



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2024: No. 112

BETWEEN:

Affiniti Ltd.

Plaintiff

-and-

Muhammed Ziaullah Khan Chishti

Defendant

JUDGMENT

Hearing date: 24 September 2024

Judgment date: 1 October 2024

Appearance: Ben Adamson and Conor Doyle of Conyers Dill & Pearman Limited for Afiniti Ltd.
Alex Potts KC (separately instructed) and Lilla Zuill of Cox Hallet Wilkinson Limited for Mr Chishti

JUDGMENT of Martin, J

Introduction

1. This is the Judgment in relation to an application for declaratory relief by the Plaintiff under an Originating Summons dated 8 May 2024 and a cross-application by the

Defendant by summons dated 4 July 2024 to set aside an Interim Injunction dated 23 May 2024 *ab initio*.

Summary and disposition

2. For the reasons set out below, I grant the Declaration sought in paragraph 2 of the Originating Summons (the other prayers for relief having been withdrawn) and I dismiss the Defendant's cross-application to discharge the Interim Injunction *ab initio*¹.
3. I have made an Order for costs *nisi*, namely I have awarded costs on the standard scale to the Plaintiff, such Order to come into effect unless the Defendant applies to be heard on the question of costs within 14 days, in which case the Order for Costs will not come into effect until such time as the parties are heard on costs (or in default until further Order of the court). I have also made provision for the release of the funds held as fortification of the Plaintiff's cross-undertaking in damages until the costs Order becomes final, i.e. either after 14 days if there is no application by the Defendant to be heard on costs, or until after the hearing on costs or further Order.

The parties and other relevant related entities

4. The Plaintiff in these proceedings is a Bermuda exempted company called Afiniti Ltd. (hereafter referred to as "Afiniti") which was apparently established to provide services in the "business process outsourcing sector" in North America.
5. The Defendant is a very successful businessman. I will refer to him as Mr Chishti in this judgment. Mr Chishti describes himself as the founder and former Chairman and a director and Chief Executive Officer (CEO) of Afiniti until he ceased² to be CEO in November 2021 after allegations of sexual harassment and sexual assault were made against him. I should say at once that Mr Chishti denies these allegations of misconduct and has taken proceedings in the United States and England for defamation against the person who made these allegations against him.
6. Mr Chishti says he was also the Chairman and CEO of The Resource Group International Limited (referred to as "TRG-I")³, also a Bermuda exempted company, which owns approximately 35% of the issued shares of Afiniti. Mr Chishti says he also resigned his position as Chairman of TRG-I in November 2021.

¹ For the reasons set out in paragraphs 37-8 below, the Interim Injunction was discharged by consent on 24 September 2024 at the outset of the hearing, and the parties agreed to submit a separate Order in agreed terms, which I have signed.

² At paragraph 8 of his first affirmation [B-363], Mr Chishti says he resigned voluntarily from these offices in November 2021 to shield the businesses from adverse publicity. However, speaking on behalf of Afiniti, Mr Khaishgi says in paragraphs 15 and 18 of his first affidavit [B-330] that Mr Chishti ceased to hold office in TRG-I in 2016. Mr Khaishgi has produced an extract of Mr Chishti's pleading in the arbitration in which Mr Chishti has asserted that he was Chairman and CEO of TRG-I until 2019 and Chairman of TRG-I until 2021. I am not able to resolve this dispute of fact on the evidence. However, for the purposes of deciding the narrow questions before me, it is not necessary to do so.

³ This is disputed by Mr Khaishgi in his first affidavit at paragraph 15 [B-330]

7. Mr Chishti owns all the shares in a third Bermuda exempted called The Resource Group Pakistan Limited (referred to as “TRG-P”) which owns shares in TRG-I. Mr Chishti says that he (through his ownership of TRG-P) is the largest shareholder of TRG-I⁴.

The Chishti Proceedings

8. Mr Chishti has initiated two sets of proceedings as a result of or in connection with the allegations of misconduct that have been made against him. These are:
 - (i) Proceedings brought by Mr Chishti in the US District Court for the District of Columbia (the “USDC proceedings”).
 - (ii) Proceedings brought by Mr Chishti in the High Court of England and Wales (the “UK proceedings”).

The TRG-I Proceedings

9. TRG-I has initiated one arbitration proceeding against Mr Chishti and one set of court proceedings against him and Mr Chishti has issued one set of arbitration proceedings against TRG-I and individuals associated with TRG-I. These are:
 - (i) Arbitration proceedings brought by TRG-I against Mr Chishti (ref. # 5425000846).
 - (ii) Arbitration proceedings brought by Mr Chishti against TRG-I and others (including Mr Khaishgi and Mr Aslam who are directors of Afiniti) in relation to alleged violations of an agreement (ref. # 5425000957).
 - (iii) Proceedings brought by TRG-I against Mr Chishti in the Southern District of New York Case No. 23-cv-01760 SDNY which are on appeal to the Second Circuit as TRG-I v Chishti No 23-286 (the “New York proceedings”).
10. No details about what the precise ambit or scope of these various proceedings have been given in the evidence, and the precise nature of the relief sought in those proceedings is not relevant to the issues to be decided in these proceedings.
11. However, what is relevant is that Mr Chishti has asserted that he is entitled to indemnification from Afiniti for (i) the costs he has and will incur in bringing or defending the USDC Proceedings and the TRG-I Proceedings and (ii) any judgment or damages or costs awards he has to pay in relation to those proceedings. He also claims the right to receive an advance of funds from Afiniti to pay his litigation expenses in each of these sets of proceedings. Mr Chishti says that these rights of indemnity were given to him under the terms of a Deed of Indemnity executed between Afiniti and himself dated 1 January 2020 (“the Indemnity”).

⁴ It is not clear what the exact percentage of shares Mr Chishti owns in TRG-I.

12. This case is concerned with the proper interpretation of the various clauses of the Indemnity which govern the *process for determining* whether the proceedings described above fall within the scope of Afiniti’s Indemnity obligation. This case is *not* concerned with actually deciding whether Mr Chishti is or is not entitled to indemnification for any liabilities incurred in or by those proceedings or whether he is entitled to advancement or indemnification of his litigation expenses in those proceedings. The reasons for this will become apparent.

The Indemnity⁵

13. The material provisions of the Indemnity that require consideration and analysis are summarized below and, where appropriate, the principal terms are reproduced in italic text.
14. The Indemnity provides in Section 2 that Mr Chishti is entitled to indemnification “...*in respect of all expenses incurred...in defending against any Indemnifiable Proceeding...in advance of the final disposition of such Indemnifiable Proceeding...at the request of [Mr Chishti].*”
15. The Indemnity says in Section 3 (a) that Mr Chishti is eligible for indemnification for proceedings brought “...*to which [Mr Chishti] is a party (or is threatened to be made a party to any proceeding) brought by or in the name of [Afiniti] to procure a judgment in [Afiniti’s] favour by reason of the fact that [Mr Chishti] is or was an Officer of [Afiniti], or is or was serving at the request of [Afiniti] as a director, officer, employee or fiduciary of any other entity...or by reason of anything done or not done ...by [Mr Chishti] in any such capacity, whether or not [Mr Chishti] is actually serving in such capacity at the time any liability or Expense is incurred for which indemnification or advancement is sought by [Mr Chishti].*”
16. Section 3 (b) provides that the extent of the indemnity to be provided is “...*to the fullest extent permitted under the Bermuda law against all judgments, fines, amounts paid in settlement and Expenses incurred by [Mr Chishti] in connection with a Proceeding described in Section 3 (a) if [Mr Chishti] acted in good faith and in a manner [Mr Chishti] reasonably believed to be in or not opposed to the best interests of [Afiniti]*” but subject to an exception in the event Mr Chishti is later found guilty of fraud or dishonesty by the court.
17. Section 4 (a) provides that Mr Chishti is entitled to indemnification for proceedings other than proceedings by or in right of Afiniti if Mr Chishti “...*was or is a party or is threatened to be made a party to any Proceeding (other than a Proceeding by or in the*

⁵The Deed of Indemnity is exhibited to the First Affidavit of Samuel Logan dated 6 May 2024 (“Logan 1”) filed on behalf of Afiniti and is in the Court Bundle at [B51-63]. References to documents in the Court Bundle will start with the letter of the bundle followed by the relevant page number (eg [A1] refers to page 1 of Bundle A).

name of [Afiniti] to which Section 3 (a) above shall apply) by reason of the facts that [Mr Chishti] is or was an Officer of [Afiniti]; or by reason of anything done or not done (or allegedly done or not done) by [Mr Chishti] in any such capacity, whether or not [Mr Chishti] is actually serving in such capacity at the time any liability or Expense is incurred for which indemnification or advancement is sought under this Agreement.”

18. Section 4 (b) provides for the fullest indemnity permitted under Bermuda law for proceedings under Section 4 (a) “*..against all judgments, fines, amounts paid in settlement and Expenses incurred by [Mr Chishti] in connection with a Proceeding described in Section 4 (a) if [Mr Chishti] acted in good faith and in a manner [Mr Chishti] reasonably believed to be in or not opposed to the best interests of [Afiniti] and, with respect to and criminal Proceeding (other than in respect of fraud or dishonesty), had no reasonable cause to believe his or her conduct was unlawful.*”
19. Section 5 provides for the indemnification to be provided “*...whether or not [Mr Chishti] is successful, on the merits or otherwise, in whole or in part, in defense of any Indemnifiable Proceeding, or in defense of any claim (other than in respect of fraud or dishonesty) or if it is determined in a final and non-appealable judgement by a court of competent jurisdiction that [Mr Chishti] is otherwise entitled to be indemnified against Expenses [Afiniti] shall indemnify [Mr Chishti] against all Expenses incurred in connection with such Indemnifiable Proceeding.*”
20. Section 6 provides that if Mr Chishti is entitled to indemnification “*...for some or a portion of the judgments, fines, amounts paid in settlement or Expenses incurred in connection with an Indemnifiable Proceeding, but not...for all of the total amount thereof, [Afiniti] shall nevertheless indemnify [Mr Chishti] for the portion of such judgments, fines, amounts paid in settlement and Expenses incurred to which [Mr Chishti] is entitled.*”
21. Section 7 confirms that the rights under the Indemnity are in addition to any other rights of indemnity Mr Chishti may have under the Bye Laws of Afiniti or by other agreement, insurance policy or by operation of law.
22. Section 8 provides that in the event Mr Chishti “*...is subject to or intervenes in any Proceeding in which the validity or enforceability of this Agreement is at issue or seeks a Proceeding to enforce [his] rights under, or to recover damages for breach of this Agreement, if [Mr Chishti] prevails in whole or in part in such Proceeding, [Mr Chishti] shall be entitled to recover from [Afiniti] and shall be indemnified by [Afiniti] against any Expenses incurred by [Mr Chishti] in connection with such Proceeding.*”
23. Section 9 requires Afiniti to require any successor or any person or entity who acquires all or substantially all the business or assets of Afiniti to extend the same indemnity to Mr Chishti.

24. There are then set out some limitations and exceptions and standard terms which are not material for present purposes.
25. Section 15 provides that the Indemnity is to be interpreted and enforced in accordance with the laws of Bermuda, and the parties submit to the exclusive jurisdiction of the Bermuda court.

Appendix A

26. Appendix A sets out the procedural provisions that govern the procedure to be followed upon the making of a request for indemnification. As these terms are central to the matters in dispute, I will set these out more fully, but will omit the parts that are not engaged by the issues to be decided.

“Article 1. Request for Company to Provide Indemnification

- (a) To receive indemnification under this Agreement, [Mr Chishti] must submit a written request to the Secretary of [Afiniti] to provide such indemnification. Such request shall include (i) documentation or information available reasonably available to [Mr Chishti] that provides a reasonably detailed description of the facts and circumstances of the request for indemnification and (ii) [Mr Chishti’s] selection of the Determining Party under Article 1 (b).*
- (b) Upon receipt of a request made pursuant to Article 1 (a), the entitlement of [Mr Chishti] to indemnification under this Agreement shall be determined by one of the following parties, as selected by [Mr Chishti] in his or her sole discretion)such party, the “Determining Party”): (i) the Board by a majority vote of Disinterested Directors, or (ii) by Independent Counsel in a written opinion to the Board, a copy of which shall be delivered to [Mr Chishti]. In the event no Disinterested Director exists to constitute the Determining Party, Independent Counsel shall be the Determining Party. The Determining Party shall make the determination as to the entitlement of [Mr Chishti] to indemnification under this Agreement not later than 45 calendar days after receipt by [Afiniti] of a request made pursuant to Article 1 (a), or if Independent Counsel acts as the Determining Party, within 45 calendar days of agreement on the identity of such Independent Counsel.*
- (c) In the event that a determination is made by the Board that [Mr Chishti] is not entitled to indemnification by the Company hereunder, [Mr Chishti] shall be entitled to seek a determination by Independent Counsel of [Mr Chishti’s] entitlement to indemnification. Independent Counsel shall within 45 days of agreement on the identity of such Independent Counsel provide a*

determination as to the entitlement of [Mr Chishti] to indemnification under this Agreement in a written opinion to the Board, a copy of which shall be delivered to [Mr Chishti]. Such determination by Independent Counsel shall be made de novo and [Mr Chishti] shall not be prejudiced by reason of the determination by the Board that [Mr Chishti] is not entitled to indemnification. [Afiniti] shall not oppose [Mr Chishti's] right to seek any such determination by Independent Counsel. If a determination is made by Independent Counsel that [Mr Chishti] is entitled to indemnification, [Afiniti] shall be bound by such determination and shall be precluded from asserting that such determination has not been made or that the procedure by which such determination was made is not valid, binding and enforceable. Any determination of Independent Counsel under this Article 1 (c) shall be the final determination of entitlement to indemnification under this Article 1, subject to Article 4 of this procedural Appendix

- (d) *Any Independent Counsel selected for the purpose of Article 1 (b) or Article 1 (c) shall be selected by the Company and approved by [Mr Chishti] (such approval not to be unreasonably withheld, conditioned or delayed), except that in the event that a Change in Control has occurred, any Independent Counsel shall be selected by [Mr Chishti]. Upon failure of [Afiniti] to so select such Independent Counsel or upon failure of [Mr Chishti] to so approve (or so select, in the event that a Change in Control has occurred), such Independent Counsel shall be selected upon application to a court of competent jurisdiction.*

Article 3

(b) If the Determining Party of this Procedural Appendix shall have failed to make the requested determination within 45 calendar days pursuant to Article 1 (b), a requisite determination of entitlement to indemnification shall be deemed to have been irrevocably made and [Mr Chishti] shall be absolutely entitled to such indemnification, absent (i) fraud in the request for indemnification of (ii) a prohibition on such indemnification under Bermuda law; provided however that such 45 day period may be extended for a reasonable period of time, not to exceed an additional 45 days, if the Determining Party shall in good faith require such additional time to obtain or evaluate documentation and/or information relating to such determination and shall have provided written notice to [Mr Chishti] within the initial 45 day period of such need for an extension of time.”

Appendix B

27. Appendix B sets out the definitions of the capitalized terms used within the Indemnity and Appendix A. The relevant definitions are set out below:

“ “Change in Control” means a change in control of [Afiniti] of a nature that would be required to be reported in response to Item 5.01 of Current Report on Form 8-K (or in response to any similar item on any similar schedule or form) promulgated under the Securities Exchange Act of 1934, as amended (the “Exchange Act”) whether or not [Afiniti] is then subject to such reporting requirement; provided, however, that, without limitation, a Change of Control shall be deemed to have occurred if after the date of this Agreement (i) any person (as such term is used in Sections 13 (d) and 14 (d) of the Exchange Act) becomes the “beneficial owner” (as defined in Rule 13 d-3 under the Exchange Act) directly or indirectly, of securities of [Afiniti] representing (or which upon settlement, exercise or conversion pursuant to their terms would represent) more than 30% or more of the combined voting power of [Afiniti’s] then-outstanding voting securities without the prior approval of at least two-thirds of the members of the Board in office immediately prior to such person attaining such percentage; (ii) [Afiniti] consummates a merger, consolidation, scheme of arrangement, sale of assets or other reorganization as a consequence of which members of the Board in office immediately prior to entry into the agreement providing for such transaction constitute less than a majority of the board of directors or similar governing body of the company that is then the ultimate parent company of the corporate group of which [Afiniti] is part upon completion of such transaction; or (iii) during any period of two consecutive years, individuals who at the beginning of such period constituted the Board (including for this purpose any new member of the Board whose election or nomination for election by [Afiniti’s] shareholders was approved by a vote of at least two-thirds of the members of the Board then still in office who were members of the Board at the beginning of such period and such approval was not in connection with an actual or threatened proxy contest) cease for any reason to constitute at least a majority of the Board.

“Disinterested Director” means a director of [Afiniti] who is not and was not a party to the Indemnifiable Proceeding in respect of which indemnification is being sought by [Mr Chishti].

“Expenses” includes expenses actually and reasonably incurred in connection with the defense or settlement of any Proceeding, and appeals, attorneys’ and other advisors’ fees and expenses (including retainers and disbursements and advances thereon) witness fees and expenses, expenses relating to any bond, and any expenses relating to establishing a right to indemnification or advancement thereunder, but

shall not include the amount of judgments, penalties, fines or amounts paid in settlement.

“Indemnifiable Proceeding” means any Proceeding of the type described in Sections 3, 4 or 8 of this Agreement, or Article 5 of the Procedural Appendix and any Proceeding approved by the Borad for such purpose, as contemplated by Section 10 (c) of this Agreement.

“Proceeding” includes any actual, threatened, pending or completed investigation, action, suit or other proceeding, whether civil, criminal, administrative, arbitration, investigative, legislative or other nature.”

The pre-action history

28. Sometime in October 2023 Mr Chishti made a request through his US and Bermuda attorneys for a determination of his eligibility for indemnification in relation to his Expenses (as defined) in respect of the USDC proceedings, the UK Proceedings, and the TRG-I Proceedings (although these requests are not in evidence)⁶.
29. Afiniti responded though its attorneys selecting Lord Peter Goldsmith KC PC of the New York law firm Debevoise & Plimpton to be the Independent Counsel to determine Mr Chishti’s eligibility for indemnification in relation to each of these Proceedings⁷.
30. Mr Chishti’s attorneys responded rejecting Afiniti’s selection and claiming that Lord Goldsmith was an unsuitable choice because of an alleged apparent bias and suggesting that Lord Goldsmith would potentially be in breach of the Bermuda Bar Act if he expressed an opinion on Bermuda law without a special practicing certificate⁸. Afiniti’s attorneys responded rejecting those claims and confirming that Afiniti stood by its selection⁹.
31. Mr Chishti’s attorneys’ riposte was that a “Change in Control” event had occurred (as defined), entitling Mr Chishti to proceed to make his own selection in any event. The basis for the claim was that within 2 years of the date of the Indemnity changes in the Board’s composition had resulted in a change in control. Mr Chishti’s position was that three resignations from the Board (including his own) had reduced the number of continuing directors to four, and that the appointment of four new directors meant that the four continuing directors did not constitute at least a majority of the Board¹⁰.

⁶ Separate requests appear to have been made in respect of the two arbitration proceedings referred to in paragraph 8 (i) and (ii) above as well although these do not appear in the evidence. See Logan 1 at paragraph 9 [B40].

⁷ B64-6 (although the appointment in relation to the UK Proceedings is not produced the evidence confirms that a similar request was made: Logan 1 at [B40-42]).

⁸ [B67-69]

⁹ [B70-72]

¹⁰ [B-46]

Afiniti's attorneys responded rejecting that analysis and saying that the effect of the words "*including for this purpose any new member of the Board whose election... was approved by a vote of at least two-thirds of the members of the Board then still in office*" excluded new directors who had been appointed by a majority of two-thirds from being counted in the reckoning of any Change in Control¹¹.

32. In further exchanges of correspondence, the parties entrenched themselves in their respective positions.
33. Mr Chishti's attorneys then wrote to Afiniti's attorneys on 11 April 2024 informing them that Mr Chishti had proceeded to appoint Mr John Keith of Blankenship & Keith of Fairfax, Virginia as Independent Counsel in respect of the determination of Mr Chishti's right to indemnification in respect of the USDC Proceedings¹².
34. Afiniti's attorneys reacted the next day by objecting to this and notifying them that Afiniti intended to apply to the Bermuda court for injunctive relief to compel Mr Chishti to comply with the terms of the Indemnity¹³.
35. Mr Chishti responded by calling upon Afiniti to make its submissions to Mr Keith in relation to the Mr Chishti's eligibility for indemnification in respect of the USDC Proceedings¹⁴.
36. On 23 April 2024 Mr Chishti's attorneys wrote to Mr Michael Murphy of DLA Piper, New York appointing him as Independent Counsel in relation to the determination of Mr Chishti's entitlement to indemnification in respect of the TRG-I Proceedings, and proposing a timetable for directions.

The Originating Summons

37. On 8 May 2024 Afiniti commenced these proceedings by way of Originating Summons seeking three types of relief¹⁵:
 - (1) An Order confirming Afiniti's selection of Lord Goldsmith as Independent Counsel in relation to the determination of Mr Chishti's requests for indemnification.
 - (2) A Declaration that Mr Chishti has no present under the Indemnity validly to select an "Independent Counsel" to act as a "Determining Party" (as defined).
 - (3) An Order restraining Mr Chishti from purporting to select or instruct "Independent Counsel" in breach of the terms of the Indemnity and from taking steps in furtherance of the selections of Independent Counsel he had made.

¹¹ [B98-9]

¹² [B106-7]

¹³ [B108-9]

¹⁴ [B110-11]

¹⁵ [A1-2]

The Interim Injunction

38. At the hearing of the Originating Summons Afiniti took the position that since the Joint Provisional Liquidators had been appointed and Afiniti was likely to go into an insolvent liquidation, there was no longer any point in pursuing the relief sought in paragraphs (1) and (3) but that there was still value and purpose in pursuing the relief sought under paragraph (2). This was because Afiniti (with the concurrence of the Joint Provisional Liquidators) considered it was important to establish as a matter of principle whether Afiniti was justified in seeking the interim injunction, ie to determine its rights under the Indemnity, and also to protect against the potential costs implications of abandoning the proceedings altogether.
39. However, Afiniti agreed at the outset of the hearing on 24 September that the interim injunction was no longer necessary and the Court was asked to confirm that Mr Chishti was no longer bound by the interim injunction, and this was duly announced and an Order was to be submitted in agreed terms to that effect¹⁶.
40. Although an interim injunction application would not normally be revisited on the hearing of the Originating Summons because the purpose of the Originating Summons is to determine the *final* rights of the parties, much criticism has been levelled at Afiniti's attorneys about the manner in which the first *ex parte* application relating to the interim injunction was conducted, as well as a further *ex parte* application seeking to bring the Court up to date on developments (which will be described in more detail below), and the failure to disclose two affidavits which had been filed with the Court under seal.
41. Mr Chishti's counsel has advanced a number of submissions aimed at setting aside the *ex parte* Order *ab initio*, relying upon these alleged breaches as to service of these affidavits, and has alleged against his opposing counsel breaches of the duty of full and frank disclosure and the duty to give a fair presentation of Mr Chishti's case on the *ex parte* hearing, in addition to the arguments of abuse of process. On the strength of these claims, Mr Chishti wishes to obtain an Order setting aside the interim injunction as if it had never been made in aid of a claim for indemnification of his costs as a preferred creditor in the liquidation of Afiniti¹⁷. Mr Chishti also wishes to be freed from any criticism that he acted in breach of the Indemnity by selecting Mr Keith and Mr Murphy as Independent Counsel, or that he failed to rescind those instructions.
42. Allegations that counsel has breached his or her duties to the court are matters that the Court must take very seriously. It is therefore appropriate (and necessary) to examine

¹⁶ This was done on 30 September 2024.

¹⁷ This was initially said to be on the basis that these costs would be litigation costs of the liquidation, although I understood Mr Chishti's counsel to row back on this later when he said that these costs might be treated as a preferred claim in the liquidation. I express no view on whether they are or might be.

the background to the *ex parte* application and ventilate each of those criticisms, and take a view on them.

43. On 20 May 2024 Afiniti issued an *ex parte* summons seeking interim relief to prevent Mr Chishti from “*commencing, continuing, proceeding with or taking any actions in furtherance of the purported appointments*” of Mr Keith and Mr Murphy as Independent Counsel. The application also sought an Order directing Mr Chishti to rescind his appointments of Messrs Keith and Murphy as Independent Counsel.
44. The application was supported by the first affidavit of Mr Samuel Logan¹⁸, the in-house legal counsel of Afiniti, and the first affidavit of Mr Mohammed Kaishghi¹⁹ who is a director of Afiniti and TRG-I which described and rebutted many of the allegations that Mr Chishti had made in the TRG-I arbitration proceedings as to his ownership and control of Afiniti. An affidavit was filed by Professor Steven Solomon²⁰ as an expert on the meaning and practical effect of the provisions Rule 501 of the Current Report of Form 8-K under the US Securities Exchange Act 1933 for the purposes of explaining whether or not there had been a Change in Control as defined in Appendix A of the Indemnity.
45. A separate application was made for leave to serve Notice of the Originating Summons out of the jurisdiction, as well as an application to serve Mr Chishti by means of substituted service on his Bermuda attorneys. This was heard on 20 May 2024 and was granted in terms by the Chief Justice²¹. The interim injunction application was listed for a separate hearing on 23 May 2024.
46. Notice of the *ex parte* application was also given to Mr Chishti’s Bermuda attorneys²², who attended on the hearing but who did not actively participate. A transcript of the hearing has been produced²³ and, although it is not an approved transcript, no-one has suggested that it does not accurately reflect what happened at the hearing. The Order was made by the Chief Justice in the terms that it was sought. Afiniti gave the usual cross-undertaking in damages and Afiniti fortified it by depositing a sum of US\$100,000 in Conyers Dill & Pearman Ltd’s trust account. The Order was endorsed with a penal notice and served on Mr Chishti through his Bermuda attorneys²⁴.
47. Mr Khaishgi also swore a second affidavit²⁵ in support of Afiniti’s application for the interim injunction in which he deposed that as a result of Afiniti’s vulnerable financial

¹⁸ [B39-49]

¹⁹ 23 May 2024 (Khaishgi 1) [B328-33]

²⁰ 6 August 2024 [Separate Binder] (Solomon Report)

²¹ [A14-5]

²² It is to be noted that at the initial stages of the proceedings Wakefield Quin the attorneys representing Mr Chishti, but a Notice of Change of Attorneys was filed on 28 May 2024 when Cox Hallett Wilkinson took over representation of Mr Chishti in these proceedings [A19]

²³ [C577-596]

²⁴ [A-14]

²⁵ [B352-3]

condition negotiations were ongoing with its primary secured lender “to address the pending maturity of its existing debt facility”. I take this to mean that there was a likelihood that Afiniti would not be in a position to meet its obligations under its present loan when they fell due, triggering a default. The basis on which this affidavit was sealed was that it contained sensitive confidential information about Afiniti’s financial position which Afiniti’s secured creditors would expect Afiniti to keep confidential, especially at a time when negotiations were ongoing. The Chief Justice accepted this as a basis for sealing the affidavit²⁶.

48. Mr Chishti issued an application to set aside the interim injunction on 4 July 2024 which came on for hearing on 18 July. At that hearing, the Chief Justice directed that Mr Chishti’s application to discharge the interim injunction should be heard concurrently with Afiniti’s application for final relief under the Originating Summons on a date to be fixed in September or October 2024²⁷.
49. Mr Chishti made a second separate application on 31 July 2024 to set aside the interim injunction on the grounds that there had been a change of circumstances and seeking additional directions to those given on 18 July and seeking an Order that Afiniti’s application be stayed until it had increased the level of fortification of its cross-undertaking to US\$200,000²⁸. It appears that this application was in part based upon the fear that Afiniti’s financial condition was deteriorating and Mr Chishti wanted to increase the level of his security against his recovery of costs and any potential damages.
50. This second application came on before the Chief Justice on 7 August 2024. It was made on the footing that there had been no note of the original *ex parte* hearing provided to Mr Chishti’s attorneys by Afiniti’s attorneys, and that the application to seal Mr Khaishgi’s second affidavit had not been disclosed or provided to Mr Chishti’s attorneys.
51. The Chief Justice refused Mr Chishti’s applications on the basis that Mr Chishti’s own attorney had been present at the original *ex parte* hearing and directed Afiniti to serve Mr Chishti with Mr Khaishgi’s second affidavit. He also granted leave to Mr Chishti to serve expert evidence in response to Professor Solomon’s affidavit on matters of US law. The Chief Justice directed that Mr Chishti’s application to set aside the interim injunction should come on for hearing at the same time as Afiniti’s Originating Summons on 24 September 2024 and gave routine directions for the exchange of skeleton arguments in advance²⁹.

²⁶ [A12]

²⁷ [A27-8]

²⁸ [A30-1]

²⁹ [A38]

52. On 6 September 2024 Afiniti applied *ex parte* to file a further affidavit sworn by Mr Khaishgi under seal to update the Court on developments regarding the solvency of Afiniti, and the decision that Afiniti had made to apply to the court for the appointment of Joint Provisional Liquidators. The basis of the application to seal the third affidavit of Mr Khaishgi was that there was a fear that Mr Chishti might seek to take steps to disturb or disrupt that application before it was presented to the Court³⁰. The application came on before Mrs Justice Subair-Williams in the absence of the Chief Justice. The application was granted on Afiniti's undertaking to serve the affidavit upon Mr Chishti's attorneys as soon as possible and in any event before the next hearing in this matter.³¹
53. In the event, the application for the appointment of the Joint Provisional Liquidators was not listed until 19 September 2024 when the appointment was made on the basis that the existing management would remain in place but that the Joint Provisional Liquidators will exercise supervision over the exercise of the Board's management (a so-called "light-touch" provisional liquidation) while a proposed restructuring is negotiated. Once the Order appointing the Joint Provisional Liquidators was made, Afiniti served Mr Khaishgi's third affidavit on Mr Chishti's attorneys.
54. Mr Khaishgi's third affidavit explained that it seems likely that the proposed restructuring would entail a sale of Afiniti's assets by the secured lenders under the terms of their security and that the result would likely be the general body of unsecured creditors of Afiniti would be left with little or no residual assets against which to prove their claims.
55. Mr Chishti's counsel made a number of complaints about the way in which Afiniti's attorneys had handled the *ex parte* proceedings.

No injunction should have been sought

56. First, it was said that there was no need for an *ex parte* hearing at all, because there was in reality no urgency, and that Afiniti had delayed making the application. Instead, it was submitted, Afiniti should have adopted a "wait and see" approach to see what Mr Keith and Mr Murphy said about Mr Chishti's claims for indemnification. It was said that Afiniti could complain afterwards and seek declaratory relief if it objected to the result.
57. Second, it was said that Mr Chishti's attorneys had taken the position that there had been a Change in Control and Afiniti was wrong to make the application because the right of selection had passed to Mr Chishti under Article 1 (d).

³⁰ [B589] at para 33

³¹ [B578-9]

58. Third, it was said that Mr Chishti had not acted in breach of the Indemnity by selecting his own Independent Counsel and Afiniti had no right to seek injunctive relief to stop him doing so, still less to obtain a mandatory order to make him rescind his instructions to his Independent Counsel.
59. Afiniti's position was that there was a time pressure running against it because if the determination was not made within 45 days from the appointment of its Independent Counsel then by default Mr Chishti would assert that he had the right to select his own Independent Counsel. If so, Afiniti faced a serious risk that it would be bound by the determination by virtue of the provisions in Article 1 (d) and Article 3 (b) of Appendix A. Afiniti did not wish to take the risk that it would be met with an unfavourable decision about which nothing could be done, or have the burden of taking action to set aside or overturn whatever Mr Chishti's Independent Counsel determined. In my view, that was not an unreasonable or uncommercial position for Afiniti to take.
60. Afiniti had also rejected the contention that there had been a Change in Control event, so that the right of selection still rested with Afiniti. If it took no action at all, Afiniti would have surrendered its only effective rights under the Indemnity. It was not unreasonable or uncommercial for Afiniti to take steps to protect those rights.
61. In my view, there was no unreasonable or inordinate delay on the part of Afiniti in seeking relief from the Court. In fact, it appears that Afiniti was trying to resolve the dispute in correspondence until Mr Chishti took the unilateral step of proceeding to select his own Independent Counsel. It was this action that led to Afiniti instituting proceedings and seeking relief from the Court. The "delay" was between 11 April and 23 May 2024, not between November 2023 and May 2024 as asserted by Mr Chishti's counsel³².
62. In my view, in the absence of a Change in Control event, the Indemnity clearly gives the right of selection of Independent Counsel to Afiniti and unless it failed to make that selection, Mr Chishti had no right to proceed to select or appoint his own Independent Counsel to determine his eligibility for indemnification under the Indemnity.
63. I am satisfied that Afiniti had a good arguable case that it had a right to select Independent Counsel under the Indemnity. This was a right which Afiniti was entitled to protect, and I agree that damages would not have been an adequate remedy for its breach.
64. Mr Chishti's counsel submitted that in proceeding the way he did Mr Chishti was not acting in breach of the Indemnity because there was no covenant that restricted him from doing so. I am unable to accept that submission. Mr Chishti is bound by the terms

³² That reference seems to relate to the first time that Afiniti's attorneys indicated that in the absence of a more reasonable approach to the selection Afiniti had made, Afiniti would apply to the Court for relief.

of the Indemnity that give Afiniti the right to select Independent Counsel and by proceeding to select his own Independent Counsel before the terms of the Indemnity that allow him to do so had been triggered, he was acting in breach of the Indemnity.

65. I am also satisfied that the balance of justice weighed in favour of granting the interim relief restraining Mr Chishti from proceeding with his selection of Independent Counsel. A right is no right at all if it cannot be enforced.

Fair presentation of Mr Chishti's case on the *ex parte* hearing

66. It was said that Afiniti's counsel did not give a fair presentation of Mr Chishti's case on the Change in Control argument at the *ex parte* application because the various grounds that were relied on at the hearing as to Change in Control as to the effect of section 98E of the Bermuda Companies Act were not explained or referred to. I will deal with the Change in Control point more fully below because its ambit was expanded considerably at the hearing in terms that were not expressed in the inter-party correspondence at the time.
67. I will note here that the Change in Control point that had been raised by Mr Chishti's attorneys in correspondence was explained to the Chief Justice, and the reasons why Afiniti had rejected that claim were set out.
68. In my view, Afiniti's counsel was entitled to assume that the only way the point had been expressed by Mr Chishti's counsel was the way it would likely be presented at an *inter partes* hearing. He was not required to imagine other ways in which the case could be put that had not been articulated, nor to speculate about novel arguments that had not been raised in what had (by then) been extensive correspondence. I do not accept the submission that there was no fair presentation of the case to the Chief Justice on 23 May on the materials as they were known (or could reasonably be predicted) at that time.

Abuse of process

69. Mr Chishti's counsel has criticized Afiniti's counsel is the failure to disclose to Mr Chishti's attorneys (i) the fact that a separate *ex parte* application had been made to seal Mr Khaishgi's second affidavit and (ii) the failure to disclose the affidavit immediately to Mr Chishti's attorneys. Further criticism was made of the failure to (i) inform Mr Chishti's attorneys about the *ex parte* application of 6 September 2024 and (ii) to serve Mr Khaishgi's third affidavit until after the hearing of the appointment of the Joint Provisional Liquidators on 19 September.
70. The second and third affidavits of Mr Khaishgi relate to the deteriorating financial position of Afiniti in fulfillment of the duty to provide full and frank disclosure to the Court.

71. The second Khaishgi affidavit alerted the Court to the fact that the secured lenders were in negotiations with Afiniti and that these negotiations were commercially sensitive and that the secured lenders expected Afiniti to keep their existence confidential. The Chief Justice acceded to this application and sealed the affidavit. It was not served upon Mr Chishti's attorneys until after the hearing on 7 August 2024 when it was ordered to be served on Mr Chishti's attorneys who had (at some point in the interim period) learned of its existence. On the face of it, this affidavit should have been disclosed to Mr Chishti's attorneys at the earliest opportunity, perhaps under strict conditions of confidentiality.
72. However, when looking at the content of the material, two points emerge: (i) the fact that Afiniti was in a vulnerable financial condition was well known to Mr Chishti from the financial statements in June 2023 to which Mr Chishti and his attorneys already had access and (ii) the content of the affidavit has no bearing on the matters to be determined by the Court in these proceedings. It might have been (marginally) relevant to the strategic approach Mr Chishti's attorneys might decide to take. It is also to be noted that Afiniti had the sanction of the Court not to disclose it, and it would also have required a further application to Court to unseal the affidavit or impose conditions. The most that can be said is that it could and (in my view) should have been served much sooner than it was.
73. The third Khaishgi affidavit concerned the imminent appointment of Joint Provisional Liquidators. An application was made to the court to seal that affidavit because of a fear that Mr Chishti would seek to use the information to disrupt the process. The learned judge was satisfied that there was a sufficient and credible risk that Mr Chishti might take some action that might prejudice the application in some way and as a precautionary measure directed that the affidavit should be served on Mr Chishti's attorneys as soon as practicable.
74. I am satisfied that in the context of avoiding the risk of disruption, it was not "practicable" (to give meaning and effect to the Order) to serve Mr Chishti's attorneys until the application had in fact been presented, and this did not happen until 19 September. This was shortly before the hearing of the Originating Summons and Mr Chishti's cross-application to set aside the Interim Injunction on 24 September. In the circumstances, I do not find that this delay was in any way abusive or prejudicial to Mr Chishti.
75. As to the effect of the delay in serving Mr Khaishgi's second affidavit, I do not think it would be a sufficient or proportionate reason to set aside the Interim Injunction on any basis, nor to treat this delay as affecting Mr Chishti in the preparation or management of the case, or as having added any real additional to cost of preparing the case. I do not accept the submission that the delay in service of this affidavit amounted to an abuse of process or that it was a "scandalous" breach of duty on the part of Afiniti's counsel.

76. Therefore, for the reasons given above, I reject the arguments advanced by Mr Chishti's counsel that the Interim Injunction should be discharged *ab initio* or as if it had never been granted³³.
77. It is of vital importance that counsel remain vigilant to ensure the Court's processes are properly followed and that the performance of opposing counsel's duty to the Court is held to the very highest standard. However, it is also equally important that counsel do not allege serious breaches of professional conduct against one another as to the performance of that duty unless the circumstances fully justify it. In this case they did not.

The Interpretation of the Indemnity

78. I turn now to the substance of the matter to be determined by the Court on the hearing of the Originating Summons. The sole question the Court has been asked to determine is whether Mr Chishti has a "present" entitlement to select an "Independent Counsel" to act as a "Determining Party" under the Indemnity.
79. It was submitted by Afiniti's counsel that the relevant date for the declaration is the date the Originating Summons was issued, namely 8 May 2024. In many (or perhaps most) cases it may well be that a declaration of right will have permanent effect and is unlimited in time so that the date of the Originating Summons is the relevant date. In this case Afiniti acknowledges the potential concern that even if Afiniti succeeds in its argument that the declaration that Mr Chishti had no "present" entitlement to select Independent Counsel on 8 May 2024, this conclusion may have been overtaken by other events by the date that Judgment is given. The appointment of Joint Provisional Liquidators may have triggered Mr Chishti's right to appoint Independent Counsel as a result of a Change in Control event. If so, the answer to the question of what are Mr Chishti's "present" rights under the Indemnity may well have changed since 8 May.
80. As far as the evidence discloses, Mr Chishti has made two selections of Independent Counsel. I propose to consider whether the purported selections made by Mr Chishti of his Independent Counsel (Messrs. Keith and Murphy) were valid "selections" under the terms of the Indemnity at the time they were made. It is these "selections"³⁴ which were in contention between the parties and the answer to this question will be relevant to the costs issues and the issues of principle which the parties have been strenuously debating. I will then consider whether the appointment of the Joint Provisional Liquidators had the effect of triggering the Change in Control provision which would

³³ It also follows that I would not have discharged the Interim Injunction with effect from 24 September 2024 had the parties not agreed that it could be discharged for the reasons given at the time.

³⁴ The selections made by Mr Chishti's attorneys on his behalf appear to have involved asking for directions to make submissions which is not contemplated by the Indemnity.

allow Mr Chishti to appoint Independent Counsel unilaterally as at the date of judgment.

Afiniti's position

81. Afiniti's position as to Mr Chishti's rights to select Independent Counsel as the determining Party under the Indemnity can be stated quite simply. There is no such right unless there has been a Change in Control event which triggers Mr Chishti's right to do so under Article 1 (d) of Appendix A.
82. A failure on the part of Afiniti to make the selection after receiving a request from Mr Chishti, or upon the failure of Mr Chishti to approve that selection, results in the ability of either party to apply to the Bermuda court to make the selection, as clearly stated in Article 1 (d). Although that is what happened in this case (namely that Mr Chishti refused to approve Afiniti's selection) neither party chose to make an application to Court. Instead, Mr Chishti proceeded to make his own selection based on his assertion that a Change in Control event had occurred which gave him the right to make his own selection unilaterally.
83. Afiniti's counsel therefore gave most of his attention in his opening address to the Court to showing why (in his submission) Mr Chishti's arguments on Change in Control were wrong. It is therefore convenient to set out Mr Chishti's arguments and then consider Afiniti's responses in relation to each argument in turn.

Mr Chishti's arguments on Change in Control

84. Apart from the argument that Mr Chishti was entitled to proceed to select Independent Counsel on his own without being in breach of the Indemnity (which I have considered and dealt with at paragraph 64 above), the main thrust of Mr Chishti's argument was to the effect that there had been a Change in Control event as defined under the Indemnity which gave him the exclusive right to proceed to select or appoint Independent Counsel.
85. Mr Chishti put his case on Change in Control on three grounds, namely (i) that there had been a Change in Control as a result of changes to the Board of Directors, (ii) that there had been a Change in Control as a result of Mr Chishti's replacement as Chairman and /or CEO, and (iii) that there had been a *de facto* Change in Control as a result of the insolvency of Afiniti³⁵.

The change in the board of directors' point

³⁵ These are set out at paragraph 25.3 of Mr Chishti's skeleton argument.

86. It has already been seen that in correspondence before the proceedings began Mr Chishti's attorneys asserted that there had been a Change in Control as a result of changes to the board of directors.
87. It was said³⁶ that seven named directors had been on the board in August 2021 and three of those directors had subsequently resigned, leaving four "continuing"³⁷ directors. The following year "well within the two-year window of change provided by the Deed" four new directors were appointed to join the "continuing" four directors. Therefore, it was said, that the four "continuing" directors did not constitute "at least a majority of the board" and "accordingly, a Change of Control has occurred."
88. This argument was repeated at the hearing, with one important modification.
89. In the correspondence Mr Chishti's attorneys accepted that the two-year period is a "rolling" or continuous period, but at the hearing Mr Chishti's counsel put the interpretation on the basis that the two-year period commenced on 1 January 2020 and suggested that the clause means that any change from the original board composition which resulted in less than 50% of the board changing resulted in a Change in Control. It was submitted that since there had been a reduction of the number of original board members below the 50% of those original directors, a Change in Control had occurred within the definition in Appendix B (iii).
90. Afiniti's position in correspondence and at the hearing was that this interpretation was plainly inconsistent with the language in Appendix B (iii) and that it gave no meaning to the words in the parenthesis namely "*...individuals who at the beginning of such period constituted the Board (including³⁸ for this purpose any new member of the Board whose election or nomination by the Company's shareholders was approved by a vote of at least two-thirds of the members of the Board then still in office who were members of the Board at the beginning of such period and such approval was not in connection with an actual or threatened proxy contest) cease for any reason to constitute at least a majority of the Board.*"
91. Afiniti's counsel submitted that the purpose of the clause was to *avoid* triggering a Change in Control event if a new member is appointed with the approval of two-thirds of the board, and that such a director was therefore not counted in the computation as a new member for the purposes of the Change in Control test.
92. When questioned during the hearing as to what meaning was to be given to the parenthetical rider Mr Chishti's counsel said that he understood the commercial purpose

³⁶ Wakefield Quin to Conyers 11 March 2024 [D596] to [D600] at [D599].

³⁷ This term is not used in the Indemnity, but was used by Mr Chishti's attorneys to describe the remaining directors.

³⁸ My emphasis added: i.e. it is the persons defined in the brackets who are to be included in the group of individuals who constituted the Board at the beginning of the period.

of the clause was to protect Mr Chishti against “perpetual stacking of the board with new members.” This submission as to the analysis of the clause is not understood, neither as to the language used nor the commercial context.

93. It seems to me that the words “during any period of two consecutive years” connote a rolling period of two years, and does not mean not within two years of the date of the Indemnity Agreement. Further, the clause could only have the meaning Mr Chishti’s counsel contends for if the proviso in the brackets did not exist. If the only words were “...*during any period of two consecutive years, individuals who at the beginning of such period constituted the Board [here omitting the brackets] cease for any reason to constitute at least a majority of the Board*” then there would have been a Change in Control event because only four of the seven individuals listed as directors on 9 August 2021 remained as directors on 25 May 2022, and they represented only 50% of the new Board, not a majority.
94. However, the ordinary and plain meaning of the words in the brackets creates an exception to the definition of “*individuals who constitute the Board at the beginning of the two-year period*” and deems (for this purpose) a new member of the Board to be counted as if he or she had been appointed at the beginning of the period if his or her appointment was approved by two-thirds of the existing Board members (who were also members of the Board at the beginning of the relevant two year period).
95. There was some speculation concerning the commercial purpose of the term. I do not need to come to any conclusion on this because the words are clear in their meaning. However, I can see the obvious benefit of such a provision in preventing an accidental or inadvertent triggering of a Change in Control event in the ordinary course of retirements and routine replacements of directors. The approval of two-thirds of the incumbent Board exclude new Board members who were appointed in a hostile take-over bid (for example) if there was no such approval. The words that exclude directors who have been appointed in the course of proxy contests from being deemed to have been directors at the beginning of the period would seem to be consistent with this interpretation.
96. Applying the proviso to the facts, the evidence relating to the appointment of Mr Shaikh as a director confirms that (i) his nomination as a director was approved unanimously by the shareholders³⁹ and (ii) his appointment as a director was approved unanimously by the other existing directors⁴⁰. (It is relevant to note that the written resolution approving Mr Shaikh’s appointment was also signed by Mr Chishti himself).
97. Therefore, although Mr Shaikh is one of the new directors appointed within the two-year period (ie on 5 October 2021), for the purposes of the Change in Control clause,

³⁹ [B161-2]

⁴⁰ [B156-9]

Mr Shaikh falls to be counted as if he had been in office at at the beginning of the period and is not counted as a new director.

98. The result is that on the evidence *five* of the eight directors listed on 25 May 2022 are Directors who are to be treated as having been directors at the beginning of the two-year period and they constitute a majority of the Board, which means that the threshold for a Change in Control under Article B (iii) has not been met.
99. Accordingly, in my judgment, Mr Chishti’s argument that a Change in Control event occurred by reason of the changes to the membership of the Board in any consecutive two-year period must be rejected.

The change in beneficial ownership point

100. Mr Chishti also contended that a Change of Control event had occurred because there had been a change in beneficial ownership of more than 30% of the shares held in Afiniti⁴¹. He relied upon Article B (i) which provides that a Change in Control event occurs when “...any “person” as such term is used in Sections 13 (d) and 14 (d) of the Exchange Act becomes the beneficial owner (as defined in Rule 13d-3 under the Exchange Act directly or indirectly of securities representing (or which upon settlement, exercise or conversion pursuant to their terms would represent 30% or more of the combined voting power of the Company’s then outstanding voting securities...”
101. Mr Chishti says that he used to be the Chairman and CEO of TRG-I which owns 35% of Afiniti. In that capacity he says he exercised the voting power of TRG-I. He says that because he is no longer the Chairman and CEO, and he no longer exercises that voting power, there has been a change in beneficial ownership for the purposes of Article B (i).
102. This is a remarkable argument which betrays a surprising and fundamental misunderstanding of the legal principles that govern the exercise of the management powers of directors.
103. It is a basic principle of company law that the powers granted to directors under the bye laws, or delegated by the board of directors to a single director such as a CEO, are not personal powers; they are fiduciary powers granted to that individual to act as the company’s agent to bind the company or take action in right or on behalf of the company⁴². The directors are subject to strict fiduciary duties to exercise those powers honestly and in good faith and with a view to the best interests of the company as a whole⁴³. A company, not being a natural person, can only act through its agents, and

⁴¹ [B377] and Mr Chishti’s Skeleton Argument at paragraph 25.3.2

⁴² A case often cited as authority for this principle is *Ferguson v Wilson* (1866) LR 2 Ch 77, 79 per Cairns LJ.

⁴³ See section 97 of the Companies Act 1981.

whatever powers are granted to them under the bye laws or delegated to them by resolution, they belong to the company, not the director who is authorized to exercise those powers. Therefore, when a CEO resigns or is replaced, this does not represent a change in beneficial ownership or change of control of the company.

104. As explained in paragraphs 6 and 7 of this Judgment, TRG-I owns 35% of the common shares of Afiniti, not Mr Chishti. Mr Chishti owns 100% of the shares in TRG-P which in turn owns an (undisclosed) share of TRG-I44. The most that Mr Chishti can say is that he owns an indirect beneficial interest in Afiniti. Legal control of Afiniti was not affected by Mr Chishti's departure from the Board.
105. On the facts of this case, the ownership of the 35% shareholding in Afiniti that belongs to TRG-I did not change when Mr Chishti ceased to be the Chairman and/or CEO of Afiniti; the legal and beneficial ownership of TRG-I's shares in Afiniti (and the beneficial ownership of the shares owned by Mr Chishti in TRG-P) remains the same today as it was when Mr Chishti was Chairman and/or CEO of Afiniti.
106. Nonetheless, Mr Chishti's counsel submitted that there had been a Change in Control because an obligation to report a change in beneficial ownership arose when he ceased to be Chairman and/or CEO of Afiniti.
107. The argument was that the definition of Change in Control in Appendix B (i) also defines a Change in Control as meaning "*a change in control ...of a nature that would be required to be reported in response to Item 5.01 of Current Report on Form 8-K (or in response to any similar item on any similar schedule or form) promulgated under the Securities Exchange Act of 1934 as amended...whether or not [Afiniti] is then subject to such reporting requirement*".
108. Although Afiniti is not regulated under the US Federal Securities Exchange Act 1933 the definition of Change in Control nonetheless requires an analysis of what would be required for a filing under Item 5.01 on the Current Report on Form 8-K. This is concerned with the reporting of a change of control of a company that is traded on a public exchange in the United States.
109. Professor Solomon gave an expert report explaining that a change in voting control requiring a filing under Rule 5.01 on Form 8-K is typically the acquisition of 50% or more of the company's voting stock, and a report of a change in beneficial ownership pertains to the ability to control the company and direct its operations through the appointment of directors is typically triggered by ownership of 50% or more of the

⁴⁴ I note in passing that in order for Mr Chishti's ultimate indirect interest in Afiniti to amount to 30%, TRG-P's interest in TRG-I would have to be in excess of 87%. It is to be inferred that whatever the size of Mr Chishti's ownership in TRG-I is through TRG-P it is less than this because if he owned in excess of 87%, Mr Chishti would be able to control all appointments to the board in TRG-I. Furthermore, it is not suggested by Mr Chishti that his ultimate indirect beneficial ownership is greater than 30% of the shares in Afiniti.

voting control of the company⁴⁵. Professor Solomon further states that Rule 13d-3 focuses on the power to direct the voting of securities⁴⁶.

110. Professor Solomon's evidence on the interpretation of Rule 501 and Rule 13d-3 is unchallenged. Although Mr Chishti adduced expert evidence from Professor Hamermesh in response to Professor Solomon's report, Professor Hamermesh's report addresses the position under Delaware law and he expressly does not address the position under the Securities Exchange Act⁴⁷.
111. Professor Hamermesh suggests that under Delaware law the fact that Mr Chishti no longer exercises the power to cast the vote of TRG-I after he left office as Chairman and CEO would amount to a Change in Control⁴⁸. However, I note that in the instructions that Professor Hamermesh was given, he was "*given to understand and assume that at all times the power to direct the voting of TRG-I's shares has been vested in TRG-I's Chairman and that Mr Chishti served in that position until November 2021 and was succeeded in that position by [Mr Khaishgi.]*" Professor Hamermesh was (apparently) told to assume that "*at no time did the board of directors of Afiniti approve or otherwise act on the replacement of TRG-I's chairman.*"
112. For the reasons I have already given in paragraph 103 above, this does not accord with the position under Bermuda law. The power to cast a vote on behalf of TRG-I in relation to the appointment of directors (or otherwise to vote TRG-I's shares in Afiniti) is vested in the Board of Afiniti under its general powers of management under the bye laws, or in a specific director by resolution of the Board. It is not a personal right that belongs to a particular director or officer. I would comment in passing that it appears that in the instructions he was given, Professor Hamermesh was asked to assume facts in Mr Chishti's favour, and this seems to have affected his treatment of the issues⁴⁹.
113. I accept the explanation given by Professor Solomon concerning the obligations to report a change of voting control and beneficial ownership under Rule 5.01 and 13d-3 of the Securities Exchange Act regime as a matter of fact for the purposes of these proceedings⁵⁰.
114. A further argument that was developed by Mr Chishti's counsel in support of the claim was that there had been a Change in Control because Afiniti had made a change to the Afiniti's beneficial ownership register (hereafter referred to as the "BO register")

⁴⁵At paragraphs 20-21 of the Solomon Report.

⁴⁶At paragraphs 29 to 36 of the Solomon Report.

⁴⁷At paragraph 9 of the Hamermesh Report ("Hamermesh")

⁴⁸At paragraph 10 of the Hamermesh Report.

⁴⁹For example, Professor Hamermesh was apparently not told that Afiniti disputed these facts. If he was told, he did not address what the position would be if the assumptions he was asked to make proved incorrect.

⁵⁰I should note that I have not taken into account Professor Solomon's analysis of the application of those matters to the facts of this case, as that is a job for this Court, not for an expert on foreign law.

showing that Mr Chishti was no longer a “Controller” of Afiniti within the meaning of section 98E (1) (b) of the Bermuda Companies Act 1981.

115. Therefore, it was submitted that Afiniti’s own corporate records reflected a change in beneficial ownership of Afiniti, and this pulled the trigger for a Change in Control event under Article B (i). It was said that the filing of a change to the BO register under section 98 H was a filing that was a “*similar schedule or form*” to the filing required under Rule 501, and therefore the requirements for a Change in Control event had been met under Appendix B (i).
116. Before turning to the provisions of Section 98, I should say at once that this argument involves an artificial interpretation of the opening provisions in Appendix B. The wording expressly limits the ambit of the definition to a filing under Item 5.01 to any similar items promulgated under the Securities Exchange Act. The definition does not extend to similar schedules or forms that Afiniti may be required to file anywhere else in the world. That alone is sufficient to end the analysis. However, because a considerable amount of Mr Chishti’s counsel’s argument was devoted to this point I will also consider the argument under the BO register requirements under Section 98 of the Bermuda Companies Act 1981.
117. In order to put the application of Section 98 E into its proper context, it is necessary to look briefly at Sections 98 F, G, H and N⁵¹.
118. Section 98 H imposes a requirement⁵² upon all Bermuda private companies⁵² to keep a beneficial ownership register:

“Duty to keep beneficial ownership register

- (1) *Every company to which this Part applies shall establish and maintain in accordance with this Part a beneficial ownership register and shall enter in its beneficial ownership register the minimum required information referred to in subsection (2) in respect of every registrable person.*
- (2) *The minimum required information referred to in subsection (1) that the company shall enter in its beneficial ownership register is as follows (a) the registrable person’s full name including, if applicable, any secondary or other name; (b) where the registrable person is an individual (i) his residential address and, if different from his residential address, an address for service; (ii) his nationality (iii) his date of birth; (c) where the registrable person is a relevant legal entity (i) the address of the person’s registered office or principal office; (ii) the date and place of registration; (iii) the form of legal entity; (iv) where applicable, the name of the exchange on which it is listed; (d) the effective date on which each person was entered into the register as a*

⁵¹ I note that these sections were not examined, explained or referred to by Mr Chishti’s counsel in the course of his presentation.

⁵² It would be impracticable for such a register to be kept for companies whose shares are traded on an appointed public stock exchange, so these are excluded under Section 98D.

registrable person of the company; (e) a statement of the nature and extent of the interest held by each such registrable person; (f) in respect of a class of beneficial owners of such a size that it is not reasonably practicable to identify each beneficial owner, details sufficient to identify and describe the class of persons who are beneficial owners; and (g) where applicable, the date on which each person who has ceased to be a registrable person in respect of it ceased to be such an owner.

(3) The beneficial ownership register shall be kept at the registered office of the company or after giving written notice to the Registrar of the place at such other place in Bermuda convenient for inspection by the Registrar.

(4) Where the beneficial ownership register is not made available for inspection by the Registrar, the Registrar may exercise the powers conferred on him by Part 3 of the Registrar of Companies (Compliance Measures) Act 2017 in respect of the company and may seek an order from the Court that the company make the beneficial ownership register immediately available for inspection.”

119. Section 98F imposes an obligation on all Bermuda companies to obtain information regarding the beneficial owners of the company.

“Companies to obtain information regarding beneficial owners

(1) A company to which this Part applies shall take reasonable steps to identify any individual who is a beneficial owner of the company and all relevant legal entities that exist in relation to the company.

(2) If, after having taken reasonable steps to identify the beneficial owners of the company and all relevant legal entities, the company is satisfied that— no individuals who are beneficial owners are identified; or if the company was not able to confirm that the individuals identified by it are the beneficial owners, the company shall keep a record of the actions taken to identify the beneficial owners thereof. For the avoidance of doubt, reasonable steps include the issue of a notice under section 98G.”

120. Section 98 G imposes an obligation on all Bermuda companies to send out notices to beneficial owners requiring the submission of information confirming the beneficial ownership of the company.

“Company to issue notice to beneficial owners

(1) A company to which this Part applies shall give notice in writing to
(a) beneficial owners and relevant legal entities identified by the company pursuant to section 98F; and

(b) any person that the company knows or has reasonable cause to believe is a registrable person.

(2) The notice shall require any person to whom it is addressed, within 30 days of the date of receipt thereof

(a) to state whether or not the person is a beneficial owner or a relevant legal entity in relation to the company; and

(b) if so to confirm or correct any minimum required information that is included in the notice and supply any required information that is missing.

- (3) *A company is not required to give a notice under subsection (1) if the company knows that the person is not a registrable person or the company has already been informed of the person's status as a registrable person in relation to it, and has received all the minimum required information.*
- (4) *For the purposes of subsection (1), the company shall be entitled to rely, without further enquiry, on the response of a person to whom a notice in writing has been sent in good faith by the company, unless the company has reasonable cause to believe that a response is misleading or false.*
- (5) *A person to whom a notice under this section is given is not required by that notice to disclose any information in respect of which a claim to legal professional privilege could be maintained in legal proceedings."*

121. Section 98 E defines what is a beneficial owner for the purposes of fulfilling the obligation to obtain information and keep a BO register.

"Meaning of beneficial owner

(1) In this Part "beneficial owner" means

- (a) any individual or individuals who own or control more than 25% of the shares, voting rights or interests in the company through direct or indirect ownership thereof;*
- (b) if no such individual or individuals referred to in paragraph (a) exist or can be identified, any individual or individuals who control a company by other means;*
- (c) if no such individual or individuals referred to in paragraphs (a) and (b) exist or can be identified, the individual who holds the position of senior manager of the company,*

and "beneficial ownership" shall be construed accordingly;

"control by other means" includes the right to appoint or remove a majority of the board of directors of a company and the exercise of control over a company by any means other than control by ownership of any interest;

"senior manager" means the chief executive, managing or executive director or president of a company or other person holding such senior position in the company by whatever title known.

(2) Shares or voting rights held by an individual or individuals shall be an indication of direct ownership.

(3) Shares or voting rights held

(a) by a relevant legal entity, which is under the control of an individual or individuals; or

(b) by multiple relevant legal entities,

which are under the control of the same individual or individuals,

shall be an indication of indirect ownership by such individual or individuals.

122. Section 98 N confers power on the Registrar of Companies to produce the information contained in the company's BO register.

“Power to obtain information and reports

- (1) The Registrar may by notice in writing served on a company or any registrable person require the company or registrable person (a) to provide the Registrar (or such person acting on behalf of Registrar as may be specified in the notice), at such time or times or at such intervals or in respect of such period or periods as may be so specified, with such information as the Registrar may reasonably require for the performance of his functions; (b) to provide the Registrar with a report, in such form as may be specified in the notice, of any matter about which the Registrar has required or could require that company or registrable person to provide information pursuant to this Part.*
- (2) The person to whom a notice is served under subsection (1) shall within 30 days of receipt of such notice provide the information requested by the Registrar.”*

123. Section 98N puts into proper context the meaning and purpose of section 98E. It can be readily appreciated that the legislative aim of these provisions is to ensure the Bermuda companies meet modern international standards of transparency and compliance with international money laundering and anti-terrorist financing obligations (i) to demonstrate that those who hold the ultimate beneficial interest in companies registered in Bermuda have been properly screened and those that exercise control over the company have been investigated and their identities disclosed and (ii) to ensure that those who have the ultimate beneficial ownership and/or exercise the control that lies behind the registered ownership are “transparent” to the Registrar of Companies.
124. The explanatory statement in the Guidance Notes issued by the Ministry of Finance dated 8 January 2019 explains in the opening paragraphs the purpose of the amendments to the Companies Act that appear in the sections referred to above.

“1.1 FATF recommendations and OECD standards require jurisdictions to maintain beneficial ownership. Such information must also be accessible and made available upon request to a requesting jurisdiction, for the administration or enforcement of their domestic laws, be it for tax, anti-money laundering, regulatory commercial or other reasons. Bermuda has committed and strives to continue to meet such international standards.

1.2 To comply with such international standards, the Government of Bermuda has adopted amendments to various provisions of the Acts by the following legislation:

- the Companies and Limited Liability Company Amendment Act 2016; and*
- the Partnership, Exempted Partnerships and Limited Partnerships (Beneficial Ownership) Amendment Act 2018.*

The legislative framework requires legal entities to keep a BO [Beneficial Ownership] register of individuals or RLEs [Relevant Legal Entities] that own or have control over such entities. The obligation to keep a BO register is in addition to the obligation to keep other information, such as a register of

members, register of limited partners and a register of directors or register of managers (as the case may be).”⁵³

125. In my judgment the provisions under sections 98 E F G H and N of the Companies Act 1981 do not have the effect of changing the ordinary rules for determining the legal or registered ownership or control of companies registered in Bermuda. They are for the purpose of enabling the Registrar of Companies to respond to a request for information made through the Ministry of Finance by a requesting authority in an overseas jurisdiction in order to meet Bermuda’s international obligations of tax and regulatory transparency.
126. It is also relevant to note that Mr Chishti was registered on Afiniti’s BO register as a “Controller” until November 2021 because he fell under section 98 E (1) (b) i.e. within the category of persons who controlled the company by “other means” than as a shareholder holding 25% or more of the issued shares. The “means” of that control was not disclosed, but Mr Chishti was *not* described as a beneficial owner in Afiniti’s BO register.
127. In relation to the drafting of Appendix B to the Indemnity, it would have been very easy for the draftsman to have included a reference in Appendix B to a circumstance that required a change to the BO register maintained by Afiniti in Bermuda as a Change in Control for the purposes of Appendix B. The relevant amendments had been made to the Companies Act 1981 by the time the Indemnity was drafted and signed. The draftsman chose a different standard.
128. It is important to appreciate that a BO register kept under section 98 is not a document that is filed on a public register, nor is it a document that is available for inspection by the public at the company’s registered office (unlike a share register); it is a document maintained by a company at its registered office and it is available only to be produced to the Registrar of Companies under section 98 N when a request has been made to the Ministry of Finance by a foreign regulatory body or tax authority. In my view, therefore, in this respect a Bermuda company’s BO register is very *dissimilar* to the Rule 501 and 13d-3 filings under the US Securities Exchange Act regime referred to in Appendix B.

The de facto Change in Control point

129. Finally, it was submitted by Mr Chishti’s counsel that there has been a Change in Control event as a result of the appointment of the Joint Provisional Liquidators on 19 September 2024⁵⁴.

⁵³ This is in Mr Chishti’s authorities at tab 2.

⁵⁴ [E642-6]

130. It was said that the court will look to the substance of the events rather than the form, and that upon the insolvency of Afiniti, the secured lenders now have *de facto* control over Afiniti, and that this also triggers a Change in Control event under the Indemnity.
131. Whilst the court may well have regard to the substance of events rather than the form in many circumstances, the issue before the court is how to interpret the express terms of a contract which the parties entered into to regulate their own relationship. The definitions and terms and conditions they agreed are set out in a document which they both wish to enforce. The terms of their agreement can only be enforced according to those terms. It is not a question of looking at substance over form for the purposes of interpreting what the parties actually agreed.
132. Under the terms of the Indemnity at Appendix B (ii) it is expressly provided that a Change in Control will be deemed to occur if Afiniti “*consummates a merger, consolidation, scheme of arrangement, sale of assets, or other reorganization as a consequence of which members of the Board in office immediately prior to entry into the agreement providing for such transaction constitute less than a majority of the board of directors or similar governing body of the company that is then the ultimate parent company of the corporate group of which [Afiniti] is a part upon completion of such transaction.*”
133. The appointment of the Joint Provisional Liquidators expressly left the current Board in place, albeit subject to the supervision of the Joint Provisional Liquidators in the exercise of their powers of management. There has been no scheme of arrangement which has been consummated and there is no evidence that there has been a sale of assets. Although these steps may be contemplated and may occur in the future, as at the date of the hearing they had not. Therefore, for the purposes of the Indemnity, no Change in Control event had occurred by that date (or by the date of this Judgment).
134. It is very likely that a Change in Control event will occur that will trigger Mr Chishti’s right to select Independent Counsel under the Indemnity, but it has not, in my judgment, occurred yet.

Conclusion

135. The result of the analysis is that Afiniti’s application for a declaration under paragraph 2 of the Originating Summons succeeds in terms. Therefore, I make the declaration in terms of paragraph 2 of the Originating Summons and (for the reasons given in paragraphs 59-76 above) I dismiss Mr Chishti’s cross-application to set aside the Interim Injunction *ab initio*. It follows that there will be no enquiry as to damages.

Costs and Fortified Undertaking

136. The normal rule is that costs follow the event. There have been several applications where the costs have been reserved. Although there are provisions that grant full indemnification to Mr Chishti for his legal costs in the event he is successful in establishing his rights under the Indemnity, there is no equivalent provision made for Afiniti. Therefore, I will make an award of costs on the standard scale in favour of Afiniti which will become effective in 14 days *unless* Mr Chishti makes application within 14 days of the date of this Judgment to be heard on costs, in which case my Order as to costs will not take effect until a hearing on costs has been determined, or in default of a hearing, a further Order is made.
137. Afiniti has secured US\$100,000 against its cross-undertaking by a deposit in the trust account of Conyers Dill & Pearman Limited. That fund shall be held until such time as the 14-day costs application period has expired or, in the event that Mr Chishti applies to be heard on costs, until after the hearing on costs has been determined, or in default of a hearing, until a further Order of the court.
138. Counsel are to perfect an Order reflecting the terms of Judgment set out in paragraphs 135-7 above.

Dated this 1 October 2024



THE HON. ANDREW MARTIN
PUISNE JUDGE