acacia in VRFB and that Garnet saw this as involving a breach of the JVA by VRFB.

291. In the circumstances I see no purpose in a further rehearsal of the extremely elaborate expert evidence given in lengthy reports and also orally. In summary, as I have said already, I prefer the view expressed by Mr Baxter. I conclude that the making of the Mustang investment in EHL was unlikely to harm EHL's future financing efforts, impact negatively on pricing in a future listing or delay raising of finance or pursuit to a listing. The real, problem, sadly is the lack of alignment and trust between the EHL shareholders.

292. Considering the various matters set out in this section of this judgment, I would conclude that VRFB was not in material breach of the JVA, assuming it to have been in breach. To my mind the quality and consequences of the breach are insufficiently grave, when set against the possible loss which the JVA sets for a party in material breach and which indicates that the parties must have contemplated a comparatively high threshold for breach by one of their number to have placed the party in material breach.

Conclusion

293. Garnet, I can well understand, may see itself as having been badly let down by VRFB in the 2021 Funding Round. This is with some justification, as VRFB was far from transparent concerning its plans. However, I am not persuaded that VRFB was in breach of the JVA, much less that it was in material breach. The upshot is that the present proceedings do not help Garnet to extract VRFB from or to diminish its position as its co-venturer in EHL. Neither, for that matter, can VRFB gain anything from its claim in these proceedings. Uncomfortable as it may be for the two sides to continue together, these present proceedings are not the way forward.