Claim No. CFI 024/2020
CFI 059/2020

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

(1) SUNSET HOSPITALITY HOLDINGS LIMITED
(2) PEATURA FZ LLC

Claimants in CFI 024/2020

(3) FIX SENSE MANAGEMENT LLC

Claimant in CFI 059/2020

and

(1) HANA HABIB MANSOOR HABIB AL HERZ

Defendant in CFI 024/2020

(2) SUNSET HOSPITALITY HOLDINGS LIMITED
(3) SUNSET HOSPITALITY GROUP HOLDINGS LIMITED

Defendants in CFI 059/2020

JUDGMENT OF JUSTICE ROGER GILES

Hearing : **28 February 2022 and 1 March 2022**

Counsel :
Patrick Dillon-Malone SC and Mosaab Aly instructed by Al Tamimi and Company on behalf of Sunset Hospitality Holdings Limited (**"Sunset RAK"**) Peatura FZ LLC (**"Peatura"**) and Sunset Hospitality Group Holdings Limited (**"Sunset BVI"**)

Mashood Iqbal instructed by Abdulhakim Binherz Advocates & Legal Consultants on behalf of Hana Habib Mansoor Habib Al Herz (**"Mrs Al Herz"**) and Fix Sense Management LLC (**"Fix Sense"**)

Judgment : **27 May 2022**

UPON reviewing the Court files in Claim No. CFI-024-2020 and Claim No. CFI-059-2020

AND UPON Claim No. CFI-024-2020 and Claim No. CFI-059-2020 (the **"Related Proceedings"**) being heard together with the evidence in one the evidence in the other

AND UPON reviewing the Claimants skeleton argument dated 22 February 2022

AND UPON reviewing the Defendants' skeleton argument dated 22 February 202

AND UPON hearing Counsel for the parties on 28 February 2022 and 1 March 2022

IT IS HEREBY ORDERED THAT:

1. Within 14 days of the date of these orders Mrs Al Herz transfer to Sunset RAK the 102 shares held by her in Black Tap Restaurant and Coffee LLC.

2. Within 14 days of the date of these orders Mrs Al Herz transfer to Peatura the 102 shares held by her in Brick Oven Restaurant LLC.

3. The counterclaim in proceedings CFI-024-2020 be dismissed.

4. Proceedings CFI-059-2020 be dismissed.

5. Mrs Al Herz and Fix Sense jointly and severally pay the costs of both proceedings of Sunset RAK, Peatura and Sunset BVI, subject to any costs orders previously made which shall stand, if not agreed the costs to be assessed by the Registrar.

6. There be liberty to apply in relation to orders 1 and 2 in the event of dispute over or failure in implementing the orders.

7. There be liberty to apply in relation to order 5 if any party seeks a different or additional order in relation to costs, such liberty to be exercised

within 21 days; the liberty may be exercised by letter to the Registry.

Issued by:
Nour Hineidi
Registrar
Date of issue: 27 May 2022
At: 11.45am

JUDGMENT

Introduction

1. On one side in these proceedings are companies in the Sunset Group: a holding company incorporated in the British Virgin Islands, Sunset Hospitality Group Holdings Ltd (**"Sunset BVI"**); its wholly owned subsidiary incorporated in the Ras Al Khaimah Economic Zone, Sunset Hospitality Holdings Ltd (**"Sunset RAK"**); and its 51% owned subsidiary also incorporated in the Ras Al Khaimah Economic Zone, Peatura FZ LLC (**"Peatura"**). The activities of the Sunset Group are or include conducting hospitality venues such as restaurants and nightclubs. The General Manager of Sunset RAK and Peatura, also a director of Sunset BVI, is Mr Antonio Gonzalez Ortuno, who was the principal witness for the companies.

2. On the other side are a Dubai company, Fix Sense Management LLC (**"Fix Sense"**), and its Managing Director and majority shareholder, Mrs Hana Al Herz, an Emirati national. Fix Sense provided consultancy services to the Sunset Group for a number of its ventures in Dubai, in association with which Mrs Al Herz acted as the 51% shareholder in the venture company in order to satisfy the requirement that a UAE national owns 51% of the share capital of any locally incorporated company. Mrs Al Herz was the principal witness for Fix Sense and on her own behalf.

3. There are two proceedings, heard together with the evidence in one also evidence in the other.

4. In CFI-024-2020, Sunset RAK and Peatura claim against Mrs Al Herz relief in relation to two Nominee Agreements, under which Mrs Al Herz holds 51% of the shares in the Dubai companies Black Tap Restaurant and Coffee LLC (**"Black Tap"**) and Brick Oven Restaurant LLC (**"Brick Oven"**). They claim that the shares are held by Mrs Al Herz on their behalves and with a promise to transfer the shares at their request, and seek orders that the shares be transferred by her in accordance with their requests. Mrs Al Herz resists the claim on the ground that she is the beneficial owner of the shares. She says that the Nominee Agreements were procured by misrepresentation or, at least as pleaded, were for various reasons void or unenforceable, and that she had paid for the shares. By a counterclaim she claims orders for rescission of the Nominee Agreements; alternatively, if the Nominee Agreements are upheld she claims damages for misrepresentation and for their breach by Sunset RAK and Peatura.

5. In CFI-059-2020, Fix Sense claims against Sunset RAK relief in relation to Heads of Agreement entered into with it and against Sunset BVI relief in relation to a Shareholders Agreement entered with it. Again at least as pleaded, it claims damages for wrongful termination of the Heads of Agreement and for failure to pay fees to which it was entitled; and it claims specific performance of the allotment of shares under options in the Heads of Agreement and the Shareholders Agreement or damages for what it says was breach of those agreements preventing it from exercising the options. The Sunset companies resist the claims on the grounds that the Heads of Agreement was validly terminated under a cross-default clause, the relevant default being the breach of the Nominee Agreements by Mrs Al Herz, with payments up to date, and that they were not in breach in relation to the options which were not validly exercised by Fix Sense.

Background Facts

6. I begin with an account of events which are common ground, or with no or little controversy are established in the evidence, including setting out or summarising relevant provisions of the Heads of Agreement and the Shareholders Agreement. The account will serve as the background against which the matters in dispute can be determined.

The Early Arrangements

7. Mrs Al Herz held 99% of the shares in Fix Sense, the remaining 1% being held by her husband, Mr Marwan Lutfi. Mrs Al Herz said that she managed the company and "I do the operation"; Mr Lutfi's executive position was not made clear, but he acted extensively on its behalf including in the negotiations towards the Heads of Agreement and the Shareholders Agreement.

8. According to Mrs Al Herz, and not disputed by Mr Gonzalez, the relationship began in 2013 when Mrs Al Herz instigated discussions with Mr Gonzalez and his then business partner resulting in the setting up of China White at the Grand Hyatt hotel in Dubai. An email from Mr Lutfi dated 31 March 2013 introduced Fix Sense's services. He said that the company worked with several venue providers to find the right location for the right concept, and worked with its clients to help them secure the best space available for their concept. The company required a mandate to present the client and its concepts,and would "introduce the signing partners and proceed with binding contracts and operational discussions". A fixed fee of AED 125,000 would be charged upon signing a leasing/operating agreement with the selected venue, and:

> "We take a 5% sweat equity stake in the final set up with a minimum annual compensation of 300,000 Dhs per year for the duration of the leasing/operating agreement. We lend our company and its services for any areas that require `UAE national' ownership and government handling".

9. In the following years Mrs Al Herz and Mr Gonzalez worked together to set up a number of other ventures in Dubai. Ventures identified by Mrs Al Herz were the nightclubs Provocateur and Chic Club and the restaurant Mazaher, and in her first witness statement dated 20 April 2020 Mrs Al Herz said of these ventures:

> "In these arrangements, Fix Sense provided consultancy services. In my personal capacity, I acted as the 51% local shareholder in the underlying companies in order to satisfy local requirements which require a UAE national to own 51% of the share capital of any locally

incorporated company, with the exception of Mazaher where I was a 5% shareholder as the company was operating from a free zone that allows 100% foreign ownership."

10. There was no detailed evidence of these ventures, or of the financial arrangements made between Mrs Al Herz and Mr Gonzalez, and more information must be gleaned from relatively isolated references. Not all were ventures in which Sunset Group was interested - as later appears, it seems that Provocateur was a venture of Mr Gonzalez through his company identified only as Kalys Hospitality Management (**"Kalys"**) and one or more partners/investors.

11. Mrs Al Herz said in her first witness statement:

"In all the arrangements prior to working on Black Tap and Brick Oven, I was never asked to enter into a nominee agreement handing over the economic and beneficial rights to my shareholding. I always remained the legal and beneficial owner of my shares. I was also recompensed for acting as a shareholder in relation to each venture. We agreed different fees for each venture. For China White I was paid a fixed annual fee. For Provocateur I was paid a fixed annual fee and a quarterly revenue sharing fee . For Chic Club I was paid a fixed monthly fee and a quarterly revenue sharing fee. For Mazaher I was paid a fixed monthly fee."

12. Mr Gonzalez's evidence in his witness statements added to these ventures that in February 2014 he was "presented with different options" for a concept in Dubai, described as The Stage concept, and in June-July 2014 he was "presented with an opportunity .which related to locations at Madinat in Dubai", in each case on payment terms of an up-front fee, an "annual sponsorship fee" and a revenue share. Some emails were exchanged, but it seems that the Madinat locations did not proceed; from other evidence, the Stage concept seems to have been taken up as a Sunset Group venture involving a company Sunset Events Management LLC (**"Sunset Events"**), of which more will be said later in these reasons. The terms in which Mr Lutfi referred in an email dated 7 July 2014 to Fix Sense's remuneration in relation to the Madinat locations, following an initial proposal of "the usual (300 + 2% revenue share)", were:

"After our call and discussion with my partner, we have agreed to the suggested rates of 150k annual sponsorship and 350K upfront (location fees) for F & B outlets that will not probably exceed AED 15 million in annual sales".

13. Mr Lutfi's reference in the email of 31 March 2013 to Fix Sense being lent for any area requiring UAE national ownership suggests that Mrs Al Herz acting as the 51% shareholder was a service offered by Fix Sense, and from her account of her recompense for acting as shareholder the recompense was through Fix Sense's remuneration. In particular, when she says that for Mazaher "I"was paid a fixed monthly fee, since she was not a 51% shareholder in Mazaher, the fee must have been the fee payable to Fix Sense. This, however, was contentious, and I will return to it in more detail when considering the beneficial ownership of the Black Tap and Brick Oven shares.

14. It is convenient at this point to describe further the occasion for Mrs Al Herz to act as 51% shareholder, at these early times and then at the time of the Nominee Agreements, and the change to and ultimate abolition of the requirement.

15. The parties' submissions began with Article 10 of Federal Law No 2 of 2015 On Commercial Companies (**"the CCL"**). The CCL came into force in mid-2015; it appears that prior to that time the equivalent provision was that in Article 22 of Federal Law No 8 of 1984 On Commercial Companies (**"the Old CCL"**), stating (in translation) that "it is a requirement for the establishment of a company to have one or more national partner(s) whose share in the company's capital is not less than 51%".

16. Article 22 in the Old CCL was superseded by Article 10 of the CCL, which repealed the Old CCL and was in force at the time of the Nominee Agreements. Article 10(1) of the CCL provided that, with exceptions not presently relevant, each company incorporated in the UAE "must have one national partner or more of a share not less than 51% of the Company's capital", and by Article 10(3) "[a]ny assignment of shares to any partner resulting in violation of the percentage set out [in Article 10(1)] shall be null and void".

17. By Federal Law by Decree No 26 of 2020, Article 10 of the CCL was "replaced" with effect from 30 March 2021 in relation to companies of a number of kinds (**"the new Article 10"**). The submissions of Mr Patrick Dillon-Malone SC on behalf of the Sunset companies included that the requirement as it applied to Black Tap and Brick Oven was thereby abolished. This was not contested by Mr Mashood Iqbal, appearing on behalf of Fix Sense and Mrs Al Herz, but it was not explained why Black Tap and Brick Oven were companies within the new Article 10.

18. By Federal Law by Decree No 32 of 2021, the CCL was repealed and replaced by the provisions of the Decree as of 2 January 2022 (**"the New CCL"**). Under the New CCL, there is no general requirement for national ownership of a percentage of a company's share capital. Rather, by its Article 10, a committee may determine a particular ratio for the contribution of UAE nationals to the capital of companies whose activities have a strategic impact. It was not suggested that Black Tap and Brick Oven are such companies.

19. By its Article 4, the New CCL does not apply to companies of a number of kinds, substantially the same as the kinds of companies in the new Article 10. One way or the other, therefore, at least from 2 January 2022 the requirement for of 51% national share ownership has not applied to Black Tap and Brick Oven. IIf they are companies within the new Article 10, it has not applied from 30 March 2021; if they are not, it has not applied from 2 January 2022.

A New Arrangement Is Proposed

20. In the latter part of 2014, Fix Sense expressed dissatisfaction with the current relationship. Mr Lutfi's email to Mr Gonzalez dated 14 November 2014 should be set out in full:

"Throughout our relationship with China White and Provocateur, there has been many incidents where Fix Sense help has been requested to sort out operational matters.

We understand that we look at our relationship as a partnership although it only trickles down to a mere sponsorship. I am sure you agree that the scope of work of a business relationship stops at the issuance of the license and some would not even allow it to go beyond providing basic support.

I have noticed, however, that Hana's time is increasingly utilised in matters that are purely operational as a result of poor handling from your related parties, especially with regards to matters related to government permissions and requirements.

I would like to highlight that exhausting our relations and contacts to provide support for operational matters is not part of our agreement. Especially when Hana is repeatedly putting billable hours to serve interests not in favour of Fix Sense. Despite that, we continue to exploit of our relationships in your favour. However, I will have to approve Hana`s whereabouts going forward and start billing for her hours at a pre-defined hourly rate. Hana's time is valuable for our business at Fix Sense and highly needed to conduct work in my behalf given my current hands-off management approach.

I am not going to accept Hana turning down my business requests because she is preoccupied with governmental visits in order to assist in your operations which are matters that should be handled by parties you appoint and pay sums of money to perform.

Therefore, I will put this support on hold until we come to an operational agreement and compensation for the hours consumed to handle such matters."

21. As no doubt was intended, this led to discussions towards a new arrangement and ultimately to the Heads of Agreement and the Shareholders Agreement. In his evidence, Mr Gonzalez referred to the discussions as a way in which the relationship with Fix Sense "could involve more of a partnership approach". It amounted to Fix Sense taking a larger remuneration under an umbrella agreement rather than striking fees for each venture, together with a 2.5% equity share in Sunset RAK and options for a further 2.5%.

22. There was some sketchy evidence of the course of the discussions, at least in their latter stages. The evidence is far from complete, and it seems that the proposals varied over time until being finalised in the Heads of Agreement and the Shareholders Agreement.

23. On 23 November 2015, Mr Lutfi emailed referring to a discussion "on fees and in principle agreement of getting in with you as partners in upcoming projects", and asking that Fix Sense be included in Sunset presentations as a Sunset "ally". Mr Gonzalez's reply included that it would be known "that Hana/Fixsense is the sponsor of Sunset", and "as to being partners in the upcoming projects, we are delighted to do so, let's work out a formula for transferring fees into equity, and the appropriate basis for this".

24. There was a discussion in December 2015, with what an email from Mr Lutfi referred to as "in principle agreement on our fix sense [sic] partnership with Sunset going forward": he asked for "the fee structure outline". On 28 January 2016, Mr Gonzalez sent him a proposed fee structure for new projects. It is unnecessary to refer to the detail; the structure was that in return for Fix Sense's services, which included "Local Sponsorship of the company when required by DED", it would be paid a yearly fee and receive 5% equity in the project.

25. A draft of what became the Heads of Agreement was provided by Mr Gonzalez to Mrs Al Herz and Mr Lutfi on 10 October 2016, and a draft of the Shareholders Agreement towards the end of October 2016. Some emails on figures were exchanged in early 2017, and what were said to be final versions were circulated at the end of March 2017, but with queries which were still being debated in mid-April 2017.

26. The agreements were executed around the end of April 2017. They are dated 1 July 2016, in accordance with the agreement from Mr Lutfi in his email to Mr Gonzalez dated 12 April 2017 that that should be the date "as that is when we switched to the 61K fees in replacement of all other fees and in anticipation of this agreement". The "61K fees" are clearly enough the monthly fees totalling that amount in the Heads of Agreement: the parties intended the agreements to govern their relationship retrospectively, at least in relation to fees payable to Fix Sense, from 1 July 2016.

The Heads of Agreement

27. As earlier noted, the Heads of Agreement (hereafter, **"the HOA"**) is between Fix Sense and Sunset RAK. Although termed Heads of Agreement, it is expressed to be legally binding. In addition to being dated 1 July 2016, it provides that its "effective date" shall be 1 July 2016 and that it "shall remain in force for an unlimited period". It is not in the conventional form of numbered clauses, but in the form of paragraphs (which may be called clauses, for example the cross-default clause) against marginal headings.

28. Against the heading "Background" are statements in the nature of recitals. Sunset RAK is said to own and control a portfolio of restaurants, cafes and bars in the hospitality and entertainment sector, being its business. Fix Sense is said to provide "local sponsor related services including services with respect to the nominee ownership of shares in UAE companies in order to meet the requirements of Federal Law No 2 of 2015 concerning Commercial Companies Law (**"CCL"**), and support services with respect to communication with local authorities". It is said that Sunset RAK intends to appoint Fix Sense for the purposes of those services required for conducting its business, and that "as consideration for Fix Sense providing the Services to Sunset Holdings, Sunset Holdings shall enter into the various transactions set out below in this Agreement".

29. Against the heading "Fix Sense Services" is a lengthy description of the services to be provided by Fix Sense, to Sunset RAK and upon request at and at the discretion of Fix Sense to its subsidiaries and affiliates. The services described are non-exhaustive, and include "[p]erforming any other legal, reasonable and pre-agreed tasks that Sunset Holdings may reasonably request for the benefit of the Sunset Group from time to time". Of present particular relevance, the first service described is:

"a) shall be a shareholder for the registration of fifty one percent (51%) of the shares in Sunset Group companies (in the name of a UAE national or a corporate entity wholly owned by UAE nationals) in order to ensure that the relevant Sunset Group companies comply with the requirements of the UAE CCL".

30. There is then provision for fees payable by Sunset RAK and for the allotment of shares to Fix Sense.

31. The fees are of two kinds: first, a monthly fee of AED 40,000 per month, commencing from 1 July 2016 and "which shall be revised each year and agreed by both Parties"; and secondly, "guaranteed monthly fees in anticipation of profit" being AED 21,000 per month for the financial year following 1 July 2016 and AED 41,000 per month for the two subsequent financial years. (The AED 40,000 plus the AED 21,000 is no doubt the 61K to which Mr Lutfi referred in his email of 12 April 2017.) The monthly fee of AED 40,000 is called "the Fix Sense Fixed Fees". The AED 21,000/41,000 fee is called "the Anticipated Profit Fee", and with reference to the grant of shares next mentioned is effectively a monthly fee

subject to crediting against it any dividends declared. It is expressly stated, "Subject to the mutual agreement by both Parties, Sunset Holdings shall be under no obligation to pay the Anticipated Profit Fee after 2018".

32. The allotment of shares is by way of an immediate allotment of 2.5% of the issued shares in Sunset RAK and options to be allotted a further 2.5%. It is desirable to set out these provisions in full:

> "Following the execution of this Agreement, the Parties undertake to execute a Shareholders Agreement, wherein Fixed Sense shall subscribe for and be issued and allotted new shares in Sunset Holdings. Consequently Fix Sense shall own two point five percent (2.5%) of the total issued shares in Sunset Holdings and shall be paid the variance of the quarterly dividends for the financial years with respect to the shares held by it (**"Fix Sense Dividend"**) over and above the Anticipated Profit Fee collected during the same quarter.
>
> Fix Sense shall have the option (but not the obligation) (**"Option"**) to subscribe for and be issued and allotted new shares in Sunset Holdings (**"Fix Sense Option Shares"**) in an amount equal to two and a half percent (2.5%) of the total issued share capital in Sunset Holdings as at the Effective Date of this Agreement. Fix Sense may exercise the Option during any one of the following option periods (**"Option Period"**):
>
> > Option Period 1: within two (2) months of the completion of the audited accounts for Sunset Holdings for the 2018 financial year; or
> >
> > Option Period 2: within two (2) months of the completion of the audited accounts for Sunset Holdings for the 2019 financial year; or
> >
> > Option Period 3: within two (2) months of the completion of the audited accounts for Sunset Holdings for the 2020 financial year.
>
> The subscription price for the Fix Sense Option Shares shall be calculated based on the applicable audited accounts and based on a valuation of the total issued share capital of Sunset Holdings at three times (x 3) the EBITDA for the financial year preceding the Option Period in which the Option is exercised."

33. Against the heading "Default by Fix Sense" there is provision for the event of breach by Fix Sense of the terms of the HOA or its failure to provide services in accordance with the HOA; breach or failure by Fix Sense itself is not alleged by the Sunset companies, and this need not be set out. As earlier indicated, however, the Sunset companies rely on the cross-default clause, which immediately follows against the heading "Cross Default by Fix Sense". It provides (the grammar and wording is as in the HOA):

> "On breach of any agreement entered into with Sunset Group by Fix Sense or its shareholders in the course of such provision of the Services apply shall constitute a default of Fix Sense of this Agreement and Sunset may (at its sole discretion) pursue the remedies as may be applicable by law."

34. By a governing law and jurisdiction clause, the HOA is governed by "the laws and regulations of the Dubai International Financial Centre" and exclusive jurisdiction is given to the DIFC Courts.

The Shareholders Agreement

35. The undertaking to execute a Shareholders Agreement in the HOA was rather misplaced as an undertaking between Fix Sense and Sunset RAK, since the Shareholders Agreement (hereafter, **"the SHA"**) is between Fix Sense and Sunset BVI. The SHA goes beyond provision for allotment of shares, immediately or pursuant to an option, in accordance with the HOA. It may be noted, however, that it provides in cl 4 that the directors shall all be nominated by Sunset BVI, that in cl 5.1 Fix Sense "covenants with the other Shareholders that it shall have no voting rights and powers of control available to it in relation to its Shareholding in the Company", and that cl 12 significantly restricts Fix Sense's ability to dispose of its shares. Fix Sense is very much a minority shareholder.

36. For present purposes, it is necessary to refer only to the provisions in the SHA relating to fees payable to Fix Sense and the allotment of shares to it.

37. In cl 11.1, Sunset BVI promises to pay monthly fees in anticipation of profits, again called "Anticipated Profit Fee", in the same amounts for the same financial years as in the HOA. It is again expressly stated that subject to a mutual agreement by both parties it shall be under no obligation to pay the Anticipated Profit Fee after 2018. The effect of cl 11.2 is that, if the Anticipated Profit Fee for a financial year is greater than the dividend for the year, Fix Sense waives its entitlement to the dividend and assigns the amount of the dividend to the other shareholders of the company; but if the Anticipated Profit Fee is less than the dividend for the year, the dividend is reduced by the amount of the Anticipated Profit Fee with assignment of the amount of the reduction. In the result, Sunset BVI is liable to pay to Fix Sense the same fees as Sunset RAK, subject to crediting any dividends declared.

38. In similar fashion, cl 6 of the SHA mirrors the provision in the HOA for allotment of shares. Clause 6.1 provides that Fix Sense "shall subscribe for and be issued and allotted two point five percent (2.5%) of the Shares within thirty (30) days upon the execution of this agreement", "the Shares" meaning the issued share capital of Sunset RAK. Clause 6.2 is an option to subscribe for and be allotted a further 2.5% of the Shares, in terms identical to those of the option in the HOA save for one different word of no consequence. Clause 6.3 provides for the calculation of the subscription price in terms slightly different from those of the option in the HOA, but to the same effect. Taking the HOA and the SHA together, they should be understood as imposing an obligation on Sunset RAK to issue the shares upon application, or upon exercise of the option and application, and on Sunset BVI to cause Sunset RAK to do so.

39. The SHA contains a governing law and jurisdiction clause to the same effect as that in the HOA.

The Black Tap Nominee Agreement

40. At some time in the first half of 2016, the Sunset Group obtained franchise rights in the Middle East for a burger brand, Black Tap. Mr Gonzalez approached Mrs Al Herz with regard to a location for a launch in Dubai: in an email to her dated 10 February 2016, he said that the franchise contract was being finalised and Sunset "will work on a relevant fee schedule and will share.".

41. There was the customary absence of detailed evidence, but Black Tap was incorporated in Dubai on 26 June 2016 with a share capital of AED 200,000 divided into 200 shares. Mrs Al Herz held 102 (being 51%) and Sunset RAK held 98 (being 49%), and it clearly enough was the vehicle for the venture. By provisions in the Memorandum of Association, profits were to be 20% to the 51% shareholder and 80% to the 49% shareholder, but Mrs Al Herz was not to be liable for any loans or facilities provided to the company by a bank.

42. The Black Tap Nominee Agreement is dated 18 December 2016 but had been under discussion even before the incorporation of Black Tap. I leave those discussions to the consideration of beneficial ownership, and here only set out or summarise its provisions.

43. The Black Tap Nominee Agreement is made between Black Tap, Mrs Al Herz, and Sunset RAK. Recital (A) is that Mrs Al Herz, called "the Nominee", is the registered owner of the "Nominee Shares", being her 51% shareholding, and the following recitals are:

> "(B) Notwithstanding that the Nominee is registered as the owner of the Nominee Shares, the Nominee assigns all the economic and beneficial interest with respect to the Nominee Shares to Sunset on the terms set out in this Agreement. Notwithstanding the assignment of such beneficial and economic interest and rights in the Nominee Shares the Nominee will remain the register legal owner of the Nominee Shares for the purposes of compliance with the UAE laws on the foreign ownership of UAE companies pursuant to Federal Law No 2 of 2015 concerning Commercial Companies (the `UAE Companies Law').
>
> (C) The Parties set out the terms and conditions on which the Nominee assigns its [sic] beneficial and economic interest in the Nominee Shares to Sunset and the terms on which he [sic] will remain as the registered owner of the Nominee Shares".

44. By cl 2, the Nominee assigns all economic and beneficial rights and interest with respect to the Nominee Shares to Sunset RAK, but it is stated that notwithstanding the assignment and transfer of the economic and beneficial rights and interests, the Nominee Shares continue to be registered in the name of the Nominee for the purposes of compliance with the UAE Companies Law, and that the Nominee is given an indemnity as provided in cl 4. Clause 4 provides for an extensive indemnity.

45. Clause 3 provides:

> "As consideration for the assignment of the economic and beneficial rights and interest in the Nominee Shares and for the services of remaining the registered owner of the Nominee Shares as agent for Sunset the Nominee shall be paid an annual fee of AED 10000 (Ten Thousand), payable on the date of signing this Agreement and on the anniversary of this Agreement each year that the Nominee remains the registered owner of the Nominee Shares."

46. Clause 5 records a number of acknowledgments and undertakings by the Nominee. They include that the Nominee "is the custodian, fiduciary agent and trustee of Sunset with regard to the Nominee Shares registered in the Nominee's name"; that the Nominee acknowledges that Sunset RAK "owns all the beneficial and economic interest in the Nominee Shares and that the Nominee has not paid any amount towards the purchase of the Nominee shares"; that Sunset RAK "is the sole and rightful owners of the Nominee Shares"; and that the Nominee "undertakes to transfer, sell and mortgage the Nominee Shares at any time to any person specified by Sunset and in accordance with any conditions set forth by Sunset in writing".

47. Further to this last undertaking, in cl 6.2 it is provided that in the event that there should be a change of law in the UAE then the Nominee "shall transfer the registration of the Nominee Shares or such part of the Nominee Shares as is permitted by law into the name of Sunset or such person nominated by it for this purpose"

48. Clause 9 is a governing law and jurisdiction clause, as with the HOA and SHA providing for the laws of the DIFC and the exclusive jurisdiction of the courts of the DIFC.

The Brick Oven Nominee Agreement

49. The evidence tells even less about this venture. It seems that it concerns a restaurant called Luigia, Peatura being a joint enterprise between Sunset RAK and a Mr Alex Sabbag in relation to the restaurant for which Brick Oven was the vehicle.

50. At some point Mr Gonzalez approached Mrs Al Herz for Fix Sense's involvement - Mrs Al Herz refers to taking him and Mr Sabbag around Dubai in her car. Brick Oven was incorporated in Dubai on 3 July 2017, as with Black Tap with a share capital of AED 200,000 divided into 200 shares of which Mrs Al Herz held 102 and Peatura held 98. Also as with Black Tap, under the Memorandum of Association profits were to be distributed 20:80.

51. The Brick Oven Nominee Agreement was executed on 27 May 2017, before Brick Oven was incorporated. Again, I leave such evidence as there is of the discussions in relation to it for the consideration of beneficial ownership. It is made between Brick Oven, Mrs Al Herz, and Peatura. It is in identical terms to the Black Tap Nominee Agreement, with Peatura in place of Sunset RAK, save that the consideration for the assignment and services in its cl 3 is an annual fee of AED 72,000 instead of AED 10,000.

The Relationship Sours

52. From emails exchanged in mid-2019, there was disagreement between Mrs Al Herz and Mr Gonzalez over Sunset RAK's dividend policy; Mrs Al Herz complained of unfair treatment, and the exchange was distinctly unfriendly on her side. Mr Gonzales proposed some "options" for their future relationship, which were not acceptable to Mrs Al Herz. In the latter part of that year there was contention over the provision of Sunset RAK's audited accounts in connection with the exercise of the share options in the HOA and SHA, which I will come to when considering the dispute in that respect. There may have been other reasons, but for whatever reason or reasons it is evident that the relationship between the Sunset Group and Mr Gonzalez of the one part and Fix Sense and Mrs Al Herz of the other part was no longer cordial. In an email to Mr Gonzalez on 1 August 2019 Mrs Al Herz wrote, "Please note that I will handover [sic] this case to my lawyer Abdul Hakim Bin Herz and he will take whatever deem [sic] appropriate to protect my interest. Therefore, from this moment please deal with my lawyer".

53. On 24 November 2019, Mr Gonzalez, writing for Sunset RAK, required that Mrs Al Herz transfer her 102 shares in Black Tap to one Mr Khaled Sandal; although I think without evidence, it was accepted in the proceedings that Mr Sandal was a UAE national. On 10 December 2019, writing for Peatura, Mr Gonzalez required that Mrs Al Herz to transfer her 102 shares in Brick Oven to Mr Sandal. On 22 December 2019 he provided Mrs Al Herz with forms of share transfer and requested that she meet at a Notary's office at a stated time or propose an alternative time. There was no response, or to a lawyers' letter dated 12 February 2020 advising that proceedings would be commenced if there was not compliance with the undertakings in the Nominee Agreements by transfer of the shares to Mr Sandal.

54. On 11 February 2020, Mr Gonzalez, writing for Sunset RAK, gave notice of termination of the HOA pursuant to the cross-default clause, on the ground that Mrs Al Herz had intentionally failed to comply with her undertakings to transfer the shares and there had been breach of an agreement entered into with Sunset Group by a Fix Sense shareholder which by the cross-default clause was a default by Fix Sense.

Beneficial Ownership of the Shares

55. The Nominee Agreements are clear. Mrs Al Herz paid nothing for the shares. She is the registered legal owner in order to comply with the requirement of 51% national ownership, but they are beneficially owned by Sunset RAK or Peatura, and Mrs Al Herz will transfer them at the request of the Sunset company. Unless the Nominee Agreements are for some reason ineffective, they establish the position as between Mrs Al Herz and the Sunset companies, whatever it might have been in their absence.

56. In the Defence in CFI-024-2020, Mrs Al Herz alleged that the Nominee Agreements were ineffective on a number of grounds: that they were void for want of consideration; that they had been procured by misrepresentation and had been rescinded; that they had been repudiated and the repudiations had been accepted; that they were unenforceable as contrary to public policy; and that the Sunset companies were estopped from enforcing them. I confine these reasons to the rather more limited grounds on which Mr Iqbal relied in his submissions.

Misrepresentation

57. The first ground was put in the terms that Mrs Al Herz would not have signed the two Nominee Agreements save for misrepresentations made by Mr Gonzalez, to which was added reference to her evidence that she had paid for her 51% shareholdings. Notwithstanding that most of the evidence in the proceedings was directed to this ground, the submission was scarcely developed, only by submitting at some length that the evidence of Mrs Al Herz should be preferred to the evidence of Mr Gonzalez. It requires that Mrs Al Herz was induced to execute the Nominee Agreements by false representations of fact made by Mr Gonzalez.

58. As I have said, most of the evidence in the proceedings was directed to this ground. Mrs Al Herz made six witness statements, with considerable overlap and repetition and variations in expression of the same matter. Mr Gonzalez made five witness statements, also with overlap and repetition. Documentary material was hit and miss. There were gaps and unexplained matters, and a notable absence of proper evidence of conversations; rather, a deal of assertion and argumentative material.

59. I go first to the Black Tap Nominee Agreement. A draft of the Black Tap Nominee Agreement had been provided to Mrs Al Herz at some time prior to 23 May 2016 (before the incorporation of Black Tap, but plainly in anticipation of its incorporation). She had made comments on the draft, and on 23 May 2016 Sunset's lawyers sent to Mr Gonzalez an amended draft.

60. Mr Gonzalez sent the amended draft on to Mrs Al Herz together with the lawyers' letter. The lawyers' letter included:

> "We are aware that the agreement may not be enforceable for public policy reasons but under DIFC Law there is less chance of such a public policy argument being permitted because DIFC Courts will likely simply look to the fact that there has been a breach of a promise to do something and loss to the party to the agreement as a result.
>
> The amount of the fee we have made a nominal consideration amount of AED 100 on the basis that the sponsor will not charge fees because they are getting shares in company [sic] pursuant to the LOI (which will be ready next week)."

61. The "LOI" was what became the HOA; the lawyers were meant to be drafting the documents for the new arrangement between the Sunset companies and Fix Sense - what Mr Lutfi referred to in an email to Mr Gonzalez on 10 July 2016 as "our new billing and shareholder arrangement".

62. Mr Lutfi's email followed an email dated 30 June 2016 from Mr Chris Spiliopoulos of the Sunset Group, saying that "our agreement for Sunset Group and Sunset Management" had been drafted by the lawyers". In it, Mr Lutfi noted that it had been agreed that the new arrangement would start from July 2016 and observed that "it has been three months and we are yet to view the first version". He continued:

> "We understand that Sunset is setting up new businesses and requires some sponsorship representation from us. However, our legal position and shareholding is not yet confirmed and that puts us in an unclear position. Hence, the recent return of the Blacktap agreement that required us to waive our rights and legal protection whilst we are yet to formalize our legal relationship.
>
> If you are in a hurry to sign, we would like to maintain our 150 k/year (12.5 K/month) we had initially agreed for Mazaher and Black Tap Jumeira. After the partnership is inked, the annual sponsorship for any venue under Sunset will be equal to the lowest sponsorship fee attainable in the market. It is degrading to our stature in society to put our names to a contract against 100 Dhs.
>
> Therefore, please advise if you would like us to start billing the monthly 40+21 from July 2016 till end of the year and 40+31 [sic] from January 2017 onwards, and how you will report the equity share distribution over an[d] above the monthly minimum variable component."

63. Later on the same day (it is not clear what sparked it, but perhaps Mrs Al Herz and Mr Lutfi had talked of the degrading AED 100) Mrs Al Herz emailed to Mr Gonzalez, "The issue is, if you read below your last point of clarification about the 100 dhs in which we still yet [sic] to receive the contract which you confirmed below a week before your below email. The nominee agreement will not be signed until we receive our contract". The "below" and the "last point of clarification" were a reference to the lawyers' email of 23 May 2016 and its reference to the nominal

consideration of AED 100 and the LOI, part of the same email chain.

64. Mr Gonzalez replied on the same day, agreeing that the process with the lawyers had taken too long but positive that "we can finalize everything shortly", and:

> "I suggest to start the billing process as of July 1st as planned, the core of the agreement is already done between us by email. We can work out the legal details for sure in parallel.
>
> Blacktap is part of the new agreement therefore there should be no further fees aside the 350k we already paid related to that project.
>
> As for the nominee agreement it was sent a while back to Hana and cleared by your lawyers. I will forward email with such approval from your side; I am not sure why now is [sic] being challenged in any way. We need that agreement for our other shareholders in the venues, both in Blacktap and in Chic. And we need that asap. Btw, the 100 Dhs is just a symbolic amount since you are partners in Sunset, not sure why this is an issue."

65. It is evident that by July 2016 the individual fee schedule for the Black Tap venture envisaged in Mr Gonzalez's email of 10 February 2016 was not to occur; the venture was to come under the umbrella agreement then being prepared, to commence from 1 July 2016. The billing process was in fact started as of July 2016: there were invoices in evidence from Fix Sense to Sunset Group for "Fixed Monthly Fees - Sunset/Fixsense partnership" of AED 40,000 and "Guaranteed Anticipated Profit Fee - Sunset/Fixsense partnership" of AED 21,000, starting from 30 July 2016.

66. A draft of the LOI was circulated in October 2016, with the SHA promised shortly. There was then a discussion on 17 December 2016 between Mr Gonzalez and his business partner and Mr Lutfi and Mrs Al Herz, according to Mrs Al Herz "mostly about the Fix Sense and Sunset partnership" but briefly about the Nominee Agreement. It is not clear what attention, if any, was given to the Nominee Agreement in the period from May-June 2016. The discussion on 17 December 2016 is at the core of the misrepresentation ground.

67. According to Mrs Al Herz in her first witness statement, Mr Gonzalez said that the Nominee Agreement was required to give flexibility so as to attract foreign investors, given that there were plans to expand into other countries, and "that the agreement was symbolic in nature". She said that she highlighted that "although I understood that the fee of AED 100 was only symbolic, presentationally it was degrading for a local partner to be contracting for such sums", and that she needed to be properly compensated. Mr Gonzalez "agreed to increase the amount, continuing to say that it was symbolic", and "spoke about figuring out an arrangement, as we had been used to and agreed in relation to our previous ventures".

68. On the next day, 18 December 2016, Mr Gonzalez sent the Nominee Agreement to Mrs Al Herz for signature, his covering email including:

> "As agreed yesterday we have changed the sponsorship amount to 10,000 Dhs, however also as agreed we acknowledge that this is symbolic and we still need to find a final agreement over this whether in the form of shareholder in Sunset group or an agreement for this outlet".

69. In her first witness statement, Mrs Al Herz said that "given that Antonio was pressing me to enter into a nominee agreement that only provided for a symbolic fee", she "understood that Sunset would not seek to claim the rights to my shares, including by asking me to sign over my shareholding to any third party, without properly compensating me". She said that she would not have signed the Black Tap Nominee Agreement if she had known that Mr Gonzalez would not put in place arrangements and would try to enforce the agreement and take away the rights in relation to her shareholding without compensation.

70. There was some evolution of this evidence. In the first witness statement, Mrs Al Herz's evidence varied between Mr Gonzales saying that the agreement was symbolic, and Mr Gonzales saying that the fee was symbolic. In subsequent witness statements, when she gave much the same evidence but with some variations in wording, and in her oral evidence when cross-examined, the former was predominant, and it was added that Mr Gonzales had assured her that the execution of the Black Tap Nominee Agreement "was only for the purposes of attracting foreign investors and the same was merely symbolic in nature", that he "had promised not to use it whatever, it is just symbolic", and that the true purpose was to take away her rights without compensating her. There was also added to her evidence that it had been represented in the lawyers' email of 23 May 2016 that the agreement was unenforceable, and therefore would not be enforced, and it was said that he "assured me verbally and in writing that it will not be enforceable and he told me it is symbolic".

71. As to the Brick Oven Nominee Agreement, Mrs Al Herz said only that Mr Gonzalez explained that it was "another symbolic agreement", and presented it to her as necessary for the same reasons as the Black Tap Nominee Agreement and with an assurance that she would be compensated for her rights in relation to her shareholding by alternative arrangements "and that the fee provided for in the nominee agreement would be symbolic".

72. Mr Gonzalez's evidence did not respond in any detail to Mrs Al Herz's evidence of the 17 December 2016 meeting, or of the explanation of the Brick Oven Nominee Agreement, but he made his position clear. He did not misrepresent anything and did not say (as was put to him in cross-examination) that he would "never use this nominee agreement against her in any event". Prior to this time, he had had control over Mrs Al Herz's nominee shareholdings through a power of attorney, a method adopted by his previous lawyers (it is clear enough from the evidence that there had been a power of attorney in favour of Sunset Events, and that after the relationship soured it was used to transfer Mrs Al Herz's 51% shareholding in the Provocateur venture company). He had asked for a nominee agreement because his international partners wanted the reassurance of the local 51% nominee shareholder being under a nominee agreement, that being the course adopted by his new lawyers. The lawyers said that there had to be an amount in the agreement, hence the symbolic amount. The fee of AED 10,000 was symbolic, in that it was a nominal amount in place of the nominal amount of AED 100 in the draft agreement; it was symbolic of the fees paid to Fix Sense under the new arrangement when the terms of that arrangement were finalised in the H0A and SHA.

73. Mr Gonzalez said that Fix Sense always received a fee for Mrs Al Herz being a nominee shareholder, and that Mrs Al Herz "knows full well that the compensation for the sponsorship Services was to be paid pursuant to the Heads of Agreement and by way of Fix Sense's 2.5% share in Sunset". That was all he had said to Mrs Al Herz, as his email of 18 December 2016 showed, and he had not represented that the Nominee

Agreement would not be enforced or was of no effect.

74. At the heart of this ground is whether Mrs Al Herz was falsely led to believe that the Nominee Agreements would not be enforced, or at least would not be enforced in the absence of agreement upon compensation in place of the stated AED 10,000 or AED 17,000 - and on her position there was not agreement, because the fees paid to Fix Sense were not such compensation. For rescission for misrepresentation, there must be a misrepresentation of fact, and it is questionable whether (if Mrs Al Herz's evidence be accepted) any representation was one of fact: although this was flagged by Mr Dillon-Malone, the submissions on behalf of Mrs Al Herz did not address it. It does not matter, since as now explained I do not accept that Mrs Al Herz was led to believe that the Nominee Agreements would not be enforced, whether absolutely or in the absence of agreement upon substituted compensation.

75. Important in her evidence were two matters: first, that her holding the 51% shareholdings and the compensation for her holding them were separate from Fix Sense; and secondly, that when asked to execute the Nominee Agreements, she was the beneficial owner of the shares. Both those matters should be considered in coming to a conclusion upon misrepresentation.

76. Mrs Al Herz was at pains in her evidence to say that she acted as shareholder in her personal capacity, distinct from Fix Sense; she said she emphasised that to Mr Gonzalez in the meeting on 17 December 2016. Her position was that the compensation for her acting as shareholder was not to be paid, as Mr Gonzalez said it was, by the fees paid to Fix Sense.

77. In my view, that is not correct, and of more significance I am satisfied that Mrs Al Herz could not have believed that it was correct. I have touched on it in paragraph [13] above. Mrs Al Herz acting as 51% shareholder was part of the service offered by Fix Sense, for which payment was made through the fees or other reward paid to Fix Sense.

78. That was expressly so in the HOA, under whichthe "Fix Sense Services" included that it shall be a 51% shareholder through a UAE national, Mrs Al Herz plainly being the UAE national. When this was put to Mrs Al Herz in cross-examination, it brought the rather extraordinary evidence:

> "MR DILLON-MALONE: So the Fix Sense services under the heads of agreement include nominee services, is that not right?
>
> MRS AL HERZ: No.
>
> MR DILLON -MALONE: I see, now, if I could ask you please to I am sorry, do you want to explain why?
>
> MRS AL HERZ: No."

79. It was also so for the individual ventures prior to the HOA and SHA; see for example the email of 31 March 2013 introducing Fix Sense's services saying that Fix Sense and it services are lent "for any areas that require `UAE national' ownership", and Mrs Al Herz's adoption of the fixed annual fees and quarterly revenue sharing fees payable to Fix Sense as her recompense for acting as shareholder as noted in paragraph [13]. On Mr Gonzalez's side, it is also stated in his email of 28 January 2016. More generally, "sponsorship" by Mrs Al Herz was how the parties often referred to the provision of Fix Sense's services, and that was how the symbolic amounts were referred to. Examples of reference to the provision of Fix Sense's services as sponsorship are Mr Lutfi's emails of 7 July 2014 and 4 November 2014 earlier mentioned, and emails sent by him in March 2019 referring to "Hana's sponsorship portfolio" being Black Tap, Sunset Events and Brick Oven and "Hana's sponsorship fees" being the Fix Sense Fixed Fees of AED 40,000 per month. The AED 100 in the draft Black Tap Nominee Agreement was regarded as a sponsorship amount in Mr Lutfi's email of 10 July 2016, and the increased amount of AED 10,000 was specifically referred to as "the sponsorship amount" in Mr Gonzalez's email of 18 December 2017. Mrs Al Herz's email of 10 July 2016 was also written as if the AED 100 represented the fees to be paid by Fix Sense under the new arrangement when finalised.

80. If it had been otherwise, with Mrs Al Herz being separately paid for being the 51% shareholder, one would expect some record of the agreements upon payment: if not formal agreements, then in emails. While there was limited evidence, it is clear enough that this was done for Fix Sense, but Mrs Al Herz did not produce any record of an agreement to support that she was paid compensation for acting as shareholder otherwise than through the fees paid to Fix Sense. In my view, she was not.

81. Mrs Al Herz was insistent in her evidence that she was the legal and beneficial owner of her 51% shareholdings in all ventures prior to the Black Tap and Brick Oven ventures, as well as in relation to those ventures. I am satisfied that she was not, and again of more significance that she could not have believed that she was.

82. Mrs Al Herz became the holder of the 51% shareholdings in order to meet the requirement of a national shareholder, as one of the services provided by Fix Sense. Subject to her evidence that she paid for her shareholdings, which as discussed below I do not accept, she did not pay for the shares - as was acknowledged in relation to the Black Tap and Brick Oven shares in cl 5 of the Nominee Agreements. It would be extraordinary if in taking advantage of the service of being a 51% shareholder, the Sunset companies gave a controlling interest in the relevant venture company to Mrs Al Herz, and an entitlement to profits through dividends.

83. Nor did Mrs Al Herz act as if they had done so. No dividends were paid to her in respect of her 51% shareholdings, nor at least until Fix Sense gained its 2.5 % shareholding did she ask for payment. She did not purport to exercise any control; on the contrary, Mr Lutfi's email of 14 November 2014 was a complaint that her time was being wrongly spent on operational matters, and he described the relationship as "looked at as a partnership but mere sponsorship". The new arrangements come to in the HOA and the SHA were not consistent with her holding the 51% shareholdings beneficially. The point of the new arrangement was to give Fix Sense an equity interest, the 2.5% shareholding and options for a further 2.5% shareholding in Sunset RAK as the holding company of the then and future venture companies. That was how the mere sponsorship became more of a partnership; it was not already a partnership through Mrs Al Herz beneficially owning the 51% shareholdings in the venture companies.

84. Mrs Al Herz's evidence included, however, that she had paid for her shareholdings. There was no such evidence in her first witness statement dated 20 April 2020, and it came in a further witness statement dated 22 July 2020. That she claimed to have paid for her shareholdings reflects that simply acting as the required 51% shareholder did not, and certainly did not in her mind, mean that she was the beneficial owner of the shares.

85. Mrs Al Herz said that she paid AED 450,000 "towards my share capital" by a cheque dated 8 June 2014 in favour of Mr Gonzalez's wife, Ms Lys Riachi, and that the payment was for her 51% shareholdings in Sunset Events and future businesses or companies to be established in the relationship with the Sunset Group. In her witness statements it was as if the payment was at the time Sunset Events was formed; it was incorporated in March 2014, and when taken to this discrepancy in cross-examination Mrs Al Herz said that Mr Gonzalez told her that her contribution had to be paid, and she said, "part of it should go to Sunset Events and part of it for other ventures, as he said". She did not otherwise back up by reference to conversations or document her assertion that the payment was for her shareholdings in Sunset venture companies.

86. In two witness statements, Mrs Al Herz said that it was unclear to her why the payment was to Ms Riachi; in a later witness statement she said that she was told it was "because she [Ms Riarchi] is going to be party to the future business". In that later witness statement she said that Mr Gonzalez came to her office a day or two before the cheque was written and said "write it in this name"; that she asked who this was; and that he said it was his wife.

87. Mr Gonzalez denied that the payment was for her shareholdings at all. Sunset Events when incorporated had a number of shareholders, being Mrs Al Herz, Kalys and a number of others. But the cheque had nothing to do with Sunset Events. He said that the money represented a finder's fee charged by himself and a business partner, Mr Manuel Ayas, to the Provocateur nightclub project for Mr Ayas introducing an investor, Purzai General Trading LLC (**"Purzai"**) to the project. Mr Ayas did not want the fee to be charged to the project as and known to Purzai as a finder's fee, so it was arranged with Fix Sense, then acting as consultant to the project, that it would invoice for AED 500,000, keep AED 50,000, and pay 450,000 to Ms Riarchi; half was then paid to Mr Ayas. The consultancy agreement with Fix Sense was amended to add the AED 500,000 to its fees as a success fee. He described Fix Sense as the custodian of the money.

88. This was denied by Mrs Al Herz. She agreed that the consultancy agreement was amended, but said that owing to "the extensive scope of work and the complexities of the setup and the necessary approvals" there was a verbal agreement between her and Mr Gonzalez that Fix Sense would be charging an additional amount of AED 500,000 as its consultancy fee "upon closing the assignment".

89. Documents in evidence show that:

(a) Kalys and Fix Sense entered into a **"Consulting Agreement"** dated 3 December 2013, under which Fix Sense was to assist Kalys in establishing the Provocateur nightclub (the assistance included setting up the operating company: this appears to be prior to any Sunset venture company).

(b) There are two copies of the Consulting Agreement in evidence. Under one, dated but not signed, the agreed remuneration is AED 300,000 per year for a described period. Under the other, dated and signed, the agreed remuneration is AED 500,000 "payable as success fees" and AED 300,000 per year for the described period.

(c) On 28 May 2014, Fix Sense invoiced Mr Gonzales/Purzai care of Kalys for a "Consulting success fee" of AED 500,000 and a "First year annual consultancy fee" of AED 300,000.

(d) The AED 800,000 was paid to Fix Sense pursuant to a Funds Transfer Request by Purzai to its bank dated 31 May 2014.

(e) On 1 June 2014, Mrs Al Herz texted Mr Gonzalez, "Just wanted to let u know payment received".

(f) On 5 June 2014, Mrs Al Herz texted Mr Gonzalez, "Send full name for ur payment. Anyway it is safe till you decide".

(g) On the same day Mr Gonzalez responded with the name of his wife.

(h) On 8 June 2014, Mrs Al Herz texted Mr Gonzalez, "Chq is ready".

(i) The cheque was dated 8 June 2014, and was a Fix Sense cheque signed by Mrs Al Herz.

90. Even by the sometimes relaxed standards of dealings between Mrs Al Herz, Mr Lutfi and Mr Gonzalez, it would be quite remarkable if a significant sum of money was paid as a floating payment for shares in possible future companies, and there is no evident reason why payment for the shares in Sunset Events should be made to Ms Riarchi: Mr Gonzalez said that she "had absolutely no connection with the business [of Sunset Group], whether as an employee or shareholder". There should have been records of the investment in Sunset Events, but none were produced, and Mrs Al Herz did not go on to relate any amount over the amount for the Sunset Events shares (whatever it was) to any future Sunset venture company in which she was 51% shareholder- for example, even if her evidence be taken at face value, there is no way of knowing whether the AED 450,000 went towards payment for the Black Tap or the Brick Oven shares, and no attempt was made to show that it did.

91. The shift in Mrs Al Herz's evidence from being unclear why the payment was to Ms Riachi to payment because she was going to be a party to further businesses is significant, and the text messaging is not consistent with Mr Gonzalez telling her in her office how to write the cheque. In particular, the "Anyway it is safe till you decide", is consistent with the AED 450,00 passing through Fix Sense in the manner of Mr Gonzalez's description of a custodian. The messaging is not consistent with Mrs Al Herz making an investment in Sunset Events, or any company - why would she need to assure Mr Gonzalez that her money was safe? And if she had indeed paid for her 51% shareholdings in Black Tap and Brick Oven, one would expect that when asked to sign the Nominee Agreements she would have made some reference to that fact, particularly when they included her acknowledging that she had not paid for them.

92. Notwithstanding that Mr Gonzalez's evidence smacks of sharp practice, in taking a course to hide the charging and payment of the success fee from Purzai, I consider that his evidence of the payment of the AED 450,000 should be preferred to that of Mrs Al Herz. I recognise that sharp practice as one of the reasons put by Mr Iqbal for why the evidence of Mrs Al Herz should be preferred to that of Mr Gonzalez, but I do not think there is anything in his other reasons, for example that by backdating the HOA Mr Gonzalez did something which "did not reflect reality", which Mr Iqbal then elevated to a sham. I considered Mr Gonzalez to be measured in his evidence, careful in his answers and prepared to concede when appropriate. I did not think the same of Mrs Al Herz's evidence. She appeared to me to be maintaining positions taken because it was in her interests to do so, including elaboration by the evolution to which I have referred, by assertion and with unwillingness to face up to their difficulties

(a small matter, but illustrative of her disregard, is her saying that the HOA was signed on 1 July 2016, in the face of the clear evidence that it was signed later). Regrettably, I am unable to see Mrs Al Herz's evidence in relation to the payment of the AED 450,000 as other than a concoction, in a misguided attempt to bolster her position that she was the legal and beneficial owner of her 51% shareholdings in Black Tap and Brick Oven. That then reflects back on whether she believed that she was the beneficial owner of the shareholdings; it indicates that she did not, because she felt the need to bolster her position.

93. Coming to a conclusion upon misrepresentation, I do not accept that it was represented to Mrs Al Herz, or that she understood, that the Nominee Agreements would not be enforced, or would not be enforced in the absence of agreement upon compensation in place of the stated amounts.

94. Her evidence was not consistent, varying between Mr Gonzalez saying that the *agreement* was symbolic and the fee was symbolic. The agreement was not symbolic. It is clear from Mr Gonzalez's email of 8 December 2016 that what he referred to as symbolic was the fee, as he had referred to the AED 100 as a symbolic amount in his email of 10 July 2016 and the lawyers had earlier referred to it as a nominal amount.

95. One cannot stop with the use of that word. What was conveyed to Mrs Al Herz? For the reasons I have given, I do not accept that the description of the fee as symbolic was heard by her in the belief that compensation for her acting as shareholder was a separate matter from the fees paid to Fix Sense, or the belief that she was the beneficial owner of the shares and would be signing away rights as the beneficial owner of shares she had paid for. The Nominee Agreements reflected the true position: she had paid nothing, and she held the shares as nominee for the purpose of compliance with the UAE laws. I accept Mr Gonzalez's explanation of how he came to use a nominee agreement and why he referred to the fee as symbolic. In my view, the AED 10,000 and the AED 17,000 were, and would have been understood by Mrs Al Herz as, symbolic of the remuneration payable to Fix Sense under the HOA and SHA and to be satisfied by payment of that remuneration to Fix Sense. Mr Gonzalez's email of 18 December 2016, in the circumstances of the discussion on 17 December 2016 "about the Fix Sense and Sunset partnership", said as much. It was a nominal figure, as described in the lawyers' email, but increased from AED 100 to AED 10,000 for the Black Tap Nominee Agreement at Mrs Al Herz's request for appearances and duplicated with a higher amount for the Brick Oven Nominee Agreement. The enforceability of the agreements was not in doubt; they were enforceable with the nominal figure, and I do not accept that Mrs Al Herz thought otherwise.

Uncertainty

96. The second ground in Mr Iqbal's submissions was that the Nominee Agreements were void for uncertainty. Here, the submission seized upon Mr Gonzalez's email of 18 December 2016 and its acknowledgement that the AED 10,000 was symbolic "and we still need to find agreement over this.". It was submitted that, in the absence of agreement on the vital matter of the fee for remaining as legal registered owner of the shares, the Nominee Agreements were incomplete, and Mrs Al Herz was not bound by them.

97. The ground can be dealt with briefly. The short answer is that there was no uncertainty as to the fee. It was AED 10,000 and AED 17,000. Even though the stated fee was symbolic, in the sense of nominal, a nominal consideration is good consideration. That it would be satisfied by payment of Fix Sense's fees, in the case of the Black Tap Nominee Agreement when finally agreed, does not mean that there was uncertainty in the agreement to pay the fee; how payment was to be made is a different matter.

Repudiation

98. Rather in passing in the submissions on the uncertainty ground, it was said that the fees of AED 10,000 and AED 72,000 were not paid to Mrs Al Herz, that this was a repudiatory breach, and that the repudiatory breach was accepted. I address this as a separate ground.

99. The ground was not developed in submissions. The Nominee Agreements were not simply contractual; by assignment and declaration, they constituted declarations of trust. It was not explained how repudiation and its acceptance would negate their proprietary effect.

100. Separate amounts of AED 10,000 and AED 72,000 were not paid. Mrs Al Herz's evidence included that "in the first year following the [Black Tap] agreement" she mentioned to Mr Gonzalez that she had not been paid, and that he laughed and said that the agreement (sic) was symbolic and he did not intend to make any payments.

101. There is no substance in the ground. Failure to pay money ordinarily does not make out repudiation of a contract, and if the AED 10,000 and the AED 72,000 were looked at alone, failure in payment would not be a repudiation of the Nominee Agreements viewed as contracts. It would be a breach, but not such as to show that Sunset RAK no longer considered itself bound by the contracts. But the amounts cannot be looked at alone; for reasons earlier described, they were to be satisfied by payment to Fix Sense of its remuneration. Fix Sense was paid; there was no breach.

The final ground

102. The final ground in Mr Iqbal's submissions was contained in five paragraphs of his skeleton argument. In closing submissions, he referred to the paragraphs and said that he could not develop it any further. I informed him that I did not understand the ground as put in the skeleton argument (which I did not) and invited explanation. Mr Iqbal was unable to explain it; he said he was instructed to put the ground before the court. He requested and was given a short adjournment. Upon resumption, he was still not in a position to explain the ground. I declined to allow a subsequent written submission, where upon Mr Iqbal said that he was not relying on the ground.

103. Counsel is not a mere mouthpiece, but must exercise independent judgment in the conduct of proceedings. The ground should not have been in the skeleton argument unless Mr Iqbal was able to support it at trial, and trial was the time to support it: it was not a new matter arising, warranting an opportunity to provide a subsequent written submission. When Mr Iqbal was unable to explain the ground, it was proper for him to abandon it.

Conclusion

104. The Nominee Agreements stand. Sunset RAK and Peatura are the beneficial owners of the respective shareholdings, and Mrs Al Herz is obliged to transfer the shareholdings to them.

The Result in CFI-024-2020

105. On 22 February 2020 Mr Gonzalez, writing on behalf of Sunset RAK and Peatura, required that Mrs Al Herz transfer the shares in Black Tap and Brick Oven to Sunset RAK and Peatura respectively in lieu of the previously requested transfers to Mr Sandal. The law had changed so that it was no longer necessary that the shares be held by a UAE national. There is no reason to decline to give effect to the beneficial ownerships of the Sunset companies. Sunset RAK and Peatura are entitled to orders that Mrs Al Herz transfer the Black Tap and the Brick Oven shares to them.

106. Mrs Al Herz's counterclaims for rescission of the Nominee Agreements and for damages for misrepresentation must be dismissed.

107. Mrs Al Herz's counterclaim for damages for breach of the Nominee Agreements, in the event that they were upheld, was not mentioned in Mr Iqbal's skeleton argument or oral submissions beyond the request that her counterclaim (in general) be granted. It is not easy to distill the claim to damages for breach of the Nominee Agreements, as distinct from for misrepresentation inducing them, from the pleading, but I think it came down to (a) breach in that she had not been paid the fees of AED 10,000 and AED 72,000 on signing the agreements and on their anniversaries in 2017, 2018 and 2019; and (b) breach in that the Sunset companies had not agreed upon additional compensation in place of the symbolic amounts.

108. As to (a), the fees were satisfied by payment to Fixed Sense of its remuneration. The claim for damages in that respect must be dismissed.

109. As to (b), in the counterclaim it was alleged that the agreements between the parties contained the additional terms that Sunset RAK or Peatura would provide further consideration to Mrs Al Herz, "whether by transferring to [Mrs Al Herz] shares in [the company] or by alternate arrangements, the details of such further consideration to be agreed between [the company] and [Mrs Al Herz] with both parties to act in good faith". The Nominee Agreements themselves do not contain a promise to agree upon additional compensation. In his email of 18 December 2016 Mr Gonzalez was referring to the process then under way resulting in the HOA and the SHA; if an implied promise is to be found, it is a promise to engage in that process. That was done and agreement was reached.

110. Further as to (b), in any event there was no attempt to quantify any loss suffered in the nature of the additional compensation which should have been agreed. On Mrs Al Herz's case, it should have been something additional to the remuneration payable to Fix Sense, but there was no evidence of, for example, a going rate for acting as 51% shareholder. The claim for damages in this respect must also be dismissed.

Termination of the HOA

111. Sunset RAK terminated the HOA on 11 February 2020 in reliance on the cross-default clause; for convenience, I repeat it:

> "On breach of any agreement entered into with Sunset Group by Fix Sense or its shareholders in the course of such provision of the Services apply shall constitute a default of Fix Sense of this Agreement and Sunset may (at its sole discretion) pursue the remedies as may be applicable by law".

112. The grammar and and wording are unhappy: they are in fact the terms of a re-worded clause proposed by Mr Lutfi in an email dated 12 April 2017, proposed by him to replace a clause which he said was "not worded in a clear way to show the agreements that we have between us". "Sunset Group" is defined to mean the subsidiaries and affiliates of Sunset RAK, which includes Peatura, Black Tap and Brick Oven; Mrs Al Herz is a shareholder in Fix Sense; and in its terms the cross-default clause is capable of being triggered by breach by Mrs Al Herz of the Nominee Agreements.

113. It was not submitted for Fix Sense that the termination was not a "remedy applicable by law" open to Sunset RAK if the cross-default clause applied. That is well understandable. Breach of the Nominee Agreements by refusing to transfer the 51% shareholdings to the Sunset companies was fundamental to the relationship of the parties under the HOA, particularly bearing in mind the service provided by Fix Sense of being a 51% shareholder in the name of a UAE national, that is, the service of Mrs Al Herz being the national shareholder. The submissions were that the cross-default clause (a) was not enforceable; and (b) did not apply to breach by Mrs Al Herz of the Nominee Agreements.

Enforceability

114. Fix Sense accepted that cross-default clauses could be part of commercial agreements, but submitted that there were limitations to their enforceability. The limitations proposed were that a cross-default clause was not enforceable where the cross-agreements were not inter-related, or where enforcement of the cross-default clause "kills the effectiveness of the other inter-related agreement".

115. For the first limitation, Mr Iqbal relied on *In re Kopel* 232 BR 57, a decision of the United State Bankruptcy Court, New York. From that case, bankruptcy courts had refused to enforce cross-default provisions where the cross-default agreements were not inter-related. That was so, however, in the application of a statutory provision concerning adoption of beneficial contracts and disclaimer of burdensome ones - as was said in the reasons, in a balancing of two competing bankruptcy policies: would enforcement of a cross-default provision involving separate contracts contravene the policy of allowing debtors to assume and assign valuable contracts? I do not think that In re Kopel, it provides any guidance outside the operation of the bankruptcy law of New York. In the present case, what matters is the operation of the agreement between Fix Sense and Sunset RAK in the HOA, and there is no reason to refuse to enforce the cross-default clause according to its terms.

116. In any event, in my view the cross-agreements, being the HOA and the Nominee Agreements, are clearly inter-related. Mr Iqbal submitted that they were not because when the HOA was executed neither of the Nominee Agreements existed, the Nominee Agreements did not themselves include cross-default clauses, and the HOA and the two Nominee Agreements "had not been entered into as part of a single, inter-related transaction"; and he said that had the cross-default clause not been in the HOA, Sunset RAK's bargain "would not have been thwarted". The first point is factually incorrect: the HOA was executed around the end of April 2017, when the Black Tap Nominee Agreement was in

existence, and when it was executed, the Brick Oven Nominee Agreement was in all probability under negotiation or in anticipation. I cannot see that it matters that the Nominee Agreements did not themselves include cross-default clauses. It is plain that, although the HOA and the two Nominee Agreements were not executed contemporaneously, the Black Tap Nominee Agreement was tied in with the incipient HOA as the HOA took its slow progress from the LOI referred to in the lawyers' email of 23 May 2016, and the Brick Oven Nominee Agreement was close in time. And the cross-default clause was important in Sunset RAK's bargain: putting what I have said above another way, that the shares held by the UAE national were indeed held on its behalf and transferred as it requested was fundamental to Sunset RAK's engagement of Fix Sense for its services, and to Sunset RAK obtaining the full benefit of the Sunset company's venture. Where the shareholder in Fix Sense was acting, or to be acting, as the 51% shareholder in the provision by Fix Sense of that service, the commercial purpose of the cross-default clause was clear, and it was a reasonable if not necessary protection to Sunset RAK in the event that the shareholder, not a party to the HOA but the majority shareholder and operator of Fix Sense, refused to abide by an agreement under which she was acting as the 51% shareholder.

117. For the second limitation, Mr Iqbal submitted that there was a contradiction between the Nominee Agreements and the HOA, in that the Nominee Agreements obliged Mrs Al Herz to transfer her shareholdings in Black Tap and Brick Oven when required, but the HOA obliged her to hold them. Thus, he said, if Mrs Al Herz complied with the Nominee Agreements it would "bring an end to the HOA"; whereas if she did not comply with the Nominee Agreements "even then it brings an end to the HOA". He described this as a killer for the HOA, as I understand it meaning for the cross-default clause.

118. The submission is unsound in both its limbs. The obligation in the HOA to which Mr Iqbal referred was the first of the services to be provided by Fix Sense upon request, in the terms that Fix Sense "shall be a shareholder for the registration of fifty one percent (51%) of the shares in Sunset Group companies.". Accepting, as the submission did, the equation of Fix Sense and Mrs Al Herz, nonetheless Mrs Al Herz is only obliged to be the shareholder if and so long as Sunset RAK avails itself of the service. If it does not, by requiring Mrs Al Herz to transfer the shares to someone else, there is no breach of the HOA. Further, even assuming breach of the HOA because Mrs Al Herz was required to transfer the shares at the request of their beneficial owner, the HOA would not thereby be brought to an end. It could (in all likelihood would because the beneficial owner making the request was Sunset RAK or another Sunset company) continue, for Sunset RAK to use all the other services provided by Fix Sense. Conversely, assuming breach of the Nominee Agreements because Mrs Al Herz refused to transfer the shares upon request, that would not necessarily bring an end to the HOA. It would be open to Sunset RAK to terminate the HOA, but it need not do so. It could take steps to force transfer of the shares whilst leaving the HOA on foot.

119. There is no merit in the submission, which provides no reason for holding the cross-default clause to be unenforceable.

Application

120. It is not easy to understand the submission. As set out in the skeleton argument, it was that there is no privity of contract between Sunset RAK and Mrs Al Herz; that from their conduct it is obvious that they chose not enter into a direct agreement with each other in the HOA; that Sunset RAK could have but did not ask Mrs Al Herz to provide a guarantee that she would abide by the terms of the cross-default clause in the HOA, and could have but did not ask Fix Sense to guarantee that Mrs Al Herz would abide by the terms of the Nominee Agreements; and:

> "Therefore, with regards to the cross-default clause there is no *animus contrahendi* between Sunset RAK and Ms Al Herz. As a consequence, Sunset RAK cannot hold Fix Sense as liable for any actual or alleged breach of the two Nominee Agreement[s] by Ms Al Herz."

121. Oral submissions did not bring clarity. It was said that the cross-default clause was "not operable" because, as I understand the submission, Fix Sense, Sunset RAK and Mrs Al Herz had the option to decide who was going to be a party to each contract, but Mrs Al Herz was not made a party to the HOA.

122. The submission quite misses the point. It is not necessary that Mrs Al Herz is a party to the HOA, or that she had any intention to contract with Sunset RAK. The point of a cross-default clause is that the default of a stranger to contract A under contract B is, by agreement of the parties to contract A, a default under contract A. That Mrs Al Herz was not made a party to the HOA is not a reason for the cross-default clause being inoperable, but part of if not the substantial reason why the cross-default clause is there. Whether she had agreed to "abide by the terms of the cross-default clause" has nothing to do with it.

Conclusion

123. The HOA was validly terminated.

The Shares Options

124. Under the HOA and SHA, Fix Sense was entitled to immediate allotment of a 2.5% shareholding in Sunset RAK. This did not occur, but at an earlier time in the proceedings it was accepted that it should, and I understand that that has been attended to and there is no further dispute in that regard. The remaining claim is in relation to the options for a further 2.5% shareholding. To recall, by the relevant clauses Fix Sense could exercise an option during anyone or three option periods, each "within 2 (two) months of the completion of the audited accounts for Sunset Holdings" for the respective 2018, 2019 and 2020 financial years. Sunset RAK's financial year was the calendar year, ending on 31 December.

125. The presentation of this claim was particularly unsatisfactory. I begin with the pleadings.

126. In the Particulars of Claim, Fix Sense alleged that the HOA contained implied terms that (i) the audited accounts (hereafter, **"the accounts"**) would be completed and provided to it within a reasonable period after the end of each financial year; (ii) that the accounts would be adequate for a decision on whether to exercise the option and/or at what price; and (iii) that the accounts would include or be supplemented by adequate audited accounts of all subsidiaries of Sunset RAK. It was alleged that the SHA contained implied terms to the effect of (ii) and (iii).

127. It was then alleged that there was significant delay in providing the accounts for the 2018 financial year, that they were inadequate in a number of respect for informing the decision whether to exercise the option and/or at what price, and that no "management accounts" for "Sunset entities

including subsidiaries of Sunset RAK" were provided. It was alleged, speaking at the date of the Particulars of Claim being 22 July 2020, that no accounts had been provided for the 2019 financial year. It was then alleged:

> "As a result of not having received adequate audited or approved accounts for Sunset RAK and subsidiaries of Sunset RAK for the 2018 or 2019 financial years, Fix Sense has been unable to finally exercise or consider exercising its option to acquire an additional 2.5% shareholding in Sunset RAK, and/or to determine the appropriate price for purchasing additional shares".

128. Although later in the Particulars of Claim it claimed specific performance of the allotment of shares, without the benefit of pleading an exercise of the option, Fix Sense's case was therefore not that one of the options had been exercised, but that Sunset RAK or Sunset BVI was in breach of contract in relation to providing accounts, whereby it had been unable to do so. However, when it came to the allegations of breach, the relevant allegations related only to the 2019 financial year and to failure to provide accounts within a reasonable period: the breach as expressed in the pleading was "failing to complete and provide to Fix Sense within a reasonable period after the end of the 2019 financial year, audited accounts for Sunset RAK for the 2019 financial year". Correspondingly, the loss for which damages were claimed was pleaded:

> "But for the failure to provide or secure the provision of the audited accounts, Fix Sense would have been able to make an informed decision as to whether to exercise the Option to acquire the additional 2.5% shareholding in Sunset RAK within Option Period 2 which would have commenced a reasonable period of time after the end of the 2019 financial year. If it were financially beneficial to do so, Fix Sense would have exercised that Option and would have acquired an additional 2.5% shareholding in Sunset RAK and would have or might have been paid dividends and profit shares [sic] attaching to those shares accordingly."

129. These discrepancies were not clarified; indeed, the unsatisfactoriness increased. In his opening, Mr Iqbal said of this claim only, "Plus the fact that Sunset did not deliberately [sic] provide the financial accounts to Mrs Al Herz and Fix Sense so that they could lawfully exercise their option right in terms of the 2.5 per cent options shares.". But not a word was said about the claim in Fix Sense's skeleton argument or in the oral submissions on its behalf.

130. I should nonetheless deal with the claim, and in the interests of finality between the parties, will do so as if breaches and consequential loss were alleged in relation to both the 2018 and the 2019 financial years. I begin with an account of events so far as the evidence goes.

131. In an email dated 10 July 2019, Fix Sense's lawyers Binherz Advocates and Legal Consultants (**"BALC"**) informed Mr Gonzalez that Fix Sense "intended to exercise his option right to buy share in the Company Sunset Hospitality and would highly appreciate receiving your positive response at earliest possible".

132. Mr Gonzalez replied on 17 July 2019, saying that he understood that the intention was to exercise the "Option Period 1" option and drawing attention to the price calculation to be based on the 2018 audited accounts. He said that Sunset RAK was in the process of obtaining their 2018 audited financials and "we will share the same after expected receipt first week of September".

133. BALC replied on 22 July 2019, relevantly:

> "Thank you for your below email, as you are fully aware 6 months have been lapsed and the year 2018 financial yet to be released which is not as per the normal practice. You have stated that the financials shall be completed by first week of September 2019 and would be highly appreciate if you share the financials by 1st week of September, 2019 along with all financials related to the different outlets where the Company hold investments with our client in order to enable them to consider which option they would like to proceed with"

134. The 2018 accounts for Sunset RAK were completed on 5 September 2019 and were provided to Mr Lutfi and BALC by Mr Spiliopoulos on that day.

135. The response from BALC was (it is reproduced as written):

> "The above Audited financial which you have forwarded to us on 5 September, 2019 is related to a company based in Ras Al Khaimah and what we have asked for the Sunset Hospitality Company Audited accounts `the Dubai company' in which our client is a partner. Our Client refer to the audited financial which is supposed to be prepared by Ernst & Young. Once again I request you to forward to us the appropriate audited financial for our review prior to the meeting which is scheduled for Wednesday, 11th, 2019 at our office. We also request you to send us all audited financial related to all other companies in which our client is a partner."

136. There was no evidence of what occurred at the meeting on 11 September 2019, if the meeting was held.

137. On 12 November 2019, BALC emailed to Mr Spiliopoulos that "we are still waiting to receive the audited financial for sunset hospitality LLC as requested by our client to consider exercising her option right to buy share in the company". They followed this up with two reminder emails.

138. Lawyers for Sunset RAK, Al Tamimi & Co (**"AT"**) became involved. They emailed BALC on 19 November 2019. It was quite a lengthy email, which included pointing out that Mrs Al Herz was not a partner in the venture companies, rather a nominee shareholder. Of present relevance, it gave an explanation of the operation of the option, leading to saying:

> "In summary therefore Option Period 1 is stated to last for a period of two months from completion of the audited accounts for the Company for the 2018 Financial Year. Fix Sense was provided with the 2018 Financial Accounts of the Company on 5 September 2019. Option Period 1 has expired, and Fix Sense may no longer call on its option to subscribe until Option Period 2, as applicable".

139. Sunset's accounts for the 2019 financial year were signed by the auditors on 20 October 2020. They were provided to Fix Sense on 14 March 2021. The reason for the delay was not explained. Mrs Al Herz gave evidence that there were discrepancies in the accounts, without identifying them; that she queried them in an email dated 23 May 2021; and that (as at the date of the witness statement, 4 October 2021) she had not received a response. She said that the accounts were provided to "an accounting professional" to authenticate the queries "whose findings are

exhibited", but neither the email of 23 May 2021 nor any findings by an accounting professional was in evidence.

140. Returning to the pleading, Sunset RAK and Sunset BVI denied the implied terms. I can see no basis for implied terms (ii) and (iii). The accounts triggering the two-months period were Sunset RAK's accounts, whatever their content provided they were the accounts, and no more; calculation of the exercise price was consequential, but the accounts would necessarily have enabled the EBITDA to be ascertained for that purpose. However, Fix Sense would not necessarily know when the accounts were completed - it was excluded from a board seat and from the management of Sunset RAK - and it may be that there was an implied term that the accounts would be provided to Fix Sense within a reasonable time after their completion (which was not the implied term pleaded). It is difficult to see a basis for an implied term that the accounts would be completed within a reasonable time - the triggering date is the completion date, whenever it may have been - but I will assume in favour of Fix Sense, without deciding, that there were implied terms that the accounts would be completed within a reasonable time from the end of the financial year and would be provided to it within a reasonable time of completion.

141. Going first to the 2018 financial year, the accounts were completed seven months after the end of the financial year. This was about the same period as for the 2017 and 2019 accounts. There was no evidence that this was an unreasonable time, and it is not uncommon that audited accounts are not finalised for some time after the end of the relevant financial year. I am not satisfied that the period was unreasonable. The accounts were provided to Fix Sense on the day of their completion, and it follows that they were provided to it within a reasonable time of completion. There was no breach of the implied terms.

142. Even if there had been breach of these implied terms, it would not have mattered. Fix Sense failed to address exercise of the option not because of any delay in either completion or provision of the accounts (which there was not), but because of an inexplicable confusion on its part from which it said that it had not received the Sunset RAK accounts, but accounts for some other company. It therefore did not exercise the option within the two months. Had the accounts been provided late, it must be asked what would have happened if they had been provided in a timely manner, and it should be concluded that the same would have happened - because of the confusion, Fix Sense would still not have exercised the option within the two months.

143. Further, even if I had found breach in the respects above-mentioned - indeed, any breach impeding the exercise of the option - Fix Sense has not provided any evidence which would enable me to arrive at damages for that breach. Had it exercise the option, Fix Sense would have had to pay the subscription price calculated as provided in the agreements. Any loss from being unable to exercise the option because of the breach would be the difference between what it paid for the shares and their "true" value at the time, if it differed from and was greater than the subscription price. No attempt was made to show from the accounts what Fix Sense would have paid, nor was there any evidence of the true value of the shares. There is no substance in the claim for breach in relation to the 2018 accounts.

144. Going into the 2019 financial year, again I am not satisfied that an unreasonable period elapsed in completion of the accounts. In the absence of explanation, however, the lapse of time from 20 October 2020 to 14 March 2021 cannot be regarded as reasonable, and on the assumption of the implied term that they would be provided within a reasonable time from completion (which, to repeat, was not pleaded) there was breach in this respect.

145. However, that does not make out a claim in relation to the Option Period 2 option. The time for exercising the option had elapsed before the accounts were provided, but again it must be asked what Fix Sense would have done if the accounts for the 2019 financial year had been provided to it shortly after 20 October 2020.

146. The answer is in part informed by what Mrs Al Herz did when she received the accounts in March 2021. It appears that the parties were proceeding on the basis that the time for exercise ran from when the accounts were provided, but even then, and even after AT's earlier explanation of the operation of the Option Period 1 option, she did not act to exercise the option but questioned what she said were discrepancies. The only more direct evidence was her evidence, in something close to a repetition of the pleading:

> "As a result of not having received adequate audited or approved accounts for Sunset RAK and subsidiaries of Sunset RAK for the 2018 or 2019 financial year, nor receiving proof of share ownership despite multiple requests, Fix Sense has been unable to finally exercise or consider exercising the option to acquire an additional 2.5% shareholding in Sunset RAK, and/or to determine the appropriate price for purchasing additional shares".

147. From this, had Fix Sense received the 2019 accounts in a timely manner, its consideration of whether to exercise the Option Period 2 option would have been held back: by questioning them, for reasons not made clear in the evidence but to do with Fix Sense's view of whether they were "adequate"; by the (erroneous) view that it should also have been provided with accounts for the subsidiaries; and (according to this evidence of Mrs Al Herz) by what appears to be the fact at that time the first 2.5% shareholding had not been allotted. These matters did not affect the running of time for the exercise of the option or the calculation of the subscription price, the last of them being so distant from exercise of the option that, despite Mrs Al Herz's reference to it, I am prepared to pass over it as not truly a factor in Fix Sense's consideration. The time ran from the completion of the accounts, or if the parties were proceeding on that basis from the time they were provided, whatever queries Mrs Al Herz had; the subscription price was calculated from the Sunset RAK accounts, and the accounts for the subsidiaries had nothing to do with it.

148. In my view, there is no proper basis for concluding that Fix Sense would have exercised the option if the accounts had been provided to it shortly after 20 October 2020. Mrs Al Herz's evidence stops at inability to consider the exercise of the option, with no indication of where consideration might have taken the decision. The inability rests on misapprehension by Fix Sense of the operation of the option, and there is no proper reason to think that the misapprehension would not have operated at the earlier time. Further, there is nothing in the evidence to indicate whether Fix Sense would or even might have concluded that exercising the option would be financially beneficial to it. This is not loss of a chance. It was for Fix Sense to make out a case for what it would have done, and I am not satisfied that Fix Sense would have exercised the option or that there was a realistic possibility that it would have done so.

149. In addition, as for the 2018 accounts, Fix Sense has not provided any evidence to enable me to arrive at damages for the breach. I refer without repeating it to what I have said in relation to the 2018 accounts. There is no substance in the claim for breach in relation to the 2019 accounts.

The Result in CFI-059-2020

150. The claim for damages for wrongful termination of the HOA must be dismissed. So also must the claims for specific performance of the allotment of shares, and for damages for breach of the HOA and the SHA preventing Fix Sense from exercising the options, be dismissed.

151. The monthly Fix Sense Fixed Fees were paid up to the date of termination of the HOA, and the Anticipated Profit Fee was paid up to the end of 2018. (Mr Gonzalez said that it was overpaid, but there was no counterclaim in that respect). The claim to damages for breach by Sunset RAK was for failure to pay the Fix Sense Fixed Fees from the date of termination of the HOA, apparently on the basis that the HOA continued in force. As I read the pleading, there was no claim in relation to the Anticipated Profit Fee, no doubt because the HOA provided that subject to mutual agreement there was no obligation to pay it after 2018. (At one point in her evidence Mrs Al Herz gratuitously said that payment of the fee was extended, but this was not taken further or taken up in Fix Sense's case.)

152. Although the Particulars of Claim contained a generalised allegation of breach against Sunset BVI for "failing to make any payments or to secure the making of dividend payments to Fix Sense in respect of Sunset RAK", the allegations of loss did not include loss of the Anticipated Profit Fee. It was not suggested by Mr Iqbal that Sunset BVI's obligation under the SHA to pay the Anticipated Profit Fee survived termination of the HOA: it appeared to be accepted that all claims to fees stood or fell with the HOA. This is understandable. Sunset BVI's obligation was to pay the same fees as Sunset RAK, in the nature of a guarantee and not an independent obligation, and it could hardly be said that Sunset BVI should continue to pay Fix Sense when, with the termination of the HOA, Fix Sense was no longer providing any services.

153. All claims in relation to fees must be dismissed.

Costs

154. Mrs Al Herz and Fix Sense have comprehensively failed in the proceedings. I will order that they pay the costs of the Sunset companies but, since I have not heard the parties on costs, will reserve liberty to apply if any party seeks a different or additional order in relation to costs. The liberty may be exercised within 21 days and may be exercised by letter to the Registry.

Orders

155. I make the following orders:

1. That within 14 days of the date of these orders Mrs Al Herz transfers to Sunset RAK the 102 shares held by her in Black Tap.

2. That **within 14 days** of the date of these orders Mrs Al Herz transfer to Peatura the 102 shares held by her in Brick Oven.

3. That the counterclaim in proceedings CFI-024-2020 be dismissed.

4. That proceedings CFI-059-2020 be dismissed.

5. That Mrs Al Herz and Fix Sense jointly and severally pay the costs of both proceedings of Sunset RAK, Peatura and Sunset BVI, subject to any costs orders previously made which shall stand, if not agreed the costs to be assessed by the Registrar.

6. That there be liberty to apply in relation to orders 1 and 2 in the event of dispute over or failure in implementing the orders.

7. That there be liberty to apply in relation to order 5 if any party seeks a different or additional order in relation to costs, such liberty to be exercised within 21 days; the liberty may be exercised by letter to the Registry.