Neutral Citation Number: [2025] EWHC 240 (Comm)

Case No: CL-2023-000591

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

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

Date: 11 February 2025

Before :

MR JUSTICE BRIGHT

- -

Between :

Mr Barry Maloney	**Claimant**
- and -	
Falcon VII Investment S.A.R.L.	**Defendant**

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- -

Jasbir Dhillon KC, Nehali Shah and Mohammud Jaamae Hafeez-Baig (instructed by **Pallas Partners LLP**) for the Claimant
Lord Wolfson KC, Joyce Arnold and Jarret Huang (instructed by **Milbank LLP**) for the Defendant

Hearing dates: 14, 15, 16, 20, 22, 23 January 2025

- -

Approved Judgment

This judgment was handed down remotely at 10:00am on 11/02/25 by circulation to the parties' representatives by e-mail and by release to the National Archives.

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Mr Justice Bright:

Introduction

1. This case concerns the contest between the Claimant ("Mr Maloney") and the Defendant ("Falcon VII") for the control of a company – Falcon Topco Limited ("Topco"), which is incorporated in Jersey.

2. As is usually the position in such cases, the respective rights and obligations of Mr Maloney and Falcon VII in relation to each other and in respect of Topco are set out in a number of related contracts and other documents, all of which cross-refer to each other. However, at the heart of the matter is a relatively straightforward issue as to the correct interpretation of one clause in one contract – clause 5.4 of the shareholders' agreement between Mr Maloney, Falcon VII, Topco and various others, dated 21 December 2018 (as subsequently varied by Deeds of Variation dated 22 February 2019 and 1 March 2020) ("the SHA").

3. A great deal is at stake, both financially and in terms of the effort and care that both sides (but especially Mr Maloney) have invested in the underlying business over a lengthy period. Both sides have worked with painstaking diligence through every conceivable point (and, perhaps, some other points as well). I am extremely grateful for all the assistance I have received. Nevertheless, the fundamental question I have to decide is short and simple, turning as it does on a provision that runs to a single sentence.

Background

4. Mr Maloney is an experienced businessman.

5. Falcon VII is incorporated in Luxembourg and is an investment SPV for ICG Europe Fund VII SCSp, a fund operated under the umbrella of Intermediate Capital Group plc ("ICG").

6. Topco owns Falcon Midco Limited ("Midco"), which in turn owns Falcon Bidco Limited ("Bidco"; all three together, the "Buyer Group" or the "Buyer Group Companies"). Via Midco and Bidco, Topco owns about 40% of Globoforce Group Public Limited Company, a company incorporated in Ireland that trades as Workhuman ("Workhuman").

7. Workhuman is a software company operating in the employee incentivisation market. It provides cloud-based employee recognition services designed to recognise and reward employees. It was founded in 1999 and since then has been extremely successful. It holds itself out as the market leader in the field and has an annual turnover of well over US$1 billion.

8. Mr Maloney became a director of Workhuman in 2001. His interest in Workhuman for many years was via shares held by funds managed by Balderton Capital (UK) LLP ("Balderton"), a venture capital firm in which he was then a partner.

9. In late 2018, Bidco purchased the Balderton funds' shares in Workhuman. The funding for the purchase included (i) a debt package provided by ICG to Bidco and (ii) equity

investments made by ICG in Topco, via Falcon VII. ICG's debt facility was advanced by a separate SPV, Falcon VII Financing S.a.r.l. ("Falcon Financing").

10. Thus, rather than having an interest in Workhuman as a partner in Balderton, Mr Maloney now had an indirect personal interest, with finance provided by ICG, via Falcon Financing and Falcon VII. The result was that Mr Maloney became the indirect holder of a 49.44% shareholding in Topco. Falcon VII had a much smaller shareholding – only 7%.

11. In early 2019, shortly after this transaction and following the exit of Balderton, Mr Maloney was appointed as Chairman of Workhuman.

12. In or around March 2020, another ICG entity, Luxembourg Investment Company 276 S.a.r.l. ("Lux 276"), purchased a 10% equity stake in Workhuman. As part of that transaction, Lux 276 agreed to accede to the Workhuman shareholders' agreement, and it acquired a right to have an observer at Workhuman board meetings.

13. It was common ground that the parties anticipated that, all going well, Workhuman would launch an IPO within a few years, which would result in ICG's involvement coming to an end. There was no certainty that an IPO would be viable, so the parties ensured that the documents covering the transaction addressed not only an IPO but also a number of other outcomes that might lead to ICG's involvement ceasing.

The documents governing the financial arrangements

14. The debt financing provided by Falcon Financing is governed by a notes subscription agreement dated 21 December 2018 (the "SFA", also referred to in some of the documentation as the "Senior Facility Agreement"), the conditions to the SFA (the "SFA Conditions") and the terms of various loan notes issued under the terms of the SFA and related security documentation. The loan notes issued to Falcon Financing comprised US$134,888,750.06 15% secured redeemable notes ("the "SF Notes"). I have been told that the total amount (principal and interest) owed to Falcon Financing at present is roughly US$110 million. The date for full and final repayment of the monies under the SFA is 21 December 2025, if not repaid sooner.

15. Falcon VII's equity position is governed principally by:

    i) The Topco articles of association dated 21 December 2018, as subsequently amended and restated on 30 April 2019 (the "Articles").

    ii) The SHA. This governs the management of Topco and the other Buyer Group Companies and their decision-making within Workhuman.

    iii) A services agreement between Mr Maloney, the Buyer Group Companies, Falcon VII and Falcon Financing dated 21 December 2018 (the "Services Agreement").

16. The various documents are closely inter-related, containing numerous cross-references to each other and (generally) adopting common defined terms. It was common ground before me that they have to be considered together.

17. The relevant provisions of the SHA, Articles and Services Agreement, and the definitions that explain the various defined terms, are set out in the Annex to this judgment.[1] I therefore will not reproduce them here, but some of the significant features were as follows. For this purpose, and generally in this judgment, I adopt the defined terms used in these documents and set out in the Annex – which the reader therefore should have to hand.

18. Both parties sought to protect their rights, relative to each other. Notably, Falcon VII acquired a 7% shareholding, but they were Original A1 shares representing 75% of the voting rights in Topco. Conversely, Mr Maloney (as Initial Lead Promoter) had majority voting control of the board of directors of each of the Buyer Group Companies, pursuant to clauses 3.1 and 3.14 of the SHA. For most of the relevant period he was the sole Promoter Director on Topco's board, and the other directors were appointed by ICG/Falcon VII – Mr Bernard Coady and Mr Sam McKelvey. Unless and until the occurrence of a Default Event or Services Default (as defined, respectively, in the Articles and the SHA), Mr Maloney had three votes, whereas Mr Coady and Mr McKelvey had one each.

19. Under the overall terms, the repayment of the full debt position was linked to the redemption of the entire equity held by Falcon VII in Topco – or, in the language used by the parties and their witnesses, the debt and the equity were "stapled" together. The equity had to be redeemed simultaneously with full repayment of the SF Notes, and vice versa. This follows from (in particular) clause 9.5 of the SFA Conditions and from the provisions in the Articles and the SHA relating to an "ICG Realisation Event", including the definition of this term. An ICG Realisation Event involves both (a) full repayment under the SF Notes/SFA and (b) the redemption of Falcon VII's Original A1 shares in Topco.[2]

20. Schedule 5 to the SHA incorporated a series of positive and negative covenants, to be given by and in relation to the conduct of different companies and persons. Schedule 5 is divided into five parts:

    i) Part A sets out a series of positive covenants given by each Buyer Group Company.

    ii) Part B sets out a series of negative covenants given by each Buyer Group Company.

    iii) Part C sets out a series of Promoters' covenants (one of the Promoters being Mr Maloney) in relation to the Buyer Group Companies.

    iv) Part D sets out a series of covenants given by the Buyer Group Companies and by the Relevant Parties (including Mr Maloney) in relation to the Target Group Companies.

[1] Where the Annex indicates that a particular definition is provided in the Articles, the same definition is also applicable to the SHA, as relevant and unless otherwise indicated.

[2] Or their sale, purchase or other cash payment resulting in Falcon VII receiving the Relevant Proportion of the applicable Market Value.

v) Part E sets out a further series of covenants in relation to the Buyer Group Companies.

21. The covenants in Parts B, C and D were all subject to the formulation "without Lender Investor Consent" – meaning that these covenants would not be applicable if Falcon VII (in particular) gave written consent (per the relevant definitions). The covenants in Part E were subject to the requirement of Promoter Consent.

22. By clause 5.2 of the SHA, each Buyer Group Company covenanted and undertook to comply with the covenants in Schedule 5. By clause 5.3, each Relevant Party (i.e., including Mr Maloney) agreed and acknowledged that the Buyer Group was to conduct its affairs in accordance with Schedule 5; and, accordingly, each Relevant Party itself covenanted and agreed to conduct himself/itself consistently with Schedule 5.

23. The covenants of particular relevance are in Part B and Part D, especially the following:

i) Part B covenant 6, in so far as it is a covenant by the Buyer Group Companies not, without Lender Investor Consent, to amend any of the Target Investment Documents – which includes the articles of association of Workhuman (the "Workhuman Articles").

ii) Part B covenant 24, in so far as it is a covenant by the Buyer Group Companies not, without Lender Investor Consent, to instigate or "take any steps" in relation to an ICG Realisation Event unless the provisions of the SHA and Articles were complied with and the ICG Exit Conditions were adhered to.

iii) Part D covenants 1, 6 (in so far as it relates to the Workhuman Articles), 12 and 13.

The falling-out, the Shareholder Resolutions and the dispute about clause 5.4

24. Up to about the end of March 2023, Mr Maloney was engaged, on behalf of the Workhuman board, in discussions regarding a potential corporate acquisition by Workhuman (the "Proposed Transaction"). Falcon VII refused to consent to the Proposed Transaction by Workhuman, except on terms that would have made it significantly better off, none of which Mr Maloney was prepared to accept. This led to a breakdown in relations between Mr Maloney and Falcon VII. Falcon VII's refusal to consent is the subject of separate proceedings in Ireland between Workhuman, Falcon VII and ICG (among others).

25. Following that breakdown in relations, Mr Maloney took steps to seek to effect the removal of ICG's VII's interests in Workhuman via Falcon VII and Falcon Financing, by repaying Falcon Financing's debt position and redeeming Falcon VII's equity position in Topco. The steps taken by Mr Maloney included (among other things) the passing of shareholder resolutions of Workhuman authorising Workhuman's actions (the "Shareholder Resolutions"). This happened as follows.

26. On 12 May 2023, Mr Maloney sent a letter dated 11 May 2023 by registered post to Falcon VII requesting the nomination of an Agreed Investment Bank (as defined in the Articles) ("AIB", and the "AIB Notice"). A softcopy was also sent by Mr Maloney's Irish lawyers, McCann Fitzgerald LLP ("McCann"), to Falcon VII's corporate legal

advisers[3] (Ropes & Gray LLP) via email on 12 May 2023. The emailed AIB Notice was forwarded by Ropes & Gray LLP to Falcon VII on 16 May 2023. The hardcopy letter sent by registered post was received by Falcon VII in Luxembourg on 23 May 2023. It was also received by Falcon VII in Luxembourg by courier on 22 May 2023. Falcon VII responded on 31 May 2023 through its lawyers (Ropes & Gray LLP) stating that Falcon VII had not received the AIB Notice but proposing that either or both of the corporate finance teams in New York of Morgan Stanley or JP Morgan should act as the AIB. McCann responded agreeing to the proposal nominating Morgan Stanley by an email of 13 June 2023. Falcon VII disputed that the nomination process set out in the Articles was complied with.

27. On 29 May 2023, the Workhuman Board met, and discussed and agreed a capital restructuring, with steps including: (i) amendments to the Workhuman Articles; (ii) a revaluation of Workhuman's investment in a subsidiary (the "Revaluation"), which gives rise to an asset valuation reserve (the "Revaluation Reserve"); (iii) the capitalisation of a portion of the Revaluation Reserve in paying up B Deferred Shares and share premium; (iv) a proposed reduction of the company's capital by cancelling the amount standing to the credit of the company's share premium account (the "Capital Reduction"); and (v) an application to the Irish Courts to approve the reduction of the company's share capital contemplated by the Capital Reduction. At this meeting, Mr Maloney voted to recommend the above steps to Workhuman's shareholders and to issue a notice to them.

28. The purpose of the capital restructuring was stated to be, as per the minutes of this meeting, "to provide flexibility and enable the Company to make distributions to its shareholders in the future (should the board deem it appropriate and in the best interests of [Workhuman] at that time to do so)." Mr Maloney's intention was that the distributable reserves created by the Capital Reduction would ultimately be used to repay and redeem Falcon VII's and Falcon Financing's positions within the Buyer Group. Mr Maloney confirmed this in evidence, and I accept his evidence on this point.

29. However, the minutes also record that the Capital Reduction was "subject to and with the consent of the shareholders and the confirmation of the High Court of Ireland". Furthermore, even if the Capital Reduction was achieved, there would then need to be a further meeting of the Workhuman board, the distribution of the reserves to the shareholders being "subject to the Board determining at that time that such distribution is in the best interests of the Company".

30. Following the meeting of the Workhuman board on 29 May 2023, Mr Maloney sent a letter to Workhuman's shareholders and a notice was issued for an extraordinary general meeting ("EGM") of Workhuman proposing the Shareholder Resolutions and calling an EGM to vote on them to be held on 21 June 2023 (the "Shareholder Circular"). On 31 May 2023, Topco issued an agenda for a meeting of its board of directors which included details of the Capital Reduction and plans to repay ICG's debt and redeem its equity in Topco.

31. On 13 June 2023, a meeting of the Topco board of directors took place at which, among other things, Mr Maloney sought to instruct PwC as accounting advisers, McCann as

[3] The Articles and SHA generally use this spelling, rather than "advisor", and this is also the spelling generally used by the parties in their dealings with each other and in the course of these proceedings.

legal advisers, and Capnua Corporate Finance Limited ("Capnua") as corporate finance advisers to act for Topco in relation to the proposed ICG Realisation Event (as defined in the Articles). Falcon VII did not accept that they should be appointed as Topco's advisers. During the board meeting, Mr Coady said that Falcon VII's position was that Mr Maloney could not act without Falcon VII's consent. He also said that Falcon VII had not agreed to the selection of Morgan Stanley as AIB, and that the instruction of any AIB should be joint. Mr Maloney disputed this, saying that he was entitled to take the steps he had under Clause 5.4 of the SHA and that Falcon VII had nominated Morgan Stanley as the AIB, which he had accepted and agreed. He also stated that he had three votes on the Topco board, while Mr Coady and Mr McKelvey each had one, so that he had a three-two majority.

32. On 16 June 2023, Falcon VII wrote a letter to each of the Buyer Group (i.e., Topco, Bidco and Midco), Mr Maloney and other relevant parties, alleging that the Shareholder Circular contemplated a series of actions requiring Lender Investor Consent pursuant to the Falcon SHA, and purporting to direct the recipients (including Mr Maloney) to vote against, and exercise their respective rights to procure that each Buyer Group Company votes against, the Shareholder Resolutions at the EGM on 21 June 2023. The letter further (in broad summary) directed Bidco and Mr Maloney to vote against the Shareholder Resolutions.

33. On 20 June 2023, the Workhuman board met to consider and approve the Revaluation and, as a consequence, to create the Revaluation Reserve representing the difference between the revised valuation of the company's assets and its previous book value. The Workhuman board (including Mr Maloney) unanimously voted to approve the Revaluation and creation of the Revaluation Reserve, resulting in a Revaluation Reserve of US$1,544,126,000. The Workhuman board (including Mr Maloney) also voted in favour of the capitalisation of the Revaluation Reserve and the application to the Irish High Court for approval of the Capital Reduction.

34. Also on 20 June 2023, by a Promoter Majority Notice, Mr Maloney purported to appoint two additional directors – Messrs Eric Mosley and Mark Evans – to each of Bidco and Midco. They were not appointed to the board of Topco, where the position remained as before – i.e., the only directors were Mr Maloney, Mr Coady and Mr McKelvey.

35. Also on 20 June 2023, Falcon VII's Irish solicitors, A&L Goodbody LLP ("ALG"), wrote to Mr Maloney, the Buyer Group Companies and various others. A similar letter was sent to McCann. ALG stated that an ICG Realisation Event could not take place without Falcon VII's consent, objected to Mr Maloney's assertions and conduct at the 13 June 2023 Topco board meeting and disputed Mr Maloney's position as to clause 5.4 of the SHA. ALG also disputed the appointment of PwC, McCann and Capnua as advisers to assist with an ICG Realisation Event, and that Morgan Stanley had been selected as the AIB and objecting to its potential engagement as AIB. ALG also requested information pursuant to clause 6.2.4 of the SHA:

> "For the purposes of clause 6.2.4 of the SHA and otherwise, our client hereby formally requests that the Lead Promotor promptly provide us with… copies of all offers, term sheets, commitments or indications of interest received by any Target Group Company, any Buyer Group Company or the Lead Promoter during the last six months in relation to a proposed financing,

> investment or other corporate transaction which could reasonably be used to finance a potential ICG Realisation Event"

36. McCann replied on the same day, disagreeing with ALG on all points. In response to the request for information, McCann said that no documents were available within the category set out above.[4]

37. On 21 June 2023, the EGM took place and the Shareholder Resolutions were passed. Mr Maloney voted Bidco's shares in favour of the Shareholder Resolutions.

38. Also on 21 June 2023, Workhuman applied to the Irish High Court to approve the Capital Reduction of US$503,416,005. This application was served by Workhuman on Falcon VII on 26 June 2023 pursuant to a direction of the Irish High Court. The Irish High Court further directed that any objections to the Capital Reduction application be delivered by 7 July 2023. Falcon VII did not deliver any objection or attend the hearing.

39. On 26 June 2023, Falcon VII responded to Mr Maloney's Promoter Majority Notice, asserting that there had been a Services Default on the basis that his actions leading up to and Bidco's actions in voting for the Shareholder Resolutions required Lender Investor Consent and/or were contrary to their direction of 16 June 2023, and therefore the purported appointments of Messrs Mosley and Evans were invalid. In short, Falcon VII disputed the position that Mr Maloney had taken at the Topco board meeting of 13 June 2023 – i.e., that he was entitled to take the steps he had under Clause 5.4 of the SHA.

40. On 5 July 2023, Falcon VII purported to appoint Messrs Coady and McKelvey as directors of Bidco and Midco, and to remove Messrs Mosley and Evans as directors of Bidco, Midco and Topco[5]. Falcon VII's position from this point onwards was that Mr Coady and Mr McKelvey constituted a majority on the boards of each of the Buyer Group Companies. Mr Maloney disputed this.

41. On 12 July 2023, the Irish High Court heard and granted Workhuman's Capital Reduction application.

42. On 18 July 2023, at a meeting of the Topco board, Mr Coady and Mr McKelvey purported to pass a director resolution resolving to terminate the appointment (if any) of, among others, Morgan Stanley as AIB. Mr Maloney's position was that he still had three votes on the Topco board, constituting the majority, and he voted against that resolution. During that meeting, Messrs Coady and McKelvey also requested information regarding the proposed refinancing of Workhuman (including third-party funding).

43. On 21 July 2023, following the Topco board of 18 July 2023 described above, Mr Coady purported to write on behalf of Topco to Ernst & Young, McCann, PwC and Capnua, terminating their appointments.

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[4] The request for information had also sought documents within other categories, in relation to which McCann replied referring to various documents which, as they said, had already been provided.

[5] This last element was redundant, because Mr Maloney had not purported to appoint them to the board of Topco.

44. On 26 July 2023, Mr McKelvey, on behalf of Falcon VII, emailed Mr Maloney requesting, among other things, information in relation to discussions with potential lenders who might finance the proposed ICG Realisation Event, and information in relation to Morgan Stanley's instruction. In a response on Mr Maloney's behalf on 11 August 2023, Capnua did not provide that information. Capnua stated that Workhuman was concerned that actions taken by ICG were damaging to it, and that Workhuman was therefore considering the request for information relating to discussions with potential funders and the terms on which it might be willing to provide the information.

45. On 28 July 2023, McCann confirmed that neither they nor PwC would be appointed in connection with the proposed ICG Realisation Event.

46. At a Workhuman board meeting on 8 August 2023, Mr Maloney proposed and voted for (without Falcon VII's consent) the establishment of a committee of the Workhuman board to consider a share redemption (the "Redemption Committee").

47. At a Topco Board meeting on 11 August 2023, Mr Maloney purported to instruct William Fry LLP ("William Fry") as legal advisers to act for Topco in relation to the proposed ICG Realisation Event. Messrs Coady and McKelvey voted against that proposal. On the day before the meeting, Mr Maloney had signed an engagement letter (purportedly on behalf of Topco) with William Fry.

48. On 21 August 2023, Falcon VII received, from William Fry, a draft engagement letter from Morgan Stanley. The draft engagement letter referred to Morgan Stanley having been engaged since 14 June 2023.

49. On 22 August 2023, at a Topco board meeting, Mr Maloney proposed a draft engagement letter and draft indemnity letter with Morgan Stanley to be approved. Mr Maloney voted in favour of that proposal, and Mr Coady and Mr McKelvey voted against it.

50. On 25 August 2023, Mr Coady, purportedly on behalf of Topco, wrote to Morgan Stanley, notifying it that: its appointment had not been approved in accordance with the contractual requirements; William Fry had not been appointed validly to act for Topco in connection with, among other things, Morgan Stanley's engagement letter; and that any future engagement by it would have to be pursuant to a joint instruction by Mr Maloney and Falcon VII.

51. On 19 September 2023, Morgan Stanley issued a preliminary draft valuation report (the "MS Report") and offered to walk the parties through its analysis.

52. On 20 September 2023, Mr Coady, purportedly on behalf of Topco, wrote to Morgan Stanley noting that Falcon VII (and purportedly Topco) did not accept the validity of their engagement or their work product (including the MS Report).

53. On 19 September 2023, Falcon VII sent Mr Maloney a purported termination notice under the Services Agreement (the "Termination Notice").

54. On 20 September 2023, Falcon VII wrote (purportedly on Bidco's behalf) to the Workhuman board, alleging the consequences of the Termination Notice upon Mr Maloney's position as a director of Workhuman and seeking to appoint a new director.

55. On 25 September 2023, ALG, requested information on behalf of Falcon VII and the Topco directors from Mr Maloney's corporate advisers and legal advisers in relation to bank accounts held by the Buyer Group Companies. The letter was also copied by email to Mr Maloney. No response was received. Mr Maloney's position was that Falcon VII was not entitled to this information.

Procedural history

56. Mr Maloney commenced these proceedings by a Part 8 Claim Form issued on 23 September 2023. He sought declarations (i) that the subject of and passing of the Shareholder Resolutions did not require Falcon VII's consent under the SHA; (ii) that neither he nor any of the Buyer Group Companies had acted in breach of the SHA in connection with the Shareholder Resolutions; and (iii) that the subject of and passing of the Shareholder Resolutions did not amount to a Services Default, Material Breach or Default Event under the Services Agreement and SHA. The Part 8 Claim Form was supported by Mr Maloney's First Witness Statement ("Maloney 1").

57. On 17 October 2023, Falcon VII filed its acknowledgment of service in which it indicated it would defend the claim and sought declarations that (i) Morgan Stanley has not been appointed as the AIB, (ii) Morgan Stanley has not been engaged or instructed in accordance with the Articles to calculate the Independent Value, (iii) the report prepared by Morgan Stanley and dated 19 September 2023 does not constitute or contain the Independent Value, and (iv) the Services Agreement has been terminated validly by Falcon VII's letter of 19 September 2023.

58. On 14 November 2023, Falcon VII filed the First Witness Statement of Mr Coady ("Coady 1"), in response to Mr Maloney's Part 8 claim and in support of its application for counterclaims.

59. On 5 December 2023, following the parties agreeing to a short extension of time, Mr Maloney filed and served his evidence in reply to the Part 8 claim and in response to the Falcon VII' application for counterclaims ("Maloney 2").

60. It took until about March 2024 for the parties to agree on the best way to progress the action. On 21 March 2024, Foxton J approved the parties' request for expedition. On the same day, Picken J made a consent order giving directions (the "Directions Order"), including directions for the service of statements of case on the counterclaim.

61. On 26 April 2024, pursuant to the Directions Order, Falcon VII filed and served its Particulars of Counterclaim. In its Counterclaim, Falcon VII asserted that Mr Maloney had been in breach not only by reason of the events associated with the Shareholder Resolutions, but also by reason of (i) the purported engagement of Morgan Stanley, (ii) the alleged failure to respond properly to the requests for information made by Mr McKelvey's email of 26 July 2023 and by ALG's letter of 25 September 2023 and (iii) the appointment of PwC and McCann as advisers.

62. On 24 May 2024, pursuant to the Directions Order, Mr Maloney filed and served his Defence to Counterclaim.

63. On 14 June 2024, pursuant to the Directions Order, Falcon VII filed and served its Reply to Defence to Counterclaim.

64. During July and August 2024, the parties provided disclosure and various requests for information were dealt with.

65. A Case Management Conference hearing was held on 18 October 2024, at which directions were given leading up to the trial date.

Amendments to Mr Maloney's Defence to Counterclaim

66. On 24 December 2024, Mr Maloney's solicitors sent a draft Amended Defence to Counterclaim to Falcon VII's solicitors. The principal effect of the draft amendments was to add various technical defences to the additional points raised by the Counterclaim, i.e. in relation to (i) the engagement of Morgan Stanley, (ii) the requests for information and (iii) the appointment of advisers.

67. This led to an application for permission to amend, which I dealt with on the first day of the trial.

68. The reason given by Mr Maloney for the amendments, and the application, being raised only when they were, was that the issues in question were only identified by Mr Maloney's legal team in the course of preparing for trial. It was not said that they arose out of any new information or that they could not have been identified earlier.

69. Falcon VII objected to the proposed amendments on the basis that they had been raised so close to the trial date and it would not be possible for Falcon VII to deal with them at the trial.

70. Having heard Lord Wolfson KC on behalf of Falcon VII outlining how Falcon VII might wish to respond to the amendments and what work this would require, I concluded that the difficulties that the proposed amendments presented for Falcon VII, in terms of the work required in order to plead and prepare a case in response were not, in fact, very great. Indeed, the general shape and contents of Falcon VII's likely case were already clear, from Lord Wolfson KC's submissions. It followed that, although late, the amendments would not cause any real disruption to the trial process or any real unfairness or prejudice to Falcon VII. I therefore indicated that the amendments would be allowed, on Day 2 of the trial – 15 January 2025 – and gave directions as to how they should be pleaded out.

71. The result was that there were a series of amendments/re-amendments to the Particulars of Counterclaim, Defence to Counterclaim and Reply to Defence to Counterclaim. The process of formally serving the final documents was not completed until 21 January 2025 – after the evidence had concluded and shortly before closing submissions. However, following the careful explanations given by both sides as to what they intended to say, there were no surprises. In the event, neither side suggested that it had been unable to deal with the other's amendments, and neither suggested that they had been prejudiced. On the contrary, it was apparent to me that each of them fully understood and was prepared for the other's arguments.

The significance of SHA clause 5.4

72. I have noted above the covenants set out in Schedule 5 to the SHA, and the fact that not only was each Buyer Group Company bound by these covenants under clause 5.2, but

also each Relevant Party (including Mr Maloney) covenanted and undertook to conduct himself and exercise his rights consistently with Schedule 5 – this being provided for in clause 5.3 of the SHA. This of course was subject to the possibility of Lender Investor Consent, i.e. written consent from Falcon VII, as regards the covenants in Parts B, C and D.

73. The capital restructuring that was discussed and agreed at the Workhuman board meeting of 29 May 2023 involved amendments to the Workhuman Articles, and the reduction of Workhuman's share capital. These were matters that fell within covenants 1, 6 and 13, in Schedule 5 to the SHA, Part D. No Lender Investor Consent had been given. Accordingly, pursuant to Schedule 5 Part D, they were matters that Bidco, Topco and Mr Maloney were all bound to oppose.

74. It follows that, unless clause 5.3 of the SHA is not applicable, and/or unless the effects of the covenants in Schedule 5 are somehow abrogated or modified, Mr Maloney was in breach of the SHA in relation to the Shareholder Resolutions. This arises from Mr Maloney's participation in and votes at the Workhuman board meetings of 29 May and 20 June 2023, and from his actions in relation to the 21 June 2023 Workhuman EGM (where he procured Bidco to vote in favour).

75. Mr Maloney's case on this was entirely reliant on clause 5.4 of the SHA. Mr Dhillon KC, for Mr Maloney, was very frank about this. He accepted that, if his arguments as to the meaning and effect of clause 5.4 were not correct, then Mr Maloney's claim must fail.

76. Indeed, he accepted that this would mean not merely that Mr Maloney was in breach of the SHA, but also that breaches in relation to the Shareholder Resolutions were (subject to clause 5.4) Material Breaches and/or Default Events and/or Services Defaults. So too was Mr Maloney's participation in and his votes at the 8 August 2023 Workhuman board meeting, in relation to the Redemption Committee (because of covenant 12, in Schedule 5 Part D). Similarly, in so far as Topco's board meetings of 13 June, 18 July, 11 August and 22 August 2023 resulted in Topco taking steps in relation to an ICG Realisation Event, in circumstances where there had been breaches in relation to the Shareholder Resolutions, then Topco too was in breach (under covenant 24 in Schedule 5 Part B to the SHA).

77. It would follow from this that Falcon VII was entitled to send its Termination Notice of 19 September 2023. Furthermore, the occurrence of any Default Event or Services Default would mean that Mr Maloney thereupon lost his right to exercise three votes at the Topco board, pursuant to clauses 3.1 and 3.14 of the SHA. This in turn would affect Mr Maloney's case as to the decisions that he says were taken at the Topco board meetings of 13 June, 18 July, 11 August and 22 August 2023.

78. In these circumstances, it was common ground from the outset that the meaning and effect of clause 5.4 of the SHA is the key issue in the case.

    i) If Mr Maloney were to win on the interpretation of clause 5.4, he would have established that the Shareholder Resolutions and the actions taken by Mr Maloney in relation to them did not require any Lender Investor Consent, and, accordingly, that there were no associated breaches by Mr Maloney or by Topco or Bidco. He therefore would succeed in principle on his claim.

ii) Success by Mr Maloney on this would not mean that Mr Maloney would win on all points, because Falcon VII still have complaints about other, subsequent breaches: notably concerning the engagement of Morgan Stanley and concerning Falcon VII's information requests. However, success on clause 5.4 would leave Mr Maloney in a significantly stronger position, even on these other points.

iii) Conversely, if Mr Maloney were to lose on the interpretation of clause 5.4, and Falcon VII were to win, that would be the end of the matter. Falcon VII thereby would not only defeat Mr Maloney's claim, it would also necessarily have established that Mr Maloney was not entitled to take the steps that followed the Shareholder Resolutions, which were dependent on his being entitled to cast three votes on the Topco board.

The words of SHA clause 5.4 and the relevant defined terms

79. Clause 5.4 of the SHA provides as follows:

> "**5. CONDUCT OF BUSINESS**
> …
> 5.4 The parties agree and acknowledge that, notwithstanding any provision of this Agreement or the Articles but subject to the provisions of the Finance Documents, an SF Repayment (as defined in the Articles) may be effected by the Buyer Group without any requirement for the consent or approval of the Lender Investors provided that the ICG Exit Conditions are satisfied and the terms of this Agreement, the Articles and the Financing Documents are all adhered to."

80. A full appreciation of this text requires the consideration of a large number of defined terms. They are all set out in the Annex. In summary:

i) "Articles" refers to the Articles.

ii) "Finance Documents" is not a defined term. It was common ground that this was a typographical error for "Financing Documents", which is a defined term in the SHA with a definition that includes the SFA and the SF Notes issued under it.

iii) "SF Repayment" is defined only in the Articles, as follows:

> "**"SF Repayment"** means the full and final repayment of all amounts advanced under the Senior Facility Agreement (unless already repaid) and all amounts owing or due (then or in the future) in respect the SF Notes and/or under the Senior Facility Agreement including by way of interest, costs or otherwise or, with prior Lender Investor Consent, all amount other than USDl;"

iv) "Buyer Group" means Topco, Midco and Bidco.

v) "Lender Investors" means, in particular, Falcon VII.

vi) "ICG Exit Conditions" is stipulated in the SHA to have the definition in the Articles. There, the definition is given in terms that take the reader to the definition of "ICG Realisation Event" and the definition of "ICG Realisation Amount".

vii) "ICG Realisation Event" means (broadly) (a) the repayment of all sums due to Falcon Financing under the SFA and the SF Notes and (b) the sale/purchase and/or redemption of the Original A1 shares of Falcon VII, provided that Falcon VII receives no less than the Market Value[6], all subject to the following general proviso:

> "… provided that, in each case, unless a Lender Investor Consent agrees otherwise, such ICG Realisation Event takes place in accordance with the terms of the Equity Documents and the ICG Conditions[7] are met;"

viii) "Lender Investor Consent" means written consent from (in particular) Falcon VII or one of the directors appointed by it to the Topco board, i.e. Mr Coady and Mr McKelvey.

ix) "ICG Realisation Amount" means an amount referable to "Market Value", which in turn depends (in some circumstances) on the "Independent Value" as stated in writing by the "Agreed Investment Bank" – i.e., the AIB.

x) "Equity Documents" includes the full suite of governing documents – i.e., it includes the SFA, the Articles, the SHA and the Services Agreement.

The rival interpretations of clause 5.4

Mr Maloney's case on the interpretation of clause 5.4

81. Mr Maloney's case, advanced by Mr Dhillon KC, was that, while it would otherwise be necessary under the Articles and under the SHA for there to be a Lender Investor Consent before Workhuman could amend its articles or carry out a capital restructuring, and for Mr Maloney to be involved in and support this process, the requirement of a Lender Investor Consent was disapplied by clause 5.4. Mr Maloney's case was that the same was also true for various other matters, notably steps taken by Topco (e.g., in appointing advisers and in engaging Morgan Stanley as AIB), in so far as they would otherwise require a Lender Investor Consent under paragraph 24 of Schedule 5 Part B to the SHA.

82. Mr Dhillon KC acknowledged that clause 5.4 only expressly refers to the situation where "an SF Repayment" is "effected by the Buyer Group", but said that the consequence of SF Repayment being stapled to the redemption of Falcon VII's equity in Topco was that clause 5.4 must be understood as relating to both things, together. Furthermore, "effected" must include not only the final act, but all steps taken in

[6] The definition provides for a further limb, (c), which relates to any "Debt Securities". Limb (c) is not relevant on the facts of this case.
[7] This must be a typographical error for "ICG Exit Conditions".

relation to the relevant object; and "the Buyer Group" includes Mr Maloney, when acting as director of a Buyer Group Company. Thus, the reference to where "an SF Repayment… effected by the Buyer Group" has to be understood as extending to any steps taken by Mr Maloney in relation to an ICG Realisation Event.

83. On this basis, Mr Maloney's case was that the proviso at the end of clause 5.4 – "provided that the ICG Exit Conditions are satisfied and the terms of this Agreement, the Articles and the Financing Documents are all adhered to" – must be understood as being subject to the abrogation of the requirement of any consent or approval of the Lender Investors. Thus, the proviso is subject to a significant exception: it requires satisfaction/adherence to the ICG Exit Conditions and the terms of the SHA and Articles, but with the exception of any provisions in any of these documents that would otherwise have required such consent or approval.

84. Thus, where clause 5.4 applies, it negates (in particular) every covenant in Schedule 5 to the SHA that is subject to Lender Investor Consent.

85. Furthermore, in so far as (for example) the ICG Exit Conditions incorporate the definition of an ICG Realisation Event, which in turn is subject to the proviso at the end that such ICG Realisation Event take place in accordance with the terms of the Equity Documents – including the SHA, including Schedule 5 to the SHA – these provisions, too, must be read subject to clause 5.4.

86. Finally, Mr Dhillon KC said that any other interpretation (in particular, Falcon VII's interpretation) would mean that clause 5.4 had no real effect. Mr Dhillon KC argued that the parties would not have included a provision that was redundant.

Falcon VII's case on the interpretation of clause 5.4

87. Falcon VII's case, advanced by Lord Wolfson KC, was that clause 5.4 only relates to an SF Repayment effected by a Buyer Group Company. This, therefore, was the only context in which it could have any effect. It did not remove the requirement of a Lender Investor Consent, if otherwise required by any provision of Schedule 5 (or any other provision), in relation to (i) anything that was not an SF Repayment, (ii) anything that was merely preparatory to an SF Repayment (rather than something that could properly be said to effect an SF Repayment), or (iii) anything that was done by someone other than a Buyer Group Company.

88. More broadly, Falcon VII said that clause 5.4 was not intended to re-write the definition of an ICG Realisation Event or to have the effect that a Lender Investor Consent could never be required if the effect would be to prevent or impede an ICG Realisation Event. An ICG Realisation Event had been defined so as to require adherence to the terms of both the Articles and the SHA; this included Schedule 5.

89. Falcon VII further said that it was significant that clause 5.4 begins with the formulation "The parties agree and acknowledge that…". It was a provision included for the avoidance of doubt. It was not intended to have any significant substantive effect. In particular, it was not intended to abrogate or negate the other provisions of the SHA, which clearly are intended to have a substantive effect – including clauses 5.2 and 5.3, and Schedule 5.

The legal principles applicable to contractual interpretation

90. There was no real disagreement about the legal principles applicable to contractual interpretation. Both parties referred me to the familiar guidance given by Lord Hodge JSC in *Wood v. Capita Insurance Services Ltd.* [2017] A.C. 1173, at [10]–[15].

91. I do not consider it helpful or wise to attempt to summarise Lord Hodge JSC's words, but I have well in mind that interpretation is a unitary exercise which involves an iterative process. That iterative process requires the court to consider the text of the clause in question and that of any other provisions that are directly linked; and to consider the context of the contract as a whole and any directly related documents; and to consider the context of the overall factual matrix. If the contract is commercial, the court should also consider commerciality. Setting matters out in this sequence does not indicate that I regard the text as having primary significance so that it outranks the other elements of the unitary exercise. However, one has to start somewhere. It is often convenient to start with the text and then move on, as I do below.

92. Mr Dhillon KC, for Mr Maloney, drew particular attention to a passage from the speech of Lord Collins JSC in decision of the Supreme Court in *Re Sigma Finance Corp* [2009] UKSC 2, at [35]:

> "I agree with Lord Mance that the appeals of interested parties C and D should be allowed for the reasons he gives, and I add only a few remarks of my own on the approach to interpretation. In complex documents of the kind in issue there are bound to be ambiguities, infelicities and inconsistencies. An over-literal interpretation of one provision without regard to the whole may distort or frustrate the commercial purpose. This is one of those too frequent cases where a document has been subjected to the type of textual analysis more appropriate to the interpretation of tax legislation which has been the subject of detailed scrutiny at all committee stages than to an instrument securing commercial obligations: cf *Satyam Computer Services Ltd v Upaid Systems Ltd* [2008] EWCA Civ 487 at [2], [2008] 2 All ER (Comm) 465 at [2]."

93. I naturally accept the principle that the kind of isolated literalism that Lord Collins JSC deprecated must be avoided. This was directly acknowledged and taken into account by Lord Hodge JSC, in *Wood v. Capita Insurance Services Ltd*. At [12], when summarising the unitary exercise, he referred to *Arnold v Britton* [2015] UKSC 36, at [77], which (as he noted) cited *Re Sigma Finance Corp*, per Lord Mance JSC at [12]; with whom Lord Collins had expressly agreed, as set out above.

94. I did not agree with Mr Dhillon KC that this, too, was a case where there are many "ambiguities, infelicities and inconsistencies". While Mr Dhillon KC was able to identify some typographical errors in the Articles and SHA[8], they were both few in number and limited in their significance, given the total volume of the transaction

[8] See the previous footnote.

documents. Overall, the standard of draftmanship was impressive. I thought it reflected well on those involved.

95. I therefore do not consider that the extract from *Re Sigma Finance Corp* that Mr Dhillon emphasized really adds anything that is not already present in Lord Hodge JSC's guidance. Lord Collins JSC was emphasizing one aspect of the exercise, and appropriately so given the kind of material that fell to be interpreted in *Re Sigma Finance Corp* and the way that it had been addressed below. However, Lord Collins JSC was not suggesting that there is no need to have regard to the immediate text and its innate meaning (no matter whether this be taken to refer to the obvious meaning, literal meaning, grammatical meaning or any other kind of meaning). Ultimately, I did not understand Mr Dhillon KC to be suggesting this, either.

96. Lord Wolfson KC, for Falcon VII, pressed on me the principle that parties do not give up valuable rights without it being made clear (by clear contractual language) that such was their intention: *MUR Shipping FB v RTI Ltd* [2024] UKSC 18, [44]-[45]. However, this principle only applies, or can assist, where it is first clear that the relevant right exists – either at common law or from some other source external to the contract, or under the contract itself.

97. The nature of the clause being considered in *MUR Shipping FB v RTI Ltd* (i.e., a force majeure clause) made it possible to consider that the underlying right to be paid in US$, rather than some other currency, existed as a contractual right. In many cases, the unitary nature of the interpretative exercise, and the iterative process that it requires, makes it impossible to start from the premise that the contract has conferred a right. Very often, one party's approach to the correct interpretation will involve it questioning whether the contract does, in fact, confer the relevant right, at least in some circumstances. That is the position here. I therefore have not gained much assistance from *MUR Shipping FB v RTI Ltd*.

98. Apart from their different approaches to *Re Sigma Finance Corp* and to *MUR Shipping FB v RTI Ltd*, the only difference between the parties as to the relevant legal principles arose in relation to factual matrix evidence. The legal issue here was a very narrow one – whether an agreed pre-contractual Term Sheet dated 12 October 2018 (the "Term Sheet") was admissible as an aid to interpretation; and, if so, its relevance and/or significance. The debate was very fact-specific, and it also concerned another clause which does not arise in any other regard – the entire agreement provision in clause 19.1 of the SHA. I therefore deal with it separately, below, in the context of the factual matrix.

The text of clause 5.4

The central phrase: "…an SF Repayment (as defined in the Articles) may be effected by the Buyer Group…"

99. The first textual issue considered in the parties' submissions relates to the central phrase in clause 5.4: "…an SF Repayment (as defined in the Articles) may be effected by the Buyer Group…". Mr Dhillon KC accepted that it was critical to his argument (i) that "SF Repayment" extended to an ICG Realisation Event, (ii) that "effected" includes any step taken and (iii) that "the Buyer Group" extends to Mr Maloney, while acting as director of a Buyer Group Company or as director of Workhuman.

100. I understand why Mr Dhillon KC put his case this way. Such an interpretation must be necessary, from Mr Maloney's point of view, in order for clause 5.4 to mean that Mr Maloney could act without Falcon VII's consent – and, indeed, contrary to Falcon VII's express request and instruction – in relation to the Workhuman board meetings of 29 May and 20 June 2023 and the EGM; and, more broadly, in relation to the Shareholder Resolutions and the Capital Reduction and the proposed distributions to shareholders; as well as in relation to the later events concerning the Topco board meetings of 18 July, 11 August and 22 August 2023 and the Workhuman board meeting of 8 August 2023. No SF Repayment has in fact been effected; nor, indeed, has an ICG Realisation Event been effected. Mr Maloney therefore needs clause 5.4 to extend to mere steps taken, including steps taken by him rather than by either Topco or Bidco, which were intended to result in an ICG Realisation Event, but which have not (yet) had that effect.

101. However, the fact that clause 5.4 has been written using defined terms makes such an expansive approach difficult. It is very difficult to understand the use of defined terms otherwise than on the basis that the parties carefully and deliberately chose to use these defined terms, intending them to convey the defined meaning, not some different meaning.

"SF Repayment"

102. The phrase "SF Repayment (as defined in the Articles)" is particularly telling. Generally, where a defined term has been defined in the Articles, clause 1.1 of the SHA sets out the relevant term and says "… shall be as defined in the Articles" – ICG Realisation Event being a pertinent example. Here, those who drafted the SHA have evidently noted that there is no definition of "SF Repayment" in the SHA – not even one that merely says that it "… shall be as defined in the Articles". They accordingly have expressly provided that "SF Repayment", as used in clause 5.4, has the meaning defined in the Articles. This was plainly deliberate, and it was done with care.

103. It therefore is inescapable that "SF Repayment" in clause 5.4 has the precise meaning of that definition. It does not mean "ICG Realisation Event". If the parties had intended the clause to apply to an ICG Realisation Event – and thus to abrogate the requirement of consent in relation to the redemption by Topco of Falcon VII's equity in Topco, as well as to the repayment by Bidco of the debt owed to Falcon Financing – they would have drafted clause 5.4 so as to refer to "an ICG Realisation Event", not to "an SF Repayment (as defined in the Articles").

"Buyer Group"

104. Furthermore, if the parties had intended clause 5.4 to affect the covenants in Schedule 5 Part D – which are not given only by the Buyer Group Companies, but also by the Relevant Parties, including Mr Maloney personally – it seems to me very unlikely that they would have done so by referring only to "the Buyer Group". This term is defined in clause 1.1 of the SHA as meaning Topco and any undertaking which is a subsidiary of Topco, excluding the Target (i.e., it includes Midco and Bido, but not Workhuman). "Buyer Group", as defined, does not extend to any natural person such as Mr Maloney. When the SHA is intended to refer to Mr Maloney, those responsible for drafting it have either used the all-encompassing phrase "Relevant Party", or have referred to the "Promoters" or to the "Initial Lead Promoter".

"effected"

105. There was also considerable debate before me as to the meaning of the word "effected". This is not defined in any of the governing documents. I was shown various dictionary definitions. I did not find this helpful, except in so far as they confirmed that the meaning of "effected" has to be considered in the light of the thing to be effected. It may have a different meaning if it refers to something relatively self-contained, such as the mere payment of money, from its meaning if it refers to a more complicated transaction that is likely to require a considerable number of steps, taken in sequence by a number of parties – for example, an ICG Realisation Event.

    i) If the central phrase in clause 5.4 is understood literally, as referring to the Buyer Group effecting an SF Repayment (as defined in the Articles), then it means effecting the relevant payment.[9] If the thing being "effected" is merely an SF Repayment, it seems to me natural to understand "effected" as referring to the act of paying, rather than anything anterior to this.

    ii) If the central phrase is understood as referring to an ICG Realisation Event, this would require not only an SF Repayment (which would be effected, i.e. paid, by or on behalf of Bidco to Falcon Financing) but also the engagement of all the other mechanics of the ICG Exit Conditions – including (for example) the selection of the AIB and its engagement with instructions by or on behalf of Mr Maloney and Falcon VII. If the thing being effected is an ICG Realisation Event, then "effected" therefore must extend to all the steps that are necessary for such an event to be achieved – no matter how many and no matter by whom each step will be taken.

106. The debate as to the extent of the word "effected" arose because the matters that originally gave rise to Mr Maloney's Part 8 claim are Mr Maloney's participation in and votes at the Workhuman board meetings of 29 May and 20 June 2023, and his actions in relation to the 21 June 2023 Workhuman EGM. These events took place so that funds could be distributed to Workhuman's shareholders, including Bidco, which could then be used to make the SF Repayment and to redeem Falcon VII's equity in Topco.

107. However, these matters were not sufficient in themselves to effect an SF Repayment, nor, indeed, to effect an ICG Realisation Event. Nor were they strictly necessary for an SF Repayment or an ICG Realisation Event. In theory, it would have been possible for the funds to be raised some other way: for example, if Mr Maloney had sufficient cash available, he could simply have paid on Bidco's and Topco's behalf.

108. Furthermore, while Mr Maloney's intention was that the funds released by the capital restructuring should be used for an ICG Realisation Event, it was not certain that this would happen. As the Workhuman board minutes of 29 May 2023 acknowledged, it was not certain that the shareholders would support the proposed Capital Reduction, or that the court in Ireland would sanction it; and, even if these conditions were satisfied, it was not certain that the funds released by the Capital Reduction would be distributed to the shareholders; nor was it certain how the shareholders would decide to use the

[9] Or payments – there may be more than one payment required, under the SF Notes and under the SFA; or, at least, one total payment that comprises a number of elements.

money. If (for example) there were to be a significant change in market conditions or the business outlook, the board of Workhuman or the board of Bidco or Topco might decide that the money would be better deployed for a different purpose.

The contrast between "effected" and "steps taken in relation to"

109. In their submissions before me, the parties predominantly developed their arguments on the basis of a distinction between interpreting "effected" very narrowly, so as to mean achieving the relevant purpose, and interpreting it broadly, so as to include merely taking steps in relation to that purpose. In this context, I heard a lot of submissions drawing on covenant 24 in Schedule 5 Part B, where the SHA uses the phrase "… instigate or take any steps in relation to an Exit or ICG Realisation Event…". Mr Dhillon KC argued that the existence of this covenant supported his argument that "effected" in clause 5.4 also includes taking steps in relation to an ICG Realisation Event. Lord Wolfson KC argued that the fact that the parties were able to use the phrase "instigate or take any steps in relation to… an ICG Realisation Event", in a provision where they regarded this as appropriate, was an indication that this was not the intended meaning of "effected" in clause 5.4.

110. I did not find either party's submissions on this point helpful. Any object or transaction that is more than extremely simple is likely to require more than one act, or step, in order for it to be achieved. Where this is so, effecting it will require those involved to take each such step. Thus, the real question is not whether "effected" in clause 5.4 does or may include "steps taken in relation to": in principle, it may do. Rather, it is where the distinction is to be drawn between acts (or steps) that are merely preparatory, and acts (or steps) that actually effect the relevant object.

111. By way of example, an ICG Realisation Event requires the redemption (or purchase, etc.) of Falcon VII's equity in Topco. This in turn requires determination of the Market Value of Topco; which requires the selection, engagement and instruction of the AIB; for which the very first step is (in practice) for one side to request the other to nominate an AIB. It therefore can be said that Mr Maloney's AIB Notice of 12 May 2023 was a step in effecting an ICG Realisation Event, because it was part of the machinery required under the SHA. This is so even though it was inevitable that any ICG Realisation Event would not be completed for several months after the AIB Notice, at the earliest.

112. By contrast, raising funds via the capital restructuring of Workhuman, so that the money released could then be distributed to shareholders and (in Bidco's case) used to repay the debts owed under the SF Notes and the SFA, and also to fund Topco's redemption of Falcon VII's equity, was not part of the machinery required under the SHA. It may in fact have been necessary, in the sense that Mr Maloney had no other way of raising the necessary funds; although, without evidence as to his general wealth and business interests, I do not know whether or not he (i) might have had sufficient cash or (ii) might have been able to raise money, whether by borrowing via a personal loan or otherwise. However, even if using the funds raised by Workhuman's capital restructuring was the only option available to Mr Maloney, it was not necessary in the sense of being required under the terms of the SHA. Furthermore, I have already noted that it was far from certain the steps that Mr Maloney and others took in May and June 2023 to bring about the capital restructuring would actually result in an ICG Realisation Event. These steps were merely preparatory.

The effect on each other of (i) the "notwithstanding" phrase and (ii) the proviso

113. The central phrase in clause 5.4 provides that an SF Repayment may be effected by the Buyer Group without the Lender Investors' consent or approval. This central phrase is subject to the phrase that precedes it, and the phrase that comes after it:

    i) First, the "notwithstanding" phrase, which stipulates that the central phrase operates notwithstanding any provision of the SHA or the Articles.

    ii) Then, the proviso at the end of clause 5.4, which stipulates that the central phrase operates only provided that the ICG Exit Conditions are satisfied and the terms of the SHA, the Articles and the Financing Documents are all adhered to.

114. A textual difficulty arises from the fact that the terms of the SHA include the covenants in Schedule 5 – which, prima facie, Mr Maloney did not adhere to. Furthermore, the definition of "ICG Realisation Event" in the Articles (as adopted both in the definition of "ICG Exit Conditions" and in clause 1.1 of the SHA) also contains a general proviso, in its final section, which requires it to take place "in accordance with the terms of the Equity Documents"; which again include the SHA, including the covenants in Schedule 5. Thus, the question arises:

    i) Does the "notwithstanding" phrase trump the proviso, so that the proviso in effect means, "… provided that the terms of this Agreement… are all adhered to except in so far as they require the consent or approval of the Lender Investors"?

    ii) Or, does the proviso trump the "notwithstanding" phrase?

115. Inevitably, Mr Dhillon KC favoured the first answer and Lord Wolfson KC the second. Each of them submitted that his favoured answer was the natural and obvious meaning. I do not find either any more natural or obvious than the other, when one considers only the text of clause 5.4 itself. It is in relation to textual issues like this that the value of the iterative process is most obvious.

The overall contractual context

116. Having considered clause 5.4 by itself, I next consider it in the context of the SHA as a whole, and in the context of the overall suite of the governing documents alongside which it came into existence.

117. Both parties referred to clause 10 of the SHA. This is a lengthy provision, entitled 'Exit and ICG Realisation Event'.

SHA clause 10.1

118. At clause 10.1, it provides that, subject to immaterial exceptions, Mr Maloney was to have "primary responsibility" for determining the timing of any Exit or ICG Realisation Event. Here, as in many other places, the SHA provides that this is subject to the Exit or ICG Realisation Event being effected "on the terms of this Agreement, the Financing Documents and the Articles". This of course means subject to clause 5.3 and the covenants in Schedule 5, unless they are abrogated by clause 5.4. However, I do not consider that clause 10.1 indicates one way or the other whether the condition of Lender

Investor Consent in those covenants is or is not abrogated by clause 5.4 in the way that Mr Maloney suggests.

SHA clause 10.2

119. Clause 10.2 provides:

> "Notwithstanding anything to the contrary, unless the Majority Lender Investors agree otherwise, no ICG Realisation Event, ICG Drag or Exit will take place unless it is carried out in accordance with the provisions of this Agreement and the Articles and the ICG Exit Conditions are satisfied."

120. The opening words, "Notwithstanding anything to the contrary…" are somewhat reminiscent of the "notwithstanding" phrase in clause 5.4. On its face, the use of this phrase in a clause means it operates notwithstanding any apparently inconsistent provision elsewhere. However, those responsible for drafting the SHA cannot have intended, simultaneously, that clause 5.4 should take precedence over all other provisions including clause 10.2 (i.e., by having effect notwithstanding any inconsistent provisions including clause 10.2), and that clause 10.2 should take precedence over all other provisions including clause 5.4. They must have intended the two provisions to be read together, so as to avoid inconsistency.

121. The remainder of clause 10.2 is, again, ultimately neutral. It provides that any ICG Realisation Event (etc.) must be in accordance with the terms of the SHA, unless Falcon VII agrees otherwise (i.e., gives its consent). However, this begs the question whether terms of the SHA such as clause 5.3 and the covenants in Schedule 5 are affected by clause 5.4.

SHA clause 10.3

122. Clause 10.3 is perhaps more helpful. It provides that no ICG Realisation Event (etc.) shall take place without Lender Investor Consent unless (i) the Lender Investors' KYC requirements are satisfied and (ii) none of the participants are Restricted Persons (i.e., on a sanctions list, or otherwise legally unacceptable). If Mr Maloney's interpretation of clause 5.4 were correct, this would have the effect that an ICG Realisation Event could take place (including an ICG Drag as defined in the Topco Articles, which under Article 13 of the Topco Articles will involve an offer that Falcon VII is bound to accept), without Falcon VII's consent, even though Falcon VII has not been able to comply with its money-laundering obligations and even though a sanctioned person is involved. It seems unlikely that this can have been the parties' intention.

SHA clauses 10.5 to 10.9

123. Clauses 10.5 to 10.9 of the SHA are also of some interest. I have noted that clause 10.1 provides that, in general, Mr Maloney has primary responsibility for determining the timing of any Exit. However, after five years from the Completion Date (21 December 2018), the Topco board was to constitute an Exit Committee, and that Exit Committee would then determine the timing of the ICG Realisation Event (as well as structure, pricing and form). After six years from the Completion Date, Falcon VII could determine the timing, by giving or procuring a Lender Investor Direction. It seems

unlikely that the parties can have intended clause 5.4 to have the effect of re-writing these provisions so that an ICG Realisation Event could take place, after five or six years, respectively, in a manner that would be inconsistent with this part of clause 10. Clauses 10.5 to 10.9 establish other mechanics, not merely the Lender Investors' consent or approval, and so are beyond the scope of clause 5.4, even on Mr Maloney's case.

SHA Schedule 5 Part B covenant 24

124. Mr Maloney relied on covenant 24 of Schedule 5 Part B. Mr Dhillon KC submitted that, because this was a covenant not, without Lender Investor Consent, to "instigate or take any steps" in relation to an ICG Realisation Event unless the provisions of the SHA (etc.) are satisfied, it follows that the scope of any such Lender Investor Consent must be in respect of instigating and/or taking any steps. In other words, any such Lender Investor Consent must include preliminary steps, not merely "effecting" in a narrow sense.

125. I see no force in this. The fact that there is a negative covenant not to do a wide category of things, without consent, does not mean that any consent that is given must cover the fullest potential width of this category of things.

126. Furthermore, "Lender Investor Consent" (as used in covenant 24) is a defined term. However, the corresponding text in clause 5.4 does not adopt this defined term; instead, it refers to "… any requirement for the consent or approval of the Lender Investors". Strictly, covenant 24 does not require a Lender Investor Consent (let alone does it require the non-defined consent adumbrated in clause 5.4). Rather, it is a negative covenant not to do various things without a Lender Investor Consent. Clause 5.4 and covenant 24 therefore are not co-extensive mirrors of each other, and the wording of covenant 24 does not seem to me to inform the correct interpretation of clause 5.4.

SHA clause 10.20 and the Articles

127. The only other provision in the SHA that either party particularly stressed was clause 10.20, which provides that, in case of conflict, the provisions of the SHA prevail over those of any other document, including the Articles. This does not advance the interpretation of clause 5.4, because the differences between Mr Maloney's interpretation and Falcon VII's do not arise from any such conflict.

128. On the contrary, the fact that the SHA incorporates many significant elements of the Articles (in particular, various definitions), and vice versa, means that I have in fact already addressed all the relevant provisions of the Articles.

The SFA Conditions

129. Other than the provisions of the SHA and the Articles, the only other provisions I was referred to from the governing documents were clauses 7.3, 9.4 and 9.5 in the SFA Conditions. These provisions confirm that Bidco could voluntarily redeem the SF Notes (as long as this was in the context of an ICG Realisation Event), but do not otherwise shed any light on clause 5.4.

The factual matrix

The Term Sheet

130. Most of the submissions in relation to the factual matrix focussed on the Term Sheet. This pre-dated the SHA and the other governing documents, being dated 12 October 2018. It is (by the standards of such things) relatively lengthy and detailed, running to 25 pages. At the top of every page was the rubric:

> "Private & Confidential Agreed form
> Subject to Contract "

131. The Term Sheet was set out in tabular form. Section 13 was entitled "ICG Exit" and provided as follows:

13.	**ICG Exit**	The ICG equity interests and Senior Facility are joined together so that, unless ICG agree otherwise, ICG's equity interests can only be forced into a sale if the Senior Facility is also being paid out at the same time in accordance with its terms and the Senior Facility can only be repaid if ICG's equity interests are being paid out at the same time in accordance with the terms below. The Buyer Group will only be able to force a refinancing or sale of ICG's equity interests if at the same time the Senior Facility is being repaid in full in accordance with its terms and in the circumstances set out below and where ICG is receiving cash for its equity interests in Topco with a specific value (the "**Valuation**") and each such Valuation shall be determined as follows: … (e) where the ICG equity interests are to be paid out as a consequence of a refinancing of the Senior Facility where there is no related acquisition or disposal of shares in the Investment, the Valuation shall be the amount determined by an Independent Valuation. …

		Implementation of Exit and refinancing provisions in relation to the Investment to be discussed.

132. Mr Maloney relied on this as showing that the parties had intended that it should be possible for the Buyer Group to force a refinancing or sale of ICG's equity interests, if the debt under the SF Notes and SFA were repaid and as long as the amount received by ICG (or, in fact, Falcon VII) for the equity represented the appropriate value.

133. Mr Maloney's submissions in this regard did not address the final paragraph of the text of section 13, i.e. that the implementation of Exit and refinancing provisions in relation to the Investment were to be discussed. Furthermore, also relevant are section 11 and section 21 of the Term Sheet, which are set out in the Annex to this judgment.

134. Much of the debate in relation to the Term Sheet concerned whether it was (i) admissible and (ii) relevant.

i) Mr Maloney contended that, because it was an agreed document, the Term Sheet was not merely a part of the pre-contractual negotiations but was among the "facts and circumstances" known to both parties: *Arnold v Britton* [2015] UKSC 36, at [15]; Mr Dhillon KC also described the Term Sheet as "a fact relevant as background", referring to *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, at [42].

ii) Falcon VII contended that, although its form was agreed, the substance of the Term Sheet was expressly subject to contract, and so not (finally) agreed; as such, it was merely part of the pre-contractual negotiations; in any event it was irrelevant, even if not excluded by clause 19.1 of the SHA – an Entire Agreement clause.

135. Preceding concluded agreements can be admissible in principle, albeit they are not generally of great relevance if they have been superseded: *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co.* [2001] EWCA Civ 735, per Rix LJ at [83]. The Term Sheet was not a concluded agreement, being expressly subject to contract (save in very limited and irrelevant respects such as its own governing law). Furthermore, it was always intended to be superseded by the contract that the parties intended to conclude later on – i.e., the SHA; and it was, in fact superseded by the SHA. It also expressly stated that the implementation of an ICG Exit and refinancing provisions were to be discussed – as, presumably, they were, before the final version of the SHA was agreed.

136. I accept that, in so far as it could be said to shed light on the general aim and purpose of the SHA, or its "genesis and aim", the Term Sheet might be nevertheless admissible in principle, despite clause 19.1: *Prenn v Simmonds* [1971] 1 WLR 1381, per Lord Wilberforce at pp. 1384-1385. However, it is not admissible as evidence of what the contract means, let alone for the detailed interpretation of a specific provision: Lewison, 'The Interpretation of Contracts' (8th ed). §§3.57-3.58; *Merthyr (South Wales) Ltd v Merthyr Tydfil County BC* [2019] EWCA Civ 526, per Leggatt LJ at [54]-[55]; *Scottish Widows Fund and Life Assurance Society v BGC International* [2012] EWCA Civ 607, per Arden LJ at [33]-[35].

137. Mr Dhillon KC was not, in truth, seeking to rely on the Term Sheet for the "general aim and genesis" of the SHA. He wanted to use it to persuade me what the parties intended clause 5.4 to mean. This is not permissible.

138. Even without these legal problems, the Term Sheet does not seem to me to assist Mr Maloney's case significantly. It was relied on by Mr Dhillon KC (and by Ms Shah, who presented Mr Maloney's case on some aspects relevant to Term Sheet, and did so very ably) as if it were decisive, on the basis that it indicated that, in some circumstances, the Buyer Group should be able to "force" a sale or refinancing of ICG's equity (i.e., Falcon VII's equity in Topco). However, as the full text confirms, section 13 is concerned with a number of specific situations. The only one that Mr Maloney contended was applicable was (e) – but this involves "… a refinancing of the Senior Facility". Mr Maloney's proposed scheme did not involve any refinancing, in the ordinary sense of the word. The proposal was not essentially to obtain alternative finance from another source, to replace the finance originally provided by Falcon Financing/Falcon VII; it was to release Workhuman's own capital resources, potentially without any financing at all.

139. Mr Dhillon KC took me to some points in the evidence that showed the witnesses using the words "refinanced" and "refinancing" fairly broadly, but they long post-dated the conclusion of both the Term Sheet and the SHA. They did not seem to me of any relevance to the meaning of "refinancing" in the Term Sheet, written as it was in October 2018.

140. Furthermore, section 13 of the Term Sheet has to be read together with section 11. Section 11 rehearses many of the limitations on what Mr Maloney and any Buyer Group Company can do without consent, which were later set out in clause 5.3 and Schedule 5 of the SHA. One legitimate way of reading the Term Sheet would be on the basis that the right to "force" an ICG Exit under section 13 depends on Mr Maloney having acted consistently with the rest of the Term Sheet provisions, including section 11. If Mr Maloney and the Buyer Group only arrived at the point of being able to replace the finance originally provided by ICG because they acted without consent and improperly under section 11, section 13 could not arise; at least if this constituted a Default Event. This ties in with the final paragraph of section 13, which left implementation and financing provisions to be discussed.

141. For all these reasons – but above all because it is inadmissible, and certainly of no real relevance – I reject Mr Maloney's case on the Term Sheet.

Article 61(1A) of the Companies (Jersey) Law 1991

142. The other factual matrix point taken before me was one raised by Falcon VII. This was that, under Article 61(1A) of the Companies (Jersey) Law 1991, a return of capital by Topco to its shareholders would require a special resolution of the shareholders. Falcon VII made the point that, under Article 1.5 of the Topco Articles, a special resolution requires a 75% vote, and Falcon VII has 75% of the voting rights in Topco.

143. This might have become relevant, if matters had proceeded to the stage where the Workhuman Capital Reduction had resulted in a distribution to its shareholders (including, ultimately, Topco), and where Topco (by its board) then wished to use these funds for a return of capital in relation to the equity held by Falcon VII. At that point,

a special resolution would have been required. However, none of this has any bearing on the meaning of clause 5.4 of the SHA, and whether Falcon VII's consent was required for the earlier stages of the scheme – i.e., the Workhuman Shareholder Resolutions, etc.

Overall commercial purpose of clause 5.4

144. Mr Maloney's case was that the overall commercial purpose of clause 5.4 was to ensure that Mr Maloney could discharge the SF debt owed to Falcon Financing and redeem Falcon VII's equity, and thus bring about an ICG Exit, without requiring Falcon VII's consent. Given the precise issues before me, with their origin in the Shareholder Resolutions, a critical feature of this case was (Mr Dhillon KC said) that the ability to act without consent must extend to obtaining alternative funds from elsewhere, in order to raise the necessary cash – whether by borrowing from an alternative financier, or by any other means, including the Workhuman Capital Reduction that was the subject of the Shareholder Resolutions.

145. In his opening submissions, Mr Dhillon KC said that the parties cannot have intended that Falcon VII should have an unconstrained veto over Mr Maloney's ability (or that of the various companies) to bring about an ICG Realisation Event:

> "Falcon VII's interpretation of Clause 5.4 has the unlikely result that Falcon VII would, notwithstanding its position as a minority shareholder in a business in which Mr Maloney had been instrumental for many years, have an unconstrained veto over the Buyer Group's ability if it so wished to refinance elsewhere by discharging the Falcon Financing debt in full and redeem the Stapled Equity at the specified value prior to 21 December 2025. Such an outcome, whereby the shareholder with the vast majority of the economic interests in the Falcon Group is unable to repay its debt early and redeem the minority shareholding to which that borrowing is stapled, does not accord with commercial commonsense."

146. In his closing submissions, Mr Dhillon KC put the point still more evocatively:

> "Falcon VII's argument… ignores the fundamental purpose of Clause 5.4, namely to allow Mr Maloney as borrower to refinance Falcon VII (and Falcon Financing) without being required to go, cap in hand, to beg permission from Falcon VII on whatever terms they see fit."

147. In support of this argument, Mr Dhillon KC relied heavily on the reference in the Term Sheet to the Buyer Group being able to "force refinancing or sale of ICG's equity interests" in some circumstances. I have already explained why this is inadmissible and/or irrelevant.

148. Beyond that, Mr Dhillon KC's argument involves an important elision. The requirement of consent for the Buyer Group to refinance or seek alternative funding is not the same as a requirement of consent for the Buyer Group to repay the Falcon Financing debt or redeem Falcon VII's stapled equity. If the Buyer Group could repay the debt and

redeem the equity without borrowing or requiring Workhuman to reduce its capital[10], then no consent would be required and there could be no "veto". Bidco would be able to repay the debt; Topco would be able to redeem the equity; if necessary (and if he had the cash), Mr Maloney could pay on their behalf. In principle, it would be possible to do so consistently with the ICG Exit Conditions, etc., which contain no express requirement of "consent or approval" save in so far as they require the occurrence of an ICG Realisation Event, which in turn incorporates the terms of the SHA, including clause 5.3 and Schedule 5.[11]

149. This gives rise to the question what commercial purpose there might be to Falcon VII having the right to withhold consent for (or "veto") borrowing or the reduction of Workhuman's capital, but not having the right to withhold consent for (or "veto") the repayment of the SF debt.

150. Falcon VII's answer to this was that the majority of the covenants in Schedule 5 (and, certainly, those of relevance to this case) exist in order to protect Falcon VII's position and Falcon Financing's position, while ICG remained a financier and investor (via Falcon VII and Falcon Financing).

151. Furthermore, I think it can be assumed that Falcon VII will have wanted it to be difficult, rather than easy, for Mr Maloney to oust ICG as financier. Mr Maloney will have wanted the opposite. If, in this respect, the terms of the SHA favour one of them more than the other, that cannot be said to be uncommercial or inconsistent with the overall purpose of the SHA. It merely reflects the fact that there were keenly pursued negotiations, and one side came out on top. I put this to the parties in submissions. Lord Wolfson KC agreed.

152. Mr Dhillon KC did not agree, and again relied on the Term Sheet – but I have dealt with that. More broadly, Mr Dhillon KC said that there could be no need for ICG or Falcon VII to be protected in circumstances where the SF debt was repaid and the equity redeemed: it would be getting paid out, with the price for the equity reflecting Market Value as determined by the AIB, all in the manner required for an ICG Realisation Event. In short, borrowing or capital reduction (etc.) that was not undertaken to fund an ICG Realisation Event might prejudice ICG's interests, in so far as those interests would be ongoing; but there could be no prejudice to ICG where the objective was for ICG to exit.

153. This takes me back to the observations I have already made in relation to "effecting" – specifically, the difference between an act (or step) that effects the defined outcome (whether an SF Repayment or an ICG Realisation Event) and an act (or step) that is merely preparatory. The Workhuman Capital Reduction and the Shareholder Resolutions were preparatory, rather than effective, as regards the SF Repayment or the ICG Realisation Event that Mr Maloney intended to be the end result. See paragraphs 108 and 110 to 112, above.

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[10] Or otherwise doing anything for which consent was required by clause 5.3 and Schedule 5 – e.g., amend the Workhuman Articles and the other matters that originally gave rise to these proceedings.

[11] In the Articles, the definition of "Agreed Investment Bank" refers to agreement as to the identity of the AIB; but such agreement is not required, because there is a mechanism for identifying the AIB in the event that there is no such agreement within 15 Business Days.

154. Another way of putting this is that the Workhuman Capital Reduction and the Shareholder Resolutions were neither sufficient conditions nor necessary conditions (as explained in paragraphs 108 and 112), for there to be an SF Repayment or an ICG Realisation Event.

155. There was, therefore, a risk that an act such as the Workhuman Capital Reduction and the Shareholder Resolutions could take place without an SF Repayment or ICG Realisation Event. This is so no matter that Mr Maloney genuinely intended them to result in an SF Repayment and an ICG Realisation Event (as I have accepted). Something might go wrong – if, for example, there were a sudden and significant change in market conditions or the business outlook. ICG, Falcon VII and Falcon Financing would then be left with their positions in the Buyer Group, but with significant changes having been made to the structure and capital base of Workhuman, without their consent.

156. For Falcon VII to want protection against this risk seems to me a reasonable commercial purpose. Accordingly, there is nothing inherently uncommercial about clause 5.4 being worded so as not to erode the protections given to Falcon VII by the covenants in Schedule 5.

Mr Maloney's argument against redundancy

157. Mr Dhillon KC argued that, if Falcon VII's interpretation of clause 5.4 is correct, it is essentially redundant. If it is concerned, narrowly, with the effecting of an SF Repayment, there is nothing elsewhere in the SHA or any other governing document that requires "consent or approval" for an SF Repayment. On the contrary, clauses 7.3, 9.4 and 9.5 of the SFA Conditions expressly provide that Bidco can repay the SF debt in full at any time (on any Business Day), subject to the provisions of these clauses, which (in this context) require this to happen as part of an ICG Realisation Event.

158. Lord Wolfson KC accepted that there was not in fact any requirement, elsewhere in the governing documents, of the kind of "consent or approval" for an SF Repayment that clause 5.4 says is not necessary. He suggested that clause 5.4 exists as an 'avoidance of doubt' provision. In other words, it was included in case it might otherwise be suggested that consent might be required for an SF Repayment, by reason of some other provision in the SHA or Articles, notwithstanding clauses 7.3, 9.4 and 9.5 of the SFA Conditions.

159. In this regard, Lord Wolfson KC pointed to the fact that clause 5.4 begins with the slightly unusual formulation, "The parties agree and acknowledge that…". He suggested that this indicates that the parties (and/or those responsible for drafting the SHA) did not believe or intend clause 5.4 to have a significant substantive effect; they regarded it as confirming – i.e., acknowledging – what should anyway be apparent to a keen-eyed, intelligent reader whose understanding of the SHA was suitably informed by the necessary familiarity with clauses 7.3, 9.4 and 9.5 of the SFA Conditions. The implication of Lord Wolfson KC's argument was that those responsible for drafting the SHA anticipated that some potential readers of the SHA might fall short of this ideal.

160. Similar "agree and acknowledge" formulations are used in a number of other provisions in the SHA. Falcon VII identified clauses 3.9, 5.1, 5.3, 10.1, 10.5, 10.15.4, 10.16, 19.18 and 19.19. Lord Wolfson KC's suggestion can plausibly be applied to all of them, but

clauses 3.9, 5.1 and 5.3 are especially strong instances. This is significant, because clauses 5.1 and 5.3 (in particular) sit in such close proximity to clause 5.4.

161. In the case of clause 5.3, it is really indisputable that the "agree and acknowledge" formulation is intended as confirmation of something that is clear from another provision. The substantive agreement that each Buyer Group covenants in accordance with Schedule 5 is in clause 5.2. Clause 5.3 then builds on this. After the "agree and acknowledge" preamble, which reflects the substantive effect of clause 5.2, its substantive provisions are the agreements at 5.3.1 and 5.3.2. These add to the covenants from the Buyer Group Companies, by imposing yet further covenants from each Relevant Party (e.g. Mr Maloney) and from each Lender Investor (e.g. Falcon VII).

162. It is difficult to avoid the conclusion that the "agree and acknowledge" formulation in clause 5.4 is intended to have similar effect to the same formulation in clause 5.3. I therefore accept Lord Wolfson KC's submission on this point.

Conclusion on the interpretation of clause 5.4

163. At the beginning of this judgment, I said in paragraph 3 that the issue of interpretation that arises is "short and simple, turning as it does on a provision that runs to a single sentence." No doubt it may be said that it should not, then, have taken me a further 160 paragraphs to reach my conclusion on this issue. Nevertheless, this remains my view. The issue is short and simple. The correct answer is not in doubt.

164. Clause 5.4 expressly abrogates any requirement of consent or approval for an "SF Repayment" that is "effected" by the "Buyer Group". None of the terms that I have rendered in quotes is hard to understand. Two of them are defined terms.

165. It is simply not tenable to re-write this, as Mr Maloney requires, so that it instead abrogates any requirement of consent or approval for "any step taken in relation to" an "ICG Realisation Event", by any "Relevant Party", in particular by the "Initial Lead Promoter"/Mr Maloney. It is especially problematic that this would necessitate removing two of the defined terms that the parties chose to use in clause 5.4, and replacing them with other defined terms, which the parties in fact chose not to use.

166. Clause 5.4 says what it means, and it means what it says. Mr Maloney requires it to mean something different from what it says. That can sometimes be the right answer, if the wider contractual context or the factual matrix suggest otherwise, or if the provision would otherwise be unworkable or illogical or uncommercial. However, none of those considerations applies here.

167. I therefore accept Falcon VII's case on the interpretation of clause 5.4.

The significance of my conclusion on the interpretation of clause 5.4

168. It follows from my conclusion on the interpretation of clause 5.4 that Mr Maloney was in breach by reason of his participation in and votes at the Workhuman board meetings of 29 May and 20 June 2023, and by his actions in relation to the 21 June 2023 Workhuman EGM.

169. These were Material Breaches and/or Default Events and/or Services Defaults. So too were Mr Maloney's later breaches, not least his participation in the Topco board meetings of 13 June, 18 July, 11 August and 22 August 2023. Falcon VII therefore was entitled to send its Termination Notice of 19 September 2023. This Termination Notice was valid and was effective at terminating the Services Agreement.

170. Furthermore, by reason of the various Default Events and/or Services Defaults Mr Maloney thereupon lost his right to exercise three votes at the Topco board, pursuant to clauses 3.1 and 3.10 of the SHA. This was the position from 29 May 2023 onwards. It means that, contrary to Mr Maloney's understanding at the time, and contrary to his case before me, he could only cast one vote at those board meetings. In so far as any votes were held, he was outvoted by Mr Coady and Mr McKelvey.

171. This in turn would affect Mr Maloney's case as to the decisions that he says were taken at the Topco board meetings of 13 June, 18 July, 11 August and 22 August 2023. Mr Maloney relied on the outcome of these board meetings for a number of significant matters. He said that, at the Topco board meeting of 13 June 2023, it had been resolved to appoint PwC, Capnua and McCann as Topco's advisers, further to clause 10.4.1 of the SHA, and Morgan Stanley as AIB; that, at the Topco board meeting of 11 August 2023, it was resolved to appoint William Fry as Topco's legal advisers; and that, at the Topco board meeting of 22 August 2023, it was resolved to engage Morgan Stanley, on the terms of the draft engagement letter and indemnity letter presented at that meeting. My conclusion on the interpretation of clause 5.4 means that this is not the case. Even in so far as votes were held (this being contentious in some instances), Mr Maloney was in the minority.

172. In short, my conclusion on the interpretation of clause 5.4 has far-reaching consequences. Some of these consequences fall to be worked out and evaluated elsewhere, notably in the proceedings in Ireland. So far as this judgment is concerned, this all means that I can deal with much of Falcon VII's counterclaim more briefly than otherwise might have been appropriate.

Why did Falcon VII withhold its consent for the Proposed Transaction?

173. I include this heading because a question in these terms was included in the parties' agreed List of Issues. It does not relate to the granting/withholding of a Lender Investor Consent in relation to the Shareholder Resolutions, etc., i.e. from about May 2023 onwards. It relates, rather, to Falcon VII's earlier refusal of consent to the Proposed Transaction in about March 2023, i.e. the potential corporate acquisition by Workhuman which was the initial casus belli.

174. As I have noted, this is the subject of separate proceedings in Ireland between Workhuman, Falcon VII and ICG (among others). My understanding is that those proceedings may require the Irish court to consider why Falcon VII withheld its consent.

175. By contrast, it does not matter a jot to the relief that either party seeks from this court why Falcon VII withheld its consent for the Proposed Transaction. I infer that this issue may have been included in the hope of stealing a march on the other party for the purposes of the Irish proceedings. I decline to decide this issue. Indeed, I consider that

it would be impertinent to do so, in so far as this would risk trespassing on territory that should rightly be mapped out only by the Irish court.

From April 2023, did Falcon VII seek to prevent an SF Repayment for an improper purpose?

176. Mr Maloney's case was that Falcon VII sought to prevent an SF Repayment in order to put pressure on him, Workhuman and the Buyer Group to make concessions and extract value to which Falcon VII was not entitled. In oral submissions, Mr Dhillon KC found it difficult to resist accepting that this really just amounted to saying that Falcon VII sought to drive a hard bargain. In any event, he expressly accepted that this argument depended on Mr Maloney being right about clause 5.4.

177. If (as I have found) the true effect of clause 5.4 was that Falcon VII was entitled to object to Mr Maloney proceeding without its consent, Falcon VII was entitled to bargain as hard as it liked. That is how commercial relationships work, under capitalism. In particular, it is how commercial contracts work, and how they are enforced by this court.

178. Accordingly, my conclusion on the interpretation of clause 5.4 means that there was no improper purpose.

179. In case it may matter, having heard the evidence of Mr Coady and Mr McKelvey on this, I am satisfied that they genuinely believed in the position that they contended for, in light of clause 5.4 of the SHA. The clause was the subject of open discussion between Mr Maloney and them, including at the critical board meetings. Even if my interpretation of clause 5.4 is wrong, I am certain that Mr Coady and Mr McKelvey believed at the time that its meaning was the same as that which Falcon VII contended for before me.

Was the appointment of Morgan Stanley as AIB valid?

180. This involves a number of sub-issues:

i) Was Morgan Stanley validly selected to be the AIB, per the definition of the AIB in the Articles?

ii) If so, was Morgan Stanley validly engaged by Topco, per the definition of "Independent Value" in the Articles?

iii) If so, was Morgan Stanley validly instructed by or on behalf of the Majority Lender Investors and the Lead Promoter, per the definition of "Independent Value" in the Articles?

181. In the light of my interpretation of clause 5.4, and the resulting conclusion that the Topco board cannot have voted to engage Morgan Stanley, it follows that neither Mr Maloney nor anyone else (including McCann and William Fry) had the authority of Topco to engage Morgan Stanley. This is enough to demonstrate that the appointment of Morgan Stanley was not valid. It was not engaged by Topco as the AIB, as the Articles require.

182. However, for completeness:

i) On 31 May 2023, Falcon VII proposed either or both of Morgan Stanley or JP Morgan as the AIB – i.e., leaving it to Mr Maloney to decide which. On 13 June 2023, McCann responded on behalf of Mr Maloney, agreeing to Morgan Stanley. Morgan Stanley therefore was agreed by the parties as the AIB. This fulfilled the requirements of the definition of AIB in the Articles. It means that Morgan Stanley was the bank selected as the AIB. If anyone were to be engaged by Topco as AIB and then instructed accordingly, it had to be Morgan Stanley.

ii) A number of the Topco board meetings appear to have been somewhat chaotic, hence the dispute as to whether what happened could be characterised as a vote, in some instances. However, I accept Mr Maloney's evidence that, at the meetings of 13 June 2023 and 22 August 2023, he supported his own proposals in relation to the AIB (and other matters) and purported to cast three votes; and Mr Coady and Mr McKelvey each disagreed, each being entitled to one vote. The procedure followed was informal, but it was objectively clear that each side was intending to express its wishes in the normal manner, by reference to their respective voting capacities. In other words, there was a vote. However, for the reasons already given, Mr Maloney in fact had only one vote. He therefore was outvoted on each occasion, by two votes to one. This is why Morgan Stanley was never validly engaged by Topco as AIB.

iii) The third sub-issue does not arise. However, the terms of the purported engagement letter (signed by Mr Maloney, but without Topco's authority, as I have found) referred to Morgan Stanley being engaged by Topco, but did not refer to it being instructed by or on behalf of Falcon VII and Mr Maloney. This was required by the definition of "Independent Value". It is noticeable that Morgan Stanley appears to have behaved as if its client, to whom it was answerable, was Topco, not Falcon VII. Whether this made any difference is another matter, but it was not what the Articles required.

Was Bidco or Mr Maloney in breach in relation to Falcon VII's information requests?

183. The relevant requests for information are those made by ALG on 20 June 2023, by Mr McKelvey on 26 July 2023 and by ALG on 25 September 2023. Mr McKelvey's request was in an email. Each of the ALG requests was in the form of a letter, but it was a letter sent by email.

184. The contractual rights to request information arise under clauses 6.1.5 and 6.2.4 of the SHA, and under paragraph 2.4 of Schedule 1 to the Services Agreement. As to these:

i) Clause 6.1.5 of the SHA (which imposes information obligations on the Buyer Group Companies) refers to:

> "… information or document relating to or held by any Target Group which Bidco is entitled to request under any [of] the Target Investment Documents law or otherwise…"

ii) Clause 6.2.4 of the SHA (which imposes information obligations on Mr Maloney) refers to:

> "… additional information relating to the Target Group… "

iii) Paragraph 2.4 of Schedule 1 to the Services Agreement (which also imposes information obligations on Mr Maloney) again refers to:

> "… additional information relating to the Target Group…"

185. In context, it is clear that the "additional information" referred to in clause 6.2.4 of the SHA means, additional to any information under clause 6.1.5. Accordingly, this too means information "… relating to or held by any Target Group which Bidco is entitled to request under any [of] the Target Investment Documents law or otherwise…" Falcon VII submitted that the meaning of the identical phrase in paragraph 2.4 of Schedule 1 to the Services Agreement must be the same. I accept this.

186. Mr Maloney argued that these rights are subject to implied terms, limiting them (i) to information which was material to allow Lender Investors to monitor their investment and/or to comply with their reporting obligations, and (ii) such that they should not be exercised in bad faith or unreasonably or for an improper purpose.

i) I do not accept the first of these suggested implied terms. The express definition in clause 6.1.5 of the SHA as to the kind of information that can be requested is clear and must be respected. There is no need or scope for the implied term suggested by Mr Maloney.

ii) I accept that the parties must have intended that any right to request information would not be exercised in bad faith or for an improper purpose. I would also accept that they must have intended that they would not be exercised unreasonably in the 'Wednesbury' sense, i.e. so unreasonable that no reasonable contracting party could make such a request. However, each of these is a high bar. Having considered the evidence of Mr Coady and Mr McKelvey, I do not accept that they or anyone at Falcon VII acted in bad faith or for an improper purpose. They requested the information that they did because the relationship between Mr Maloney and Falcon VII had broken down, so that neither side trusted the other. This was not, in itself, inherently unreasonable. The requests made were wide, but this reflected the parties' divergent views as to clause 5.4 and their respective rights arising from it, and the generally acrimonious circumstances. Against this background, Falcon VII did not act inconsistently with the implied terms that I have found.

187. However, it is not enough that Falcon VII was entitled to make these requests. Its case as to breach is (essentially) that the Bidco was obliged to provide the information requested, as the relevant Buyer Group Company; that, in default, Mr Maloney was obliged to provide the information, or ensure that Bidco did so; and that the failure to do so was a Material Breach or Services Default.

188. Where a breach of such a serious nature arises from a failure to respond to a request, carefully negotiated contracts such as these very often stipulate how the request is to be communicated and to whom. Clause 20 of the SHA and clause 10 of the Services Agreement are examples. Mr Maloney argued that the three communications relied on by Falcon VII did not satisfy the relevant formal requirements under the SHA or the Services Agreement.

189. Both clause 6.2.4 of the SHA and paragraph 2.4 of Schedule 1 to the Services Agreement specify that such a request shall be an email request. Clause 20 of the SHA and clause 10 of the Services Agreement require any "Notice" – which includes any request – to be made as there specified. These provisions include detailed stipulations as to the method of service, but neither provides an address for service by email. Clause 10 of the Services Agreement does not appear to accept service by email in principle.

190. All the information requests relied on by Falcon VII were sent by email (including the ALG letters of 20 June and 25 September 2023). They were not sent as required under clause 20 of the SHA and clause 10 of the Services Agreement. I infer that the parties did not intend a request that was not sent by a method prescribed by those provisions to have the draconian effect relied on by Falcon VII. This does not mean that the requests were not valid, or that Bidco and/or Mr Maloney (respectively) were not in breach in circumstances where they were not complied with. However, no right to terminate arose, on this basis.

The appointment of PwC, McCann and/or William Fry as advisers

191. My conclusion on the interpretation of clause 5.4, and its consequences for Mr Maloney's voting power, mean that none of PwC, McCann or William Fry could be validly appointed.

192. In fact, McCann was never even purportedly appointed to act on behalf of Topco.

193. A question also arose as to whether PwC was independent (as required under the SHA), in circumstances where it already acted as tax adviser to Topco. I have no doubt that PwC was and is independent, so that any advice that it gave was and/or would have been independent.

194. Falcon VII contended that Mr Maloney's actions in relation to the purported appointments of PwC and William Fry were in each case a Material Breach or Services Default in any event. On the basis of my conclusion as to clause 5.4, Mr Maloney's actions, being actions taken purportedly on behalf of Topco, were ineffective nullities. They were incapable of constituting any kind of breach.

Clause 5.2.2 of the Services Agreement

195. Mr Maloney contended that, even if Falcon VII was entitled in principle to terminate the Services Agreement on the basis of breach, under clause 5.2.2 it first had to give five business days' notices, to give him the opportunity to remedy any such breach. However, under clause 5.2.2 no notice is required if the breach remains unremedied 5 Business Days after the breach arose. This was the case here, in every instance.

Overall conclusion

196. Mr Maloney's claim fails.

197. Falcon VII's counterclaim succeeds. In principle, it is entitled to the declaratory relief sought. I will now hear submissions as to the precise wording of the declarations to be made, and any other consequential matters.

ANNEX TO JUDGMENT – EXTRACTS FROM GOVERNING DOCUMENTS

SFA

10. Enforcement
... each Obligor undertakes that it will duly observe and perform the obligations on its part contained in this Agreement and the Notes shall be issued and held subject to and with the benefit of the provisions of this Agreement, the Conditions, the Schedules and the Annexures, all of which shall be deemed to be incorporated in this Agreement and shall enure for the benefit of all Noteholders.

Annexure 2
The Conditions

7.3 Voluntary Redemption

(a) Subject to Clause 7.3(b) (*Voluntary Redemption*) and Clause 9.5 (*Redemption in full in accordance with the Equity Documents*), the Company may:

(i) on or prior to the date falling three years after the Closing Date, and if it gives the Agent not less than five Business Days' (or such shorter period as the Majority Noteholders may agree) prior notice redeem the whole or any part of the Notes (but, if in part, being an amount that reduces the Notes by a minimum amount of $500,000) provided that:

(A) unless such redemption of Notes relates to a redemption of capitalised interest only (including for the avoidance of doubt any partial redemption of capitalised interest in a minimum amount of $500,000), all accrued interest (including interest that has capitalised and any interest that has accrued on such capitalised amounts) under the Notes since the Closing Date has been, or will be as part of such redemption, paid, or in the case of capitalised amounts, redeemed in full; and

(B) without prejudice to paragraph (A) above, no redemption of principal amounts outstanding in respect of the Loan B Notes may be made unless the principal amounts outstanding in respect of the Loan A Notes have been redeemed in full; and

(ii) after the date falling three years after the Closing Date, and if it gives the Agent not less than five Business Days' (or such shorter period as the Majority Noteholders may agree) prior written notice:

(A) redeem any accrued and capitalised interest in respect of the Notes (provided that such redemption is in a minimum amount of $500,000); or

(B) subject to a payment in full under paragraph (A) above, redeem all (but not part) of the Notes.

(b) The Company may only make a voluntary redemption of the Notes on an Interest Payment Date, unless there is a redemption in full of the Notes in accordance with this Agreement, in which case such redemption in full can be made on any Business Day.

(c) The Company may not make a voluntary redemption of the Notes other than in accordance with this Clause 7.3.

Clause 9 Restrictions

…

9.4 Redemption and call protection

(a) Subject to paragraph (b) below, during the Non-Call Period, all or any part of the Loan B Notes that are redeemed pursuant to Clause 7.3 (*Voluntary Redemption*), Clause 7.4 (*Right of cancellation and redemption in relation to a single Noteholder*), Clause 8.1 (*Exit*) and Clause 8.2 (*Disposal, Acquisition Proceeds and Cash Proceeds*) or as a direct result of action taken by the Noteholders pursuant to Clause 22.16 (*Acceleration*), shall be so redeemed by the Company at a price equal to 100% of the principal amount that is to be redeemed plus accrued interest on such amount to the date of redemption plus (but without double counting) the Applicable Premium.

(b) The Company shall not be obliged to pay the Applicable Premium to any Noteholder pursuant to paragraph (a) above to the extent that a Noteholder is being redeemed pursuant to Clause 7.1 (*Illegality*)

9.5 Redemption in full in accordance with the Equity Documents

(a) Notwithstanding any other provision in this Agreement:

(i) the Company may not voluntarily redeem the Notes in full in accordance with Clause 7.3 (*Voluntary Redemption*); and

(ii) the Company shall not be required to redeem the Notes in full in accordance with Clause 8.1 (*Exit*) or Clause 8.2 (*Disposal, Acquisition Proceeds and Cash Proceeds*),

unless there is an ICG Realisation Event on the date of such redemption. For the avoidance of doubt, mandatory redemptions of the Notes in accordance with Clause 8.1 (*Exit*) or Clause 8.2 (*Disposal, Acquisition Proceeds and Cash Proceeds*) shall continue to be made in the full amount required to be redeemed under the terms of this Agreement subject to there being at least $1 of principal outstanding under the Notes at any time while a redemption of the Notes in full is prohibited by this Agreement.

(b) If the Company is required to redeem the Notes in full in accordance with any provision of this Agreement it shall also be required to effect an ICG Realisation Event on the date of such redemption.

Topco Articles

2. DEFINITIONS AND INTERPRETATIONS

2.1 In these Articles the following expressions shall have the following meanings:

…

"Agreed Investment Bank" means either (a) the corporate finance team based in either Manhattan, New York City, San Francisco or Los Angeles of United States of America any of Jefferies Group LLC, Credit Suisse Group AG, Morgan Stanley, Barclays Investment Bank, Deutsche Bank AG or JP Morgan. (each a **"Leading Investment Bank")** as agreed in writing by the Majority Lender Investors and the Lead Promoter; or (b) if the Lead Promoter and the Majority Lender Investors cannot agree on which Leading Investment Bank should be appointed within 15 Business Days of the earlier of (i) receipt by the Lead Promoter of a written request from the Majority Lender Investors to so nominate; or (ii) receipt by the Majority Lender Investors of a written request from the Lead Promoter to so nominate, a Leading Investment Bank selected by the President for the time being of the Institute of Chartered Accountants of England and Wales following a request to do so from either the Lead Promoter or the Majority Lender Investors, provided that such President may not select a Leading Investment Bank which was originally nominated by either the Majority Lender Investors or the Lead Promoter;

…

"Buyer Default Event" shall mean any of the following:

(a) any Buyer Group Company, the Lead Promoter or any BM Investco having been being in Material Breach (and for this purpose no account shall be taken of any waiver given in respect of any such breach (other than an Unconditional Waiver) or non-compliance by any person or any standstill agreement or any person signing and/or voting on similar arrangements with any person); and (b) a Senior Event of Default having occurred (and for this purpose no account shall be taken of any waiver given in respect of any such breach, other than an Unconditional
Waiver) or non-compliance by any person or any standstill agreement or any person signing and/or voting on similar arrangements with any person);
(c) failure by the Company to redeem any Al Ordinary Shares in accordance with these Articles, in each case, without prior Lender Investor Consent by either (i) the date falling 10 Business Days after the relevant due date; or (ii) any earlier date on which any holder of Al Ordinary Shares (other than a Lender Investor) has threatened to take action in respect of the failure to so redeem, irrespective of whether such redemption would be unlawful or would be incapable of payment by virtue of Article 26 (*Overriding Provisions*);
(d) failure by any (Buyer Group Company Consent) to pay any amount in respect of any Securities (whether interest or principal), without prior Lender Investor Consent, by either (i) the date falling 10 Business Days after the relevant due date; or (ii) any earlier date on which any Security Holder (other than a Lender Investor) has threatened to take action in respect of such non-payment in each case, (irrespective of whether such payment would be prohibited by virtue of Article 26 (*Overriding Provisions*);
(e) an Insolvency Event having occurred in relation to a Buyer Group Company;
(f) any Buyer Group Company being in breach of any provision of Clause 20 (*Financial Covenants*) of the Senior Facility Agreement (and for this purpose no account shall be taken of any waiver (other than an Unconditional Waiver) given in respect of any such breach or non-compliance by any person or any standstill agreement or any person signing and/or voting on similar arrangements with any person); or
(g) it being reasonably likely in the opinion of the Majority Lender Investors that any of the matters set out in (c), (d), (e) or (f), will occur in the following 3 months provided that such opinion is based on:

(i) financial information provided by the Target Group Companies to Bidco; or
(ii) if the Majority Lender Investors can show that such information is incorrect, the reasonable opinion of the Majority Lender Investors,

(and for this purpose no account shall be taken of any waiver given in respect of any such breach or non-compliance by any person (other than an Unconditional Waiver) or any standstill agreement or any person signing and/or voting on similar arrangements with any person) and provided that it will not be reasonable for the Majority Lender Investors to determine that a matter set out in (f) which can be remedied by a Cure Amount (as defined in the Buyer Financing Documents) being paid in accordance with the terms of the Buyer Financing Documents is reasonably likely to occur until such time as the deadline for paying such Cure Amount in cash into the Cash Collateral Account (as defined in the Buyer Financing Documents) in accordance with the terms of the Buyer Financing Documents has passed;

…

"Buyer Group" means the Company and any undertaking which is a subsidiary undertaking of the Company from time to time (but excluding each Target Group Company) and, if applicable, any New Buyer Holding Company and references to **"Buyer Group Company"** and **"member of the Buyer Group"** shall be construed accordingly;

…

"Default Event" shall mean either an Buyer Default Event or a Target Default Event;

…
"Equity Documents" means any and all of these Articles, the Shareholders Agreement, the Implementation Agreement, the Services Agreement, the Promissory Note Documents and any instrument or agreement under which any other Security has been issued and/or constituted;
…
"ICG Drag" means an ICG Realisation taking place in part pursuant to Article 13 and clauses 10.2, 10.3, 10.5, or 10.15.5 of the Shareholders Agreement;
…
"ICG Exit Conditions" means, unless a Lender Investor Consent agrees otherwise in writing, both (i) an ICG Realisation Event occurring, and (ii) the Lender Investors receiving an amount in cash at least equal to or greater than the ICG Realisation Amount, at the same time;
…
"ICG Realisation Event" means:

(a) the full and final repayment in cash of all amounts advanced under the Senior Facility Agreement (unless already repaid) and all amounts owing or due then in respect the SF Notes and/or under the Senior Facility Agreement including by way of interest, costs or otherwise;

(b) either:

(i) the sale for cash of all of the Original Al Shares then held by the Lender Investors to a buyer or buyers who is permitted under and who has complied with Clauses 10.2 and 10.3 of the Shareholders Agreement as part of a single transaction or a series of connected transactions which happen simultaneously (other than as part of a Buyer Reorganisation or to a Lender Investor Permitted Transferee);

(ii) the redemption or purchase by the Company for cash of the Original Al Shares then held by the Lender Investors;

(iii) the payment of cash dividends in respect of the Original A1 Shares then held by the Lender Investors;

(iv) the cash payment on a return of capital in respect of the Original Al Shares then held by the Lender Investors; or

(v) any combination of (i), (ii), (iii) or (iv),

provided that as a result of which the Lender Investors receive an amount in cash equal to or greater than the Relevant Proportion of the applicable Market Value; and

(c) the purchase, redemption, repayment or payment of all Debt Securities (other than any within (a) above held by the Lender Investors, for an amount in cash equal to all principal and interest thereon,

provided that, in each case, unless a Lender Investor Consent agrees otherwise, such ICG Realisation Event takes place in accordance with the terms of the Equity Documents and the ICG Conditions are met;
…
"Independent Expert" means the Nominated Partner at the Agreed Investment Bank;
…
"Independent Value" means the aggregate market value for all of the Shares then in issue, either (A) as stated in writing by the Independent Expert; or (B) if the Independent Expert produces a range of aggregate values for the Shares, the mid-point of such range as stated in writing by the Agreed Investment Bank, in each case, as at the relevant Exchange Date unless agreed otherwise by the Majority Lender Investors and the Lead Promoter. In calculating such Independent Value the Independent Expert must calculate the aggregate value of all Shares on the basis of a sale of the entire issued share capital of the Company between a willing seller and a willing buyer on arms' length terms and, in determining the aggregate market value of the Shares, the Independent Expert shall in particular:

(i) be engaged by the Company and instructed by or on behalf of the Majority Lender Investors and the Lead Promoter to calculate the Independent Value as a specific number but that, if the Independent Expert determines that a range is required, the high point of such range may be no more than 105% of the low point of such range (or such other percentage as the Majority Lender Investors and the Lead Promoter may agree in writing);
(ii) assume that all amounts outstanding under the Buyer Financing Documents are being repaid in full, in each case, as at completion of the relevant Exit, ICG Drag or ICG Realisation Event;
(iii) take account of the provisions of Article 5;
(iv) disregard any restrictions as to transfer, redemption, purchase and/or repayment in respect of any of the Shares;
(v) assume that the Target Group is then carrying on business as a going concern;
(vi) calculate the value of the Target Group Companies on a cash free debt free basis subject to normalised working capital for the Target Group using the same methodology in calculating and determining what is debt and cash and the normalised working capital for the Target Group as has been agreed between the Lender Investors and the Initial Lead Promoter (or their advisers) by the Completion Date, with such methodology being confirmed as being the same by Nick Jeal (of such other Transactional Services partner of Deloitte LLP based in the City of London nominated by Deloitte LLP at the relevant time) to the Independent Expert on a non-reliance basis (the **"Value Methodology").** For the avoidance of doubt, deferred revenue redemption costs less accounts receivable (management definition of "restricted" cash) shall be included in the Value Methodology as a debt-like item and reclassified from working capital; and
(vii) assume that all amounts due in respect of the Securities (including all accrued dividends and interest thereon) are due and payable on the relevant Exit, ICG Drag or ICG Realisation Event whether the relevant company could lawfully make such payment or not;

…
"Market Value" means, in relation to the total amount of Shares in issue at the relevant time:
…
(c) in respect of an ICG Realisation Event which occurs simultaneously with or following an SF Repayment:
(i) if such SF Repayment was related to or in connection with the acquisition by any Buyer Group Company of equity securities in the Target Group from any person other than a Target Group Company **("Acquired Target Shares"),** the higher of:
(A) the amount equal to the aggregate consideration which would be payable to the Buyer Group if all of the Securities in the Target Group held by any Buyer Group Company at the relevant time were purchased at a price per share equal to the weighted average of the price per share paid by the relevant Buyer Group Company for the Acquired Target Shares over the previous 6 months, less the Relevant Net Indebtedness immediately prior to such SF Repayment and adjusted in accordance with the Value Methodology if such Value Methodology was not used in agreeing the consideration payable for such Acquired Target Shares; and
(B) such value as would result in the Original Al Shares held by the Lender Investors at such time receiving a payment which in aggregate is at least equal to or greater than two times the ICG Equity Investment; and otherwise
(ii) if not referred to in paragraph (a), (b), (d) or (e), the Independent Value;
…
(g) in respect of any other ICG Realisation Event or the ICG Drag, the Independent Value;

…
"Material Breach" means:

(a) any breach or failure to comply with (A) any provision of Articles 4, 5, 7, 8 or 11; or (B) any provision of clauses 5.3, 6.10, 8, 10.2, 10.12, 10.13, 10.14, 10.15 or 11.4 of the Shareholders Agreement; and/or

(b) the circulation of a resolution by or with the authority of the Board or some other person who is ostensibly legally entitled to do so: (A) for a Buyer Winding-Up; (B) for a reduction in the capital of the Company; or (C) varying any of the rights attaching to any of the Al Ordinary Shares, in each case without Lender Investor Consent;

…
"Relevant Proportion" means the proportion which the number of Original A 1 Shares held by the Lender Investors at the relevant time represents of the total number of Original Equity Shares at the relevant time;

…
"SF Repayment" means the full and final repayment of all amounts advanced under the Senior Facility Agreement (unless already repaid) and all amounts owing or due (then or in the future) in respect the SF Notes and/or under the Senior Facility Agreement including by way of interest, costs or otherwise or, with prior Lender Investor Consent, all amount other than USDl;

…
"Target" means Globoforce Group Public Limited Company, a public limited company incorporated in Ireland (Irish company number 533586);

…
"Target Group" means the Target and its subsidiary undertakings from time to time and references to a **"Target Group Company"** shall be construed accordingly;

4. DIVIDEND RIGHTS

4.1 Subject to: (i) the Board recommending payment of the same; (ii) the Law; (iii) the receipt of any consent required pursuant to the Shareholders Agreement and in accordance with the terms of the Shareholders Agreement; and (iv) the remaining provisions of this Article 4, any Available Sources which the Company may determine to distribute at any time shall be distributed in the following order:

4.1.1 in priority to any other payments under this Article 4.1, where following an ICG Realisation Event (other than an ICG Realisation Event which occurs after a Target Listing in respect of which the Lender Investors have served an Equity Retention Notice), the Al Ordinary Shareholders elect to receive some or all of the amount due to them as a consequence of such ICG Realisation Event by way of dividend, by paying to the holders of the Original Al Shares an aggregate amount equal to the Prior Return less any amounts that have been paid or which are to be paid to in respect of the Original Al Shares in respect of the same ICG Realisation Event by way of return of capital pursuant to Article 5, redemption pursuant to Article 7 or a buyback by the Company in respect of such Original A 1 Shares, such amount to be distributed between the holders of such Original Al Shares in proportion to their respective holdings of such Original Al Shares; …

7. REDEMPTION RIGHTS

Redemption of A1 Ordinary Shares

7.1 All of the Original Al Shares then in issue shall, subject to any restrictions set out in the Law, be redeemed by the Company, subject to receipt of a Lender Investor Consent:

7 .1.1 immediately prior to completion of an Exit, or ICG Drag (except in respect of any

Original Al Shares being transferred in connection with such Exit or ICG Drag) provided that the redemption of the Original Al Shares is part of a simultaneous ICG Realisation Event and the ICG Exit Conditions are being satisfied at the same time; or

7 .1.2 on an ICG Realisation Event (other than an ICG Realisation Event which occurs after a Target Listing in respect of which the Lender Investors have served an Equity Retention Notice), provided that (unless a Lender Investor Consent agrees otherwise) on completion of such ICG Realisation Event the ICG Realisation Amount is being received by the Lender Investors and the ICG Exit Conditions are being satisfied at the same time,

provided that, in each case, no Al Ordinary Shares shall be redeemed for a period of 24 months from the Completion Date where such redemption would be prohibited by Regulation 43 of the AIFM Regulations. …

27. NOTICES

27.1 Subject to the specific terms of these Articles, any notice to be given to or by any person pursuant to these Articles (other than a notice calling a meeting of the Board or a committee thereof) shall be in writing. …

SHA

1. DEFINITIONS AND INTERPRETATION

1.1 The following words and expressions where used in this Agreement have the meanings given to them below:

…

"Buyer Group" means the Company and any undertaking which is a subsidiary undertaking of the Company from time to time (but excluding each Target Group Company) and, if applicable, any New Buyer Holding Company and references to "Buyer Group Company" and "member of the Buyer Group" shall be construed accordingly;

…

"Exit" means a Buyer Sale, a Buyer Assets Sale (provided it is promptly followed by (i) the passing of a shareholders resolution or (ii) the filing of a court order in respect of a Buyer Winding-Up), a Buyer Listing or a Buyer Winding-Up;

…

"Financing Documents" means the Senior Facility Agreement and the SF Notes together with the associated security documents and ancillary documents including any intercreditor deed referred to therein and any other similar finance or facility agreements entered into from time to time by any Buyer Group Company together with the associated security documents and ancillary documents including any intercreditor deed referred to therein;

…

"Initial Lead Promoter" means Barry Maloney;

"Initial Lender Investor" means Falcon VII Investment S.a r.l;

…

"Lender Investor" means (a) Falcon VII Investment S.a.r.l; (b) any Lender Investor Associate; and (c) any other person who undertakes to perform the obligations of a Lender Investor under a Deed of Adherence, in each case for so long as it (or any person who holds the legal title to Shares and/or any other Securities as nominee, custodian, trustee or otherwise on its behalf) holds any Share and/or other Security or is otherwise owed any sum by any Buyer Group Company, and **"Lender Investors"** shall be construed accordingly;

…

"Material Target Information" means (i) written details of any circumstances which the Lead Promoter is aware of and is reasonably likely to (A) cause any actual or prospective material adverse change in the financial position, prospects, assets or business of any Target Group Company; (B) constitute a material breach of, or materially adversely affect, any Target Group Company's ability to perform its obligations under this any Target Investment Document or the Target Financing Documents; (C) cause any reputational damage to any Target Group Company (including issues relating to bribery, corruption or whistleblowing); or result in any threatened or instituted litigation, arbitration, administrative proceedings or claim materially and adversely affecting any member of the Target Group (whether financially, commercially or reputationally); and (ii) the board packs and management reports received by Bidco and/or the Lead Promoter from any Target Group Company and the minutes of any board or committee meeting;

…

"Relevant Party" means each party to this Agreement from time to time including, for the avoidance of doubt, a person joining through a Deed of Adherence) other than the Lender Investors;

…

"Services Default" means any action or omission of the Initial Lead Promoter or the Replacement Lead Promoter (after he becomes the Lead Promoter) at any time which entitles a party to the Services Agreement to terminate the Services Agreement in accordance with its terms (excluding where this arises by reason of his becoming a Fair Leaver) including where this arises by reason of his failure at any time to act in accordance with the terms of the Services Agreement (and for the purpose of this definition no account shall be taken of any waiver given in respect of any such breach (other than an Unconditional Waiver) by any person or any standstill agreement or similar arrangements with any person);

…

1.4.8 an **"Lender Investor Consent"** or an **"Lender Investor Direction"** shall mean the giving of a written consent or direction by the Majority Lender Investors, provided that for so long as there is a Lender Investor Director, any such consent or direction required or permitted to be given by the Majority Lender Investors under this Agreement shall be validly given if given by the Lender Investor Director in the manner set out in Clause 7 or, if at any time there is more than one Lender Investor Director, any Lender Investor Director, in the manner set out in Clause 7 (in each case such consent being given by the Lender Investor Director in his capacity as a representative of the Majority Lender Investors and not in his capacity as a director of the Company);

3. CONSTITUTION OF THE BOARD

3.1 At all times prior to (i) the occurrence of a Default Event or Services Default; or (ii) the Promoters together with the Promoter lnvestcos ceasing to hold, in aggregate, 5% in number of all Company Equity Securities in the Company in issue at the relevant time:

3.1.1 subject to Clauses 3 .3 and 3.10, a Promoter Majority shall be entitled to appoint up to three people to the Board and to the board of each other Buyer Group Company (and to any committee of any such board) as directors (each a **"Promoter Director"),** and to remove any such person as their appointee for any reason whatsoever and to appoint another person in his place; and

3.1.2 the Majority Lender Investors shall be entitled at any time to appoint up to two people to the Board and to the board of each other Buyer Group Company (and to any committee of any such board) as non-executive directors (each a **"Lender Investor Director"),** and to remove any such person as its appointee for any reason whatsoever and to appoint another person in his place.

…

Board resolutions

3.13 Meetings of the Board shall make decisions by passing resolutions. Subject to Clause 3.14 each Director shall have one vote and a resolution shall be considered to be passed if more votes are cast for it than against it.

3.14 At all times prior to the occurrence of a Default Event or a Services Default (but not thereafter):

3.14.1 if only one Promoter Director has been appointed, that Promoter Director (or his alternate) voting on a resolution of the Board shall be deemed to exercise three votes in respect of such proposed resolution; and

3.14.2 if only two Promoter Directors have been appointed, such Promoter Directors (or their alternates) voting on a resolution at a meeting of Directors shall be deemed to exercise, between them, three votes in respect of such proposed resolution provided that, if both Promoter Director so vote, such votes are exercised in like manner; and

3.14.3 if only one Lender Investor Director has been appointed, that Lender Investor Director (or his alternate) voting on a resolution of the Board shall be deemed to exercise two votes in respect of such proposed resolution.

4. CONSTITUTION OF THE TARGET BOARD

4.1 Without prejudice to any other rights he may have whether under the Articles or the Target Articles, as a matter of law or otherwise, at all times prior to the occurrence of a Default Event or a Services Default, the Lead Promoter shall be entitled to act as the Target Investor Director. Without prejudice to his right to appoint a temporary alternate director in accordance with Clauses 3.5 and 4.3, in no circumstances shall the Lead Promoter or Bidco (without prior Lender Investor Consent) appoint any other person to act as the Target Investor Director.

4.2 Without prejudice to any other rights any person (other than a Promoter) may have whether under the Articles, this Agreement, as a matter of law or otherwise, following a Default Event or a Services Default, the Majority Lender Investors shall be the only person entitled to appoint and/or remove the Target Investor Director and if so directed to so by an Lender Investor Direction, the Buyer Group Companies shall exercise their rights and powers to remove any Target Investor Director and appoint the replacement set out in such Lender Investor Direction.

5. CONDUCT OF BUSINESS

…

5 .2 Each Buyer Group Company covenants and undertakes to the Lender Investors (except to the extent that this would constitute an unlawful fetter on its statutory powers, for which purpose each paragraph of Schedule 5 is separate and severable) to comply with the obligations and restrictions contained in Schedule 5 and to procure that each Buyer Group Company shall comply with the obligations and restrictions contained in Schedule 5.

5.3 The parties agree and acknowledge that the Buyer Group shall conduct its affairs in accordance with the restrictions and obligations set out in Schedule 5 and, accordingly:

5 .3. 1 each Relevant Party covenants and undertakes to the Lender Investors that he shall at all times conduct himself and exercise his rights (whether as a security holder, director, or employee or otherwise of any Buyer Group Company and/or Target Group Company, as applicable) in a way which is consistent with, and to ensure compliance with, the obligations and restrictions set out in Schedule 5 and he shall procure the performance of each obligation or adherence to such restrictions and obligations as set out in Schedule 5 by each Buyer Group Company; and

5.3.2 until the occurrence of a Default Event, each Lender Investor covenants and undertakes to the Promoters that it shall not exercise any of its voting rights attached to any

of its Equity Securities to pass a shareholder resolution of the Company to take an action which is prohibited under Part E of Schedule 5.

5.4 The parties agree and acknowledge that, notwithstanding any provision of this Agreement or the Articles but subject to the provisions of the Finance Documents, an SF Repayment (as defined in the Articles) may be effected by the Buyer Group without any requirement for the consent or approval of the Lender Investors provided that the ICG Exit Conditions are satisfied and the terms of this Agreement, the Articles and the Financing Documents are all adhered to.

6. PROVISION OF INFORMATION

Target Group Information

6.1 Each of the Buyer Group Companies hereby agrees with the Investors that they will:

…

6.1.5 promptly following a request from an Investor:

(a) obtain any other information or document relating to or held by any Target Group which Bidco is entitled to request under any the Target Investment Documents law or otherwise and promptly deliver such information to all Investors upon receipt; and

(b) procure the enforcement of(or, in the case of Bidco, enforce) Bidco's rights in relation to the receipt of any information under any of the Target Investment Documents or the law or otherwise; and

6.1.6 promptly following receipt, inform the Majority Lender Investors and the Lead Promoter and deliver to the Investors all such information and/or docum~nts referred to in clauses 6.1.1 to 6.1.3 and all Material Target Information received by the Buyer Group.

6.2 The Lead Promoter hereby agrees with the Buyer Group Companies and the Lender Investors that he will:

…

6.2.4 upon receipt of an email request from any of the Lender Investors for additional information relating to the Target Group (such request to be made no more frequently than monthly):

(a) if such information is known or available to the Lead Promoter, promptly respond to such email request with the relevant information; or

(b) if such information is not known or available to the Lead Promoter and/or if the Majority Lender Investors reasonably determine that the response from the Lead Promoter does not adequately address the Lender Investors' request(s) for information:

(i) procure that the chief financial officer of the Target Group promptly receives the request(s) for information made by the Lender Investors;

(ii) if Bidco is entitled to receive such information under the Target Investment Documents:

(A) procure the delivery of such information; and

(B) if the information is not forthcoming, procure the enforcement of Bidco's rights under the Target Investment Documents in relation to such request(s) for information; and

(iii) if Bidco does not have the right to receive the information requested by the Lender Investors, use reasonable endeavours in good faith to procure the prompt delivery of such information to the Lender Investors by the chief financial officer of the Target Group; and

6.2.5 promptly following receipt, inform the Majority Lender Investors and deliver to the Lender Investors all such information and/or documents referred to in Clause 6.2.4 and all Material Target Information received by the Lead Promoter

Buyer Group Information

6.3 Each Buyer Group Company agrees with the Investors that it will, if necessary, introduce and maintain effective and appropriate control systems in relation to the financial, accounting and record-keeping functions of the Buyer Group and will generally keep the Investors informed of the progress of each Buyer Group Company's business and affairs and in particular will:

6.3.1 procure that the Investors are given such information and such access to the officers, employees and premises of the Buyer Group as they may require for the purposes of enabling them to monitor their investment in the Buyer Group; and

6.3.2 direct each Buyer Group Company's auditors from time to time to provide direct to any Investor such information as that Investor may request for the purposes of enabling them to monitor their investment in the Buyer Group.

…

6.10 Each Relevant Party shall procure the full and prompt performance by each Buyer Group Company of its obligations under this Clause 6 (and shall ensure each relevant Buyer Group Company complies with any direction given by a Buyer Group Company or a Lender Investor Direction in respect of any provision of this Clause 6) and shall inform the Lender Investors in writing, forthwith upon the Relevant Party becoming aware of the same, of any circumstances giving rise to an obligation on any Buyer Group Company to inform the Lender Investors under the terms of this Clause 6. Each Buyer Group Company shall procure the full and prompt performance of each person's obligations under this Clause 6.

7. **LENDER INVESTOR CONSENTS AND DIRECTIONS**

7. I If the same proposed transaction or matter requires a Lender Investor Consent under more than one provision of this Agreement, a single Lender Investor Consent to that proposed transaction or matter shall be deemed to cover all required Lender Investor Consents.

7.2 A Lender Investor Consent or a Lender Investor Direction given by a Lender Investor Director may only be validly given (whether for the purposes of this Agreement, the Articles or otherwise) if the Lender Investor Director or, if at any time there is more than one Lender Investor Director, one of the Lender Investor Directors:

7.2.1 gives his consent or direction in writing to the Company; or

7.2.2 (in the case of a consent, as opposed to a direction, required from any of the Lender Investor Directors) signs a written resolution of the Board or signs the minutes of the Board or committee meeting approving the relevant transaction or matter, and provided that the relevant consent or direction is expressly referred to as a Lender Investor Consent or Lender Investor Direction. A Lender Investor Director may (in the absence of any such express reference) consent to or refer to a matter in his capacity as a director without that representing a Lender Investor Consent or a Lender Investor Direction.

10. EXIT AND ICG REALISATION EVENT

10.1 Subject to clauses 10.2, 10.6 and 10.8, each of the parties agree and acknowledge that:

10.1.1 prior to (i) the occurrence of a Default Event or Services Default or (ii) the Initial Lead Promoter becoming a Leaver (other than a Good Leaver), the Initial Lead Promoter shall have primary responsibility for determining the timing of any Exit or ICG Realisation Event, subject always to such Exit or ICG Realisation Event being effected on the terms of this Agreement, the Financing Documents and the Articles; and

10.1.2 prior to (i) the occurrence of a Default Event or Services Default but after (ii) the Initial Lead Promoter becoming a Fair Leaver, a Replacement Lead Promoter shall have primary responsibility for determining the timing of any Exit or ICG Realisation Event, subject always to such Exit or ICG Realisation Event being effected on the terms of this Agreement, the Financing Documents and the Articles; and

10.1.3 following (i) the occurrence of a Default Event or Services Default or (ii) the Lead Promoter becoming a Leaver (other than a Good Leaver), the board of the Company shall have primary responsibility for determining the timing of any Exit or ICG Realisation Event, subject always to such Exit or ICG Realisation Event being effected on the terms of this Agreement, the Financing Documents and the Article and in such circumstances each reference to "Initial Lead Investor" in this clause 10 shall be deemed to refer to the board of the Company, acting with Lender Investor Consent.

Exit Conditions

10.2 Notwithstanding anything to the contrary, unless the Majority Lender Investors agree otherwise, no ICG Realisation Event, ICG Drag or Exit will take place unless it is carried out in accordance with the provisions of this Agreement and the Articles and the ICG Exit Conditions are satisfied.

10.3 No Exit, ICG Drag and/or ICG Realisation Event shall take place without Lender Investor Consent unless:

10.3.1 all of the Lender Investors' requirements for KYC Information have been satisfied; and

10.3.2 none of the direct or indirect participants in the Exit, ICG Drag and/or ICG Realisation Event are Restricted Persons.

Obligations and Process

10.4 Subject to clause 10. 11, if an Exit or an ICG Realisation Event is proposed by the Board, provided all requisite Lender Investor Consents have been obtained in accordance with Clauses 10.2 and 10.3, then:

10.4.1 the Board shall appoint corporate finance advisers and financial, accounting and legal advisers to act in respect of such Exit or ICG Realisation Event on behalf of each Buyer Group Company and/or all of the Security Holders which, in each case shall be independent third parties who are not connected persons of any Relevant Party and/or any of their Affiliates (save that this shall not apply to prevent Capnua Limited being appointed for this role);

10.4.2 such advisers' fees will be borne by the Company or any other Buyer Group Company (to the extent permitted by law) and/or the Shareholders in accordance with the provisions of Clause IO. l 7 provided that such fees and any expenses are reasonable and proportionate in accordance with market practice for such engagements; and

10.4.3 the Lead Promoter and the Buyer Group Companies shall promptly give such co-operation and assistance in preparing for and implementing the Exit or an ICG Realisation Event and satisfying the ICG Exit Conditions as the Board may reasonably request, including in relation to the preparation of an information memorandum and vendor due diligence reports and the giving of presentations to potential buyers, investors, financiers and/or their advisers.

10.5 The parties acknowledge and agree that:

10.5.1 on an Exit, ICG Drag or ICG Realisation Event, the Lender Investors and the Lender Investor Directors will not give any representations, warranties or indemnities except for a warranty to be given by each Lender Investor as to the title to its Shares and as to its capacity to sell those Shares;

10.5.2 in view of the opportunity afforded to them by the terms of their participation in the transaction of which this Agreement forms part, on an Exit or an ICG Drag, those of the Promoters as are at that time directors, employees of or service providers to any Buyer Group Company or Security Holders will (and will procure that their Promoter Investees will) give such undertakings, warranties and indemnities as are reasonably requested by the buyer or the sponsor as the case may be, or which are customarily given to a buyer or a

sponsor in the context of an Exit or other partial Exit, in each case subject to customary limitations on liability;

10.5.3 subject to clause 10.5.1, nothing herein shall oblige any of the Lender Investors to incur any potential liability or take on any obligation.

Exit Committee

10.6 If on the date falling five years from the Completion Date the Lender Investors hold any Securities, the Board shall constitute an exit committee (the **"Exit Committee")** (which shall at all times comprise an Investor Director, the Lead Promoter) which shall be authorised to have sole authority to together pursue, negotiate and execute an ICG Realisation Event which satisfies the ICG Exit Conditions.

10. 7 Subject to Clause 10.8 below, the Exit Committee, once constituted, shall determine the timing, structure, pricing and form of such ICG Realisation Event provided that such ICG Realisation Event satisfies the ICG Exit Conditions.

…

Buyer Group Listing

10.15 Without prejudice to Clauses 10.1 to 10.10, on an Exit by way of a Buyer Listing:

Disclosure

10.15.5 Each of the Relevant Parties each undertake to each of the Lender Investors that if an ICG Realisation Event, Exit or ICG Drag is contemplated he will, prior to the ICG Realisation Event, Exit or ICG Drag occurring, disclose to them in writing (whether or not at the specific request of the Lender Investors) the full details of any agreements, arrangements or understandings pursuant to which he (or any person connected with him) will or may receive any other consideration or payment, directly or indirectly in connection with the ICG Realisation Event, ICG Drag or an Exit.

…

The Articles

10.20 If the provisions of the articles of association for the time being of any Buyer Group Company and/or any other instrument or agreement pursuant to which Securities (other than the SF Notes) have been issued conflict with the provisions of this Agreement then, during such period, the parties agree that the provisions of this Agreement shall prevail.

10.21 If any such conflict should be identified, each of the Relevant Parties agrees and undertakes, if so requested by Lender Investor Direction, to procure the amendment of the articles of association of the relevant Buyer Group Company or the relevant instrument or agreement pursuant to which the relevant Securities have been issued to eliminate the conflict.

11. COMPLIANCE COVENANTS

11.1 Subject to clause 11.5, each party agrees to observe and comply fully and promptly with the provisions of the Articles to the intent and effect that each and every provision thereof shall be enforceable by the parties to this Agreement between themselves and in whatever capacity notwithstanding that any such provision might not have been so enforceable in the absence of this Clause 11.1.

11.2 Each of the Relevant Parties undertakes that he will exercise his rights in each Buyer Group Company and each Buyer Group Company (whether as a Security Holder, director, employee or otherwise) to procure that full effect is given to the obligations of each Buyer Group Company under this Agreement, the Articles and/or any other Transaction Document and/or any other instrument or agreement governing the relevant Security.

13. CONFIDENTIALITY

…

13.2 Subject to Clause 13.1, each party shall in all respects keep confidential and not at any time disclose or make known in any other way to anyone whomsoever or use for his own or any other person's benefit or to the detriment of any Buyer Group Company any Confidential Information, provided that:
13 .2.1 such obligation shall not apply to information which becomes generally known (other than through a breach by any party of this Clause);
13.2.2 any party shall be entitled at all times to disclose such information as may be required by law or by any competent judicial or regulatory authority or by any Recognised Stock Exchange or for tax or accounting purposes or required by the Financing Documents (provided that, so far as practicable, the disclosing party shall consult with the other parties prior to making such disclosure); and
13.2.3 nothing contained in this Clause shall prevent any employee of any Buyer Group Company from disclosing information in the proper performance of his duties as an employee.

19. GENERAL
Entire agreement
19.1 This Agreement (together with any documents referred to herein or entered into pursuant to this Agreement, which shall include the Transaction Documents) contains the entire agreement and understanding of the parties and supersedes all prior agreements, understandings or arrangements (both oral and written) relating to the subject matter of this Agreement and any such document. Each of the other parties acknowledges that he is entering into this Agreement without reliance on any undertaking or representation given by or on behalf of any Lender Investor other than as expressly contained in this Agreement, provided that nothing in this Clause shall exclude any liability of a party for fraudulent misrepresentation.

20. NOTICES
Form of Notice
20.1 Any notice, consent, request, demand, approval or other communication to be given or made under or in connection with this Agreement (each a **"Notice"** for the purposes of this Clause) shall be in writing and signed by or on behalf of the person giving it.
Method of service
20.2 Service of a Notice must be effected by one of the following methods:
20.2.1 by hand to the relevant address set out in Clause 20.4 and shall be deemed served upon delivery if delivered during a Business Day, or at the start of the next Business Day if delivered at any other time; or
20.2.2 if posted in the same jurisdiction as the recipient, by prepaid first-class post to the relevant address set out in Clause 20.4 and shall be deemed served at the start of the second Business Day after the date of posting; or
20.2.3 if not posted in the same jurisdiction as the recipient, by prepaid international airmail to the relevant address set out in Clause 20.4 and shall be deemed served at the start of the fourth Business Day after the date of posting; or
20.2.4 by email to the email address specified in Clause 20.4 and shall be deemed served at the time of sending, provided that service shall not be deemed to have occurred if the sender received an automated message indicating that the message has not been delivered to the recipient.
20.3 In Clause 20.2 **"during a Business Day"** means any time between 9.30 a.m. and 5.30 p.m. on a Business Day based on the local time where the recipient of the Notice is located. References to **"the start of a Business Day"** and **"the end of a Business Day"** shall be construed accordingly.
Address for service

20.4 Notices shall be addressed as follows:

20.4.1 Notices for any Buyer Group Company shall be marked for the attention of:
Name: the Directors
Address: c/o James Roddis and Bernard Coady, Intermediate Capital Group, Juxon House, 100 St Paul's Churchyard, London EC4M 8BU;

20.4.2 Notices for any Promoter or Promoter Investco shall be addressed or sent to the relevant Promoter at the address set out next to his name in Part A of Schedule 1.

20.4.3 Notices for any Lender Investor shall be addressed or sent to the relevant Lender Investor at the address set out next to its name in Part B of Schedule 1.

20.4.4 Notices for the Executive shall be addressed or sent to him at the address set out next to its name in Part C of Schedule 1.

20.4.5 Notices for any of the Capnua Entities shall be addressed or sent to him at the address set out next to its name at the start of this Agreement.

20.4.6 In the case of any other party to this Agreement from time to time, notices shall be addressed to the relevant party at the address set out in the Deed of Adherence relating to that party.

Copies of Notices

20.5 Copies of all Notices sent to any of the Buyer Group Companies and Lender Investors shall also be sent to Helen Croke of Ropes & Gray International LLP, 60 Ludgate Hill, London, EC4M 7AW. Failure to do so shall not invalidate such Notice.

20.6 Copies of all Notices sent to the Initial Lead Promoter shall also be sent to Niall Powderly and Ben Gaffikin of McCann FitzGerald, Riverside One, Sir John Rogerson's Quay, Dublin 2, Ireland. Failure to do so shall not invalidate such Notice.

Agent for service and deemed service

20.7 Each Promoter each irrevocably severally authorises and appoints each of his Promoter Investcos to be his agent, acting severally, for service of notices and/or proceedings in relation to any matter arising out of or in connection with this Agreement and vice versa. Service on such agent in accordance with this Clause 20 shall be deemed to be effective service on the Promoters and/or Promoter Investcos (as appropriate).

Change of details

20.8 A party may change its address for service provided that it gives the other party not less than 28 days' prior notice in accordance with this Clause 20. Until the end of such notice period, service on either address shall remain effective.

SCHEDULE 5
CONDUCT OF BUSINESS

…

Part B: Negative Covenants

No Buyer Group Company shall, and shall exercise its rights in each Buyer Group Company to procure that each Buyer Group Company shall not, without Lender Investor Consent (but in any event subject to the terms and conditions of the Financing Documents):

…

Agreements and arrangements

…

6. enter into, amend, vary or waive any provision of, or terminate (or give notice to terminate) any of, the Financing Documents, the Share Purchase Agreement, the Service Agreements, the Target Investment Documents, or any instrument or agreement governing or relating to any Securities or Target Group Securities or request any indulgence or waiver thereunder (excluding, for the avoidance of doubt, the exercise of any cure rights) or take any action inconsistent therewith;

…

Loans and borrowings

…

12. grant, create or allow to arise any Security Interest over any of its assets (other than as envisaged by the Senior Facility Agreement);

13. borrow any monies or incur any indebtedness or other liability other pursuant to the Senior Facility Agreement;

…

24. instigate or take any steps in relation to an Exit or ICG Realisation Event unless the provisions of this Agreement and the Articles are being complied with and the ICG Exit Conditions are being satisfied (where applicable);

…

28. agree to do any of the things referred to in this Part B.

Part D: Target Covenants

Without prior Lender Investor Consent (i) no Buyer Group Company or Relevant Party shall consent to (whether by exercising voting rights or otherwise) any of the following matters, (ii) each Buyer Group Company shall exercise its rights to procure that there shall not be, and (iii) each Relevant Party shall vote against any of the following matters if raised or proposed to any board of directors (or any committee thereof) of any Target Group Company in respect of which such Relevant Party is entitled to vote:

1. any (conditional or unconditional) increase or reduction or other alteration whatsoever (including by way of redemption, purchase, sub-division, consolidation or redesignation) of any Target Group Company's share capital…

…

6. any amendments to the Target Investment Documents and/or any other constitutional documents or other equity documents of any Target Group Company other than any amendments necessary to implement a Target Listing provided that such Target Listing complies with the terms of this Agreement;

…

12. establishing or making any appointment to any committee of the board of directors of any Target Group Company other than the audit committee, remuneration committee and nomination committee of the Target which exist at the Completion Date; and/or

13. any agreement to do any of the things referred to in this Part D.

Services Agreement

1. DEFINITIONS AND INTERPRETATIONS

1.1 In this Agreement, the following terms shall, unless the context otherwise requires, have the following meanings:

…

"Loss" means all costs, expenses, liabilities, claims and losses (including legal costs) for any Buyer Group Company or any Security Holder;

3. SERVICES

3.1 BM shall provide to the Buyer Group Companies the Services on the terms and conditions of this Agreement and perform the obligations under this Agreement in accordance with the terms of this Agreement.

5. TERM AND TERMINATION

…

5.2 Any Buyer Group Company (with prior Lender Investor Consent) or any Lender Investor may terminate this Agreement with immediate effect on giving notice of such to BM if BM or any BM Investco:

5.2.1 ceases to or fails to provide any of the Services in accordance with the terms of this Agreement in circumstances where he is a Fair Leaver;

5.2.2 breaches or fails to perform or meet any of his obligations under this Agreement, for whatever reason, where such breach or failure is either incapable of remedy or, where it is capable of remedy, it remains unremedied (provided that a breach or failure shall be deemed to be unremedied if there is any Loss either as a result of the breach or failure or in connection with the remedy) 5 Business Days after the earlier of (i) written notice of such breach or failure being sent by a Lender Investor to BM; or (ii) such breach of failure arising;

5.2.3 commits any fraud or provides any fraudulent misstatement in- connection with his role as a director of any Target Group Company or any Buyer Group Company, commits any criminal offence, is declared bankrupt or makes an arrangement with or for the benefit of his creditors, or has a county court administration order or similar made against him under the County Court Act 1984 or similar in any other jurisdiction;

5.2.4 is disqualified from acting as a director;

5.2.5 commits a Material Breach; or

5.2.6 following a Default Event occurring,

in each case, for whatever reason and no compensation, recompense or restitution shall be payable to BM in respect of any such termination.

…

10. NOTICES

10.1 Any notice, consent, statement, request or approval (a "Notice") to be given under this Agreement shall be in writing and signed by or on behalf of the party giving it. Any Notice shall be sent to the party to be served at the address set out at the front of this Agreement. Any alteration in such details shall, to have effect, be notified to the other party in accordance with this Clause 10.

10.2 Service of a Notice must be effected by prepaid recorded delivery or registered post. In proving service, it shall be sufficient to prove that the envelope containing the Notice was correctly addressed, postage paid and posted.

SCHEDULE 1
THE SERVICES

1. TARGET BOARD

1.1 Acting as the Target Investor Director and exercising all of the rights and powers of a Target Investor Director and exercising his voting rights and using any and all rights and powers vested in him or any Buyer Group Company from time to time as a holder of any securities in any and/or director of any Target Group Company and/or Buyer Group Company or otherwise in his discretion subject to the obligations in the Shareholders Agreement and the Articles.

…

1.3 Promptly reporting to the Lender Investors in respect of any matter on which the Target Investor Director or any Buyer Group Company has given any consent or direction or exercised any voting rights or negative control rights when such any matter required the consent of the Lender Investors under the Shareholders Agreement or Articles.

2. INFORMATION

…
2.2 Inform the Lender Investors in writing, forthwith upon becoming aware of the same, of any circumstances giving rise to an obligation on any Buyer Group Company to inform the Lender Investors under the terms of clause 6 of the Shareholders Agreement.
…
2.4 Upon receipt of an email request from any of the Lender Investors for additional information relating to the Target Group (such request to be made no more frequently than monthly):

(a) if such information is known or available to BM, promptly responding to such email request with the relevant information; or

(b) if such information is not known or available to BM and/or if the Majority Lender Investors reasonably determine that the response from BM does not adequately address the Lender Investors' request(s) for information:

(i) exercise his voting rights and use any and all powers vested in him or any Buyer Group Company from time to time as a holder of securities in any and/or a director of any Target Group Company or Buyer Group Company or otherwise to procure that:

(A) the chief financial officer of the Target Group promptly receives the request(s) for information made by the Lender Investors;

(B) if the Company is entitled to receive such information under the Target Investment Documents:

(1) such information is delivered; and

(2) if the information is not forthcoming, the Buyer Group Company's rights under the Target Investment Documents in relation to such request(s) for information are enforced; and

(ii) if the Company does not have the right to receive the information requested by the Lender Investors, using reasonable endeavours in good faith to procure the prompt delivery of such information to the Lender Investors by the chief financial officer of the Target Group.

3. CONDUCT

At all times conduct himself and exercise the rights and powers of vested in him or each Buyer Group Company from time to time whether as a security holder, director, or employee under Law or otherwise of any Buyer Group Company or Target Group Company:

3.1 in accordance with, and to ensure compliance with the obligations and restrictions set out in Parts B, C and D of Schedule 5 of the Shareholders Agreement; and

3.2 to procure that each BM Investco, alternate, proxy or any other person to which BM delegates (or who acts as BM's substitute) complies with the obligations and restrictions set out in Parts B, C and D of Schedule 5 of the Shareholders Agreement; and

3.3 in accordance with, and to ensure compliance with Clause 10 of the Shareholders Agreement.

Term Sheet

11.	**Consent Matters**	ICG will have agreed investor protections over the actions of the Buyer Group including, without limitation, those set out in Schedule 1. Suitable financial thresholds (where applicable) in relation to the matters set out in Schedule 1 to be agreed between ICG and BM. Unless there has been a Default Event and subject to Section 15, these investor

		protections shall not operate at the level of the Investment, and BM will have control over the exercise of the Buyer's vetoes at Investment level. However, ICG's consent will be required before any BM, any Promoter or any Buyer Group Company may give its consent or approval to the following actions (or knowingly refrain from exercising its rights to prevent any of the following actions happening) in relation to the Investment Group Companies (the "**ICG Consent Rights**"): (a) issue of shares or securities (or options or warrants etc.) other than any issue of shares issued (i) as part of reorganization of the Investment's share capital immediately prior to an IPO where the economic rights are unchanged by such issue and provided such IPO is taking place in compliance with ICG's rights; or (ii) as a primary offering which is taking place immediately following an IPO (provided such IPO is taking place in compliance with ICG's rights); or (iii) any issue of shares under a MIP or other employee share scheme provided that no more than 5% in aggregate of the fully diluted share capital of the Investment on Completion (on the basis that all Options have been exercised and satisfied) is so issued; (b) new borrowings or any amendments to any current borrowings other than (i) replacing some or all of the $15 million borrowings which the Investment Group Companies currently have for the sole purpose of providing balance sheet support for the facilitation of the payment of dividends by Globoforce (the "**Existing Dividend Borrowings**") on the same terms as the Existing Dividend Borrowings (the "**Replacement Borrowings**"); or (ii) increasing the Existing Dividend Borrowings on the same terms (the "**Increased Dividend Borrowings**") provided that such Increased Dividend Borrowings, all Replacement Borrowings and Existing Dividend Borrowings do not in aggregate exceed $25 million and such Increased Borrowings are on the same terms as the Existing Dividend Borrowings;5 any granting of security; any appointment or removal of the director(s) appointed by the Buyer to any board of any Investment Group Company; any alteration of the rights attached to any securities or the introduction of new rights for any securities; any amendments to constitutional documents or other equity documents other than any amendments necessary to implement an IPO provided such IPO is taking place in compliance with ICG's rights; any action or omission which BM knows (having consulted with ICG) is a breach of any law or regulation; the entry into liquidation, etc. t above is subject to due diligence. In addition, ICG will be consulted by BM before any decisions are made to appoint or remove any other directors to the board of any Investment Group Company (other than any directors being appointed by Atlas in accordance with the rights to appoint their representative to the board). there has been a Default Event and subject to Section 15, BM will have the following consent rights in relation to the Buyer Group (the "**BM Consent Rights**"):

		issue of shares or securities convertible into shares; new borrowings other than Replacement Borrowings or Increased Dividend Borrowings; any granting of security; any alteration of the rights attached to the shares in any member of the Buyer Group unless the alteration has an equivalent and proportionate effect on the economic rights of the shares held by the Promoters as it does held by ICG; any redemption, buyback of shares or return of capital; any amendments to constitutional documents which materially affect the economic rights of the shares in the Buyer Group held by the Promoters unless such amendment has an equivalent and proportionate effect on the economic rights of the shares held by ICG; the entry into liquidation, etc. tended that unless there has been a Default Event and subject to Section 15 and without prejudice to the ICG Consent Rights and the other provisions of this term sheet, the Buyer Group's veto rights relating to operational matters for the Investment will be delegated by the Topco board to BM under the Services Agreement. e avoidance of doubt, unless there has been a Default Event and subject to Section 15, BM shall have sole responsibility for any decision to dispose of, or not dispose of, any shares in the Investment as part of a bona fide exit process to an independent third party (which for the avoidance of doubt excludes any related parties) on arms' length terms and provided that the proceeds are being used to first repay the Senior Facility in accordance with its terms and to acquire ICG's equity interests in accordance with Section 13 below and the other terms set out in this term sheet. shall exercise the powers and rights it has to procure that (i) the Investment Group Companies maintain systems and policies to ensure compliance with any applicable laws and regulations that apply to any of them and take all steps to comply with all such obligations; and (ii) ICG is promptly informed upon BM or any Buyer Group Company becoming aware of any facts or circumstances which are reasonably likely to constitute a breach by any Investment Group Company or any relevant person of any law or regulation in any jurisdiction in which any Investment Group Company operates and of any action taken to remedy the situation.
13.	**ICG Exit**	The ICG equity interests and Senior Facility are joined together so that, unless ICG agree otherwise, ICG's equity interests can only be forced into a sale if the Senior Facility is also being paid out at the same time in accordance with its terms and the Senior Facility can only be repaid if ICG's equity interests are being paid out at the same time in accordance with the terms below. The Buyer Group will only be able to force a refinancing or sale of ICG's equity interests if at the same time the Senior Facility is being repaid in full in accordance with its terms and in the circumstances set

		out below and where ICG is receiving cash for its equity interests in Topco with a specific value (the "**Valuation**") and each such Valuation shall be determined as follows: (a) where the ICG equity interests are to be paid out as a consequence of a disposal of Bidco's shares in the Investment to an independent third party on arms' length terms (so other than a disposal to Atlas, another shareholder in the Investment, BM, a Promoter or a related party of any such person (a "**Related Person**") or as part of an IPO of the whole equity share capital of the Investment other than as set out in (d) below) the Valuation shall be determined on the basis of the price paid for such shares in the Investment (the "**Third Party Price**"); or (b) where the ICG equity interests are to be paid out as a consequence of a disposal of Bidco's shares in the Investment to a Related Person and: (i) the disposal takes place prior to the 3rd anniversary of Completion, the Valuation shall be the higher of (A) the equity valuation calculated based on the price paid for such shares in the Investment by the Related Person (the "**Related Person Price**") and (B) a 2x return on the ICG equity interests (based on the amount paid for the ICG equity interests at the date of Completion (adjusted to exclude any premium ICG has had to pay for their subscription for their internal purposes) (the **"Subscription Price")**); or (ii) the disposal takes place after the 3rd anniversary of Completion, the Valuation shall be the determined by a valuation by an independent partner (or person of equivalent standing) with experience in such matters based in either New York, LA or San Francisco at an investment bank from the list of investment banks set out in Schedule 3, as agreed by B and ICG, (or, failing agreement, chosen by the President of the Charted Accountants from such list provided that in making such choice the President can not pick either investment bank originally proposed by ICG or by BM) will be carried out to establish the equity value of the Investment if it was being sold on arms length terms to an independent third party with no minority discount being applied and therefore the value of ICG's equity interests in Topco (again with no minority discount being applied) (an "**Independent Valuation**") and the Valuation shall be the amount determined by such Independent Valuation. The valuer shall be instructed that the Independent Valuation should be determined as a specific number but that, if a range is required, the high point of such range may be no more than 105% of the low point of such range (or such other percentage as BM and ICG may agree). If the valuation provided is a range of values then the Independent Valuation will be at the midpoint of such range, unless agreed otherwise by BM and ICG. The Independent Valuation shall be addressed to ICG and BM or, where ICG and BM agree, to a member of the Buyer Group; or

		(c) where the ICG equity interests are to be paid out as a consequence of a refinancing of the Senior Facility which is related or in connection with an acquisition of shares by a Buyer Group Company in the Investment, the Valuation shall be the higher of (A) the equity valuation calculated based on the price paid for such shares in the Investment; and (B) a 2x return on the ICG equity interests (based on the Subscription Price); or (d) if after an IPO ICG continues to hold equity interests in Topco and the ICG equity interests are to be refinanced/acquired (either at the same time as the repayment in full of the Senior Facility or if the Senior Facility is no longer outstanding) and BM's equity interests in Topco are not, (but not, for the avoidance of doubt, where ICG exercises its right referred to in Section 7 to require the sale of Listed Shares) the valuation will be the higher of (A) the listing price at the time of the IPO; and (B) the price equal to the Listed Price for the Listed Shares at that time; or (e) where the ICG equity interests are to be paid out as a consequence of a refinancing of the Senior Facility where there is no related acquisition or disposal of shares in the Investment, the Valuation shall be the amount determined by an Independent Valuation. A 12 month anti-embarrassment protection will be required on any onward sale etc. If there has not already been an exit or disposal of all of the ICG equity interests, from 5th anniversary of this transaction completing, an Exit Committee of the Buyer Group will be formed (consisting of an ICG Director, BM and others to be discussed) to take steps on behalf of the Buyer Group to effect a purchase or refinancing of all of ICG's equity interests (at a value at least equal to the Valuation) and repayment of the Senior Facility in accordance with its terms (an "**ICG Exit**"). If an ICG Exit has not occurred by the 6th anniversary of this transaction completing, ICG will have the right and the power to effect an ICG Exit itself (subject to BM having right of first refusal to provide, or procure the provision of, funding that would facilitate the ICG Exit) with ICG's equity interests being acquired at a Valuation determined by an Independent Valuation. Implementation of Exit and refinancing provisions in relation to the Investment to be discussed.
21.	**Governing Law**	The terms of this term sheet are confidential and this term sheet is governed by the laws of England and Wales and will be subject to the subject to the exclusive jurisdiction of the courts of England and Wales. Other than the preceding sentence, this term sheet is not and is not intended to be legally binding upon any person.