

In the name of the King

Judgment

AMSTERDAM DISTRICT COURT

Private law division, judge in preliminary relief proceedings, civil-law matters

case number / docket number C/13/682073 / KG ZA 20-306 CdK/MvG

Judgment in preliminary relief proceedings of 14 May 2020

in the matter of

1. **LIENARD EVERTS B.V.**,
a private company with limited liability [*B.V.*]
with registered office in Huizen,
2. **CARMA HOLDINGMAATSCHAPPIJ B.V.**,
a private company with limited liability [*B.V.*]
with registered office in Utrecht,
claimants by draft summons of 9 April 2020,
represented by P.D. Olden LLM of Amsterdam,

versus

NORDIAN FUND III COÖPERATIEF U.A.,
a cooperative association with excluded liability
with registered office in Amsterdam,
defendant, appeared voluntarily,
represented by A.F.J.A. Leijten LLM, O.J.W. Schotel LLM and J.M. Schepel LLM of Amsterdam.

The claimants will hereinafter collectively be referred to as Everts et al. and individually as Everts and Carma. The defendant will hereinafter be referred to as Nordian.

1. The course of the proceedings

Due to the Corona crisis the judge in preliminary relief proceedings, in accordance with the Temporary derogation applicable to preliminary relief proceedings in district courts in commercial and family matters, had scheduled a personal appearance of the parties on 30 April 2020 via Skype for Business. On that occasion Everts et al. explained their claims as detailed in the summons. Nordian conducted a defence on the basis of a statement of defence which it had submitted beforehand. Both parties submitted exhibits and a memorandum of oral pleading and had their positions explained in greater detail. After a further debate the parties requested the court to render judgment, which was subsequently scheduled for today. Present at the oral hearing via Skype for Business were:
on the part of Everts et al.: S. Everts, director of Everts. M. van Doorn, director of Carma, with counsels Olden and M.J. Faber;

on the part of Nordin: G. Beusmans, partner, P. Bos, managing partner, F. van Schijndel, associate, and counsels Leijten, Schotel and Schepel.

2. The facts

2.1. Everts and Carma are the personal holding companies of S. Everts and M. van Doorn respectively. S. Everts and Van Doorn are the incorporators and (indirect) directors under the articles of association of J-Club International Holding B.V. (hereinafter: J-Club). Collectively Everts et al. are the holders of around 61.5% of the shares in J-Club. The remaining shares are held by investors.

2.2. The activities of J-Club involve installing displays in retail chains (department stores, super markets, fashion chains and drugstores) for jewellery, hair fashion products, sun glasses and reading glasses, greeting cards and other fashion accessories, which products are sold on consignment in those stores. Nearly all the products sold by J-Club are produced in China. J-Club is active in 22 countries and generates 80% of its sales in the Netherlands, Germany, France, Belgium, Italy, Switzerland and Austria. In 2019 J-Club achieved an EBITDA of approximately 9 million, with a total number of approximately 28,000 displays in stores.

2.3. Nordin is a part of Nordin Capital Partners, a Dutch investment company.

2.4. In October 2019 J-Club approached Nordin and 21 other candidates regarding a management buy-out of J-Club (Project Sparkle), whereby Everts et al. and one of the candidates would become shareholders in a new holding company, which was going to hold the shares in J-Club. The idea behind the buy-out was to enable the expected growth of J-Club and provide the minority shareholders to cash in on their stake in the company.

2.5. During Project Sparkle Everts et al. were assisted by Rabobank M&A and the law firm of NautaDutilh, whereas Nordin was assisted by the law firm of CORP en Nielen Schuman, one of whose activities is providing assistance and advice in takeovers.

2.6. By letter of 20 December 2019 Nordin made an indicative offer for J-Club. On 3 and 4 January 2020 Rabobank M&A on behalf of Everts et al. sent a letter to Nordin and four remaining candidates, in which the parties were invited to take part in the second round of the bidding process, with a view to reaching a binding offer. Within that context Nordin was given access to a virtual data room in which, among other things, transaction documentation had been made available, including a Share Purchase Agreement (SPA). Also available in the virtual data room was information about J-Club for the benefit of a due diligence investigation.

2.7. By e-mail of 12 February 2020 Nielen Schuman on behalf of Nordin shared a base case model (the Base Case Model) with Iinvest, a financing company which had been approached by Nordin. The Base Case Model is a conservative estimate of the long-term expectations, with matters such as the EBITDA being taken into account.

2.8. By letter of 24 February 2020 Nordin made a binding offer for J-Club. This matter contains the following passages, to the extent relevant:

With this letter we submit our binding offer for J-Club and would like to explain 'Our view of the Enterprise', followed by the 'Valuation'. Next we will explain our views regarding the 'Structure of the Transaction', the 'Share value' and the 'Subsequent steps' in order to come to a closing of the transaction.

(...)

Proper funding: In the past few weeks we have been busy obtaining adequate funding. As you can read in the enclosed commitment letter, we have together with Iinvest reached agreement on a very flexible financing structure, inter alia containing a large CAPEX and NWC facility;

(. ..)

We are pleased to have had the chance in the past week together with Sjoerd and Marcel to look into the structure of a possible deal. In that light we have reached agreement about a structure on the assumption of obtaining bank financing in the amount of EUR 45 million. At this moment Idinvest have committed themselves to financing the transaction at closing for a drawn down amount of EUR 40 million. We are also waiting for a reply from BlackRock, who have indicated that they are looking into a financing level of EUR 40-45 million. We are currently awaiting confirmation of the moment of the final decision.

(...)

EUR 125 million

This bid concerns 100% of the shares on a 'cash-and-debt-free basis' ("Enterprise Value") as at the effective date of 31 August 2019 and is based on the available information and our own due diligence investigations. This Enterprise Value is also in line with the agreed structure of the past week and is built up as follows:

- The Enterprise Value is made up of a fixed amount of EUR 100 million, to be settled at closing, and a variable subsequent amount of EUR 25 million (the "Ratchet");
- The Ratchet becomes due and payable when a money multiple of 3.0x is generated by Nordian, following which 50% of the Nordian proceeds becomes due to the sellers, with a maximum of 25 million.

Structure of the transaction

Since it is not yet certain if the desired funding will be provided by BlackRock, we have included two options. Option 1 is based on the debt level of EUR 40 million to which Idinvest has committed itself and which enables us to close the deal quickly. Compared with the structure that was agreed last week we have in this option allocated the difference in funding of EUR 5 million to a EUR 2.5 million higher vendor note for Sjoerd and Marcel, EUR 1.25 million in additional equity contribution by Nordian and EUR 1.25 million in additional equity contribution by Sjoerd and Marcel.

Option 1: Binding offer with committed bank financing of EUR 40 million

This binding offer has been fully approved by Nordian's Investment Committee and may lead to signing within the foreseeable future. Idinvest's committed financing applies up to and including Friday 23 February.

- **Bank financing of EUR 40.0 million provided by Idinvest:** In the past few weeks we have together with Nielen Schuman and Idinvest been working on a flexible and growth-oriented financing structure. As you can read in the enclosed commitment letter, the present financing structure leaves a great deal of room for growth, as is also clearly shown by the large CAPEX and NWC facility with generous covenants;
- **Vendor loan of EUR 10 million:** Sjoerd and Marcel agree to provide a vendor loan of EUR 10 million at 6% interest. This vendor loan has to be repaid in the event of Nordian's exit or so much earlier as permitted by the cash situation and more senior financing parties;
- **Equity investment of EUR 31.5 million by Nordian:** Nordian agrees to invest EUR 31.5 million and will receive a share of 61.1% in return;
- **Reinvestment of EUR 10 million each for Sjoerd and Marcel:** Sjoerd and Marcel agree to invest EUR 10 million each in the equity capital of the enterprise and will each of them receive a share of 19.5% in return;
- **Management participation:** The remaining management members agree to make an investment by way of a Trust Office Foundation (in Dutch: STAK) and will in exchange receive an envy of 1.0x - 3.0x, depending on the amount of the investment. The management investment level, yet to be determined, will lead to a pro rata dilution on the part of Nordian, Sjoerd and Marcel.

(...)

Option 2: Offer containing a financing arrangement clause and with bank financing in the amount of EUR 45 million

This offer is based on the structure that was agreed last week, which was also authorized by Nordian's IC, but subject to obtaining committed financing in the amount of EUR 45 million from BlackRock.

(...)

Subsequent steps

To emphasize our interest in J-Club, option 1 of this offer letter may be regarded as fully binding and we are convinced that with this option we have provided you with a great deal of security and promptness of execution. However, the following standard provisos still apply:

- Reaching agreement on an SPA and an SHA which are convenient to both parties. Both documents have already been the subject of preliminary discussions between NautaDutilh and Corp Advocaten (see enclosed mark-ups);
- Obtaining Warranty & Indemnity insurance. Given the fact that our due diligence activities have been fully completed, we expect to be able to obtain this within 5 working days;
- Reaching agreement on final financing documentation with Idinvest and/or BlackRock. We would like to point out that the Idinvest financing has been committed in full (on the basis of a specific Nordan case) and has already been worked out on commercial terms. On this matter see also the commitment letter with this letter;
- Obtaining the approval of the relevant competition authority. On the basis of the investigation carried out by Maverick Advocaten it has become clear that such is necessary with regard to Germany only. As a rule this takes 2 weeks. We expect no issues, given our experience in the matter.

2.9. In substantiation of its offer Nordan has enclosed a Commitment Letter from Idinvest dated 24 February 2020 with the letter referred to in 2.8. This letter states as follows, to the extent relevant:

We, IDINVEST PARTNERS SA (the “**Mandated Lead Arranger**”), are pleased to set out in this letter (the Commitment Letter) the terms and conditions on which we are willing to arrange and commit to provide the Facilities (including through certain of its Affiliates or Related Funds in accordance with paragraphs 11.3 and 11.4 below) for, amongst other things, payment of (part of) the consideration payable by the Group in respect of the Acquisition and the refinancing of any of the indebtedness of the Target Group.

(...)

2.1 Subject to acceptance of the terms of the Mandate Documents in accordance with paragraph 19 (*Acceptance*), this offer to commit to provide the Facilities is made on the terms of the Mandate Documents and is only subject to:

- (a) the preparation, execution and delivery of the Facility Documents, in each case, reflecting the terms of the Mandate Documents and delivery of applicable initial conditions precedent (customary for this type of financing, including applicable due diligence reports and tax structure memorandum);

(...)

2.2 For the purpose of the initial conditions precedent referred to under paragraph 2.1(a) above, the Mandated Lead Arranger confirms that:

- (a) it has completed all its due diligence on the Target Group and the Sponsor as well as the proposed financing (as contemplated under the Commercial Grid);
- (b) it has reviewed and is satisfied with the most recent versions of the Base Case Model delivered to it (as at the date of this letter) (provided that none of these in final form contains any changes that are materially adverse to the interests of the Mandated Lead Arranger under the Mandate Documents or any of the Facility Documents); and
- (c) it has received all necessary credit committee and other approvals or consents required for it to provide and/or fund (as applicable) the Facilities on the basis as set out in the Mandate Documents.

2.10. Also on 24 February 2020 Nordan sent Everts et al. an amended mark-up of the SPA. On 26 and 27 February 2020 the parties, assisted by their lawyers, negotiated about the SPA. During those negotiations the parties spoke about the Corona crisis and agreed not to include any material adverse change clause or specific Corona clause in the SPA.

2.11. Agreement was reached by the parties on 28 February 2020 and the Signing Protocol was signed, annexed to which was the SPA in 'agreed form'. The Signing Protocol states as follows, to the extent relevant:

- E. Each of the Parties has taken all necessary corporate action and has obtained all necessary internal and external approvals, authorizations, consents, clearances, permits and waivers for the acquisition contemplated by this Signing Protocol, except for such approvals, authorizations, consents, clearances, permits and waivers which are pending as a condition precedent set forth in this Signing Protocol or in the SPA.
- F. The Parties wish to agree in this Signing Protocol the terms and conditions of entering into the Agreed Form SPA.

(...)

Article 2 W&I Insurance Condition

- 2.1 The Parties acknowledge that the Agreed Form SPA cannot be signed until Nordian Capital has taken out a W&I insurance policy in respect of the Proposed Transaction providing coverage for the far majority of the claims under the Seller's Warranties as well as claims under the Tax Indemnity, as defined in the SPA, and it being understood that uncovered claims under the Seller's Warranties and the Tax Indemnity, the latter to the extent not explicitly agreed otherwise in the Agreed Form SPA, remain for the risk and the account of for the Purchaser (as defined in the Agreed Form SPA) (the "**W&I Insurance Condition**").
- 2.2 Nordian Capital shall be solely responsible for the satisfaction of the W&I insurance Condition. Nordian Capital shall use best efforts to fulfil the W&I Insurance Condition as soon as possible in any event within 10 Business Days after signing this Signing Protocol. Nordian Capital shall provide the Sellers with the W&I insurance policy upon its availability.

Article 3 Signing

Subject only to satisfaction of the W&I Insurance Condition, the Parties irrevocably commit to sign the Agreed Form SPA, and Seller 1 and Seller 2 shall procure that the Other Shareholders shall forthwith sign the Agreed Form SHA, within 2 business days after the date on which the W&I Insurance Condition is satisfied or such other date as agreed between the Parties.

2.12. The SPA contains two conditions precedent regarding the transfer of the shares: a Regulatory Condition and a Finance Condition. The Regulatory Condition was fulfilled as a result of the approval of the share transfer by the German competition authority on 17 March 2020. With respect to the Finance Condition the SPA states as follows:

4.1 Finance Condition

The Purchaser shall only be obliged to proceed to Closing if and when a senior term loan agreement (**Loan Agreement**) has been executed by the Purchaser for an amount of at least EUR 40,000,000 (forty million euro) for part of the Purchase Price on terms that, as per the date of this Agreement, are customary for this type of leveraged transaction (the **Finance Condition**).

(...)

Fulfillment of the Finance Condition

- 4.4.4 The Purchaser shall and shall procure that each member of the Purchaser Group shall (i) use reasonable commercial endeavours to have the Loan Agreement executed and shall use reasonable commercial endeavours to have all conditions precedent for utilisation satisfied within three (3) weeks after the date of this Agreement and (ii) keep the Sellers' Representative reasonably informed about the status of satisfaction of the Finance Condition and in particular if it becomes aware of anything that could result in the satisfaction of the Finance Condition being delayed or not being satisfied.

(...)

- 4.4.5 In the event no agreement will be reached with the initial financial institutions approached by the Purchaser (as set out in the Debt Term Sheet) and, consequently, the Loan Agreement with the initial financial institutions shall not be executed, the Purchaser is obliged, as soon as possible after it became known that no Loan Agreement shall be executed with such initial financial institutions, to contact other reputable financial institutions to obtain financing as referred to under Clause 4.1 above and the

Purchaser shall and shall procure that each member of the Purchaser group shall (i) use reasonable commercial endeavours to have the Loan Agreement executed on terms that, as per the date of this Agreement, are customary for this type of leveraged transaction, and use their reasonable commercial efforts to have all conditions precedent for utilisation satisfied within three (3) weeks after it has established that no agreement has been reached with the financial institutions (ii) and regularly inform the Sellers' Representative of the progress and communication with such other financial institutions and take into consideration the Sellers' Representative's reasonable feedback.

Article 4.5 of the SPA provides that the parties may unilaterally abandon the agreement, if the two conditions precedent of the SPA have not been fulfilled on 1 July 2020 at the latest (Long Stop Date).

2.13. On 10 March 2020 one of CORP's lawyers on behalf of Nordian sent the following news about the progress of the W&I insurance to Everts et al.'s lawyer:

"We expect to receive an update on the policy tomorrow, which should then be final, or as good as final. I shall inform you the moment we have received the latest version of the policy",

and on 12 March 2020:

"We have nearly completed matters with the insurance company, but there still remain a number of tax exclusions that Nordian would like to see taken out of the policy. It is for this reason that a call will be scheduled with Nordian's tax advisers and the insurance company. The consequence of this might be that we will not be able to finalize the W&I tomorrow, but shortly after the weekend in any case".

2.14. By e-mail of 12 March 2020 Nordian sent four Corona scenarios to J-Club: a low impact, a medium impact, a high impact and an extreme impact scenario, plus the expected EBITDA effect.

2.15. By e-mail of 19 March 2020 Beusmans (Nordian) suggested to S. Everts and Van Doorn (Everts et al.) to put the transaction process on hold, in order to await the consequences of the Corona crisis for J-Club. One of its passages reads as follows:

We greatly appreciate your suggestion to investigate in what way the deal structure may be adjusted with a view to allowing for the risks posed by the Corona crisis. However, we have come to the conclusion that at this moment it is impossible to find a deal structure that is acceptable to the sellers and is doing justice to the unimaginable risks of the Corona situation. More in particular this means that the financing arrangement clause has to stay in the contract on the proposed closing date, since Idivest currently does not want to provide financing and we consider it highly unlikely that at the present moment we will find another financial institution prepared to finance the transaction. This is highly inconvenient for all the parties involved, both for the selling shareholders who will now have to remain in the dark about the moment of closing, and for the enterprise, which is prevented from pursuing its growth strategy, and for ourselves, since it has become impossible for us to close the contemplated transaction.

We have already said this a number of times, but find it important to express it once again in this letter: Nordian is looking forward to closing the transaction as soon as it has become clear what the impact of Corona will be on the enterprise and hence on the transaction. It is for these reasons that we propose to agree on a number of matters that will contribute towards us being able to resume the closing process as soon as possible and to finally perform the closing:

1. Continuing our talks about the way the crisis is developing, the effects it has on J-Club and Nordian and what we can do for each other in facing the challenges that are going to arise, more specifically in weekly conference call as far as we are concerned;
2. Keeping in close contact with Idivest, with frequent updates regarding the situations at J-Club, Nordian and Idivest;
3. Sharing information on a weekly basis about market developments at J-Club and enterprises of Nordian, which may provide a basis for assessing to what extent the situation is returning to normal and for resuming the transaction process;
4. Completing any current processes regarding W&I Insurance, so that these will not provide any problems any longer for a possible resumption of the transaction process. With respect to this process two follow-up investigations have not yet been completed at this moment, i.e. regarding transfer pricing and IT software. We would be happy to tackle these issues with you and will of course pay for any extra costs incurred as a result thereof.

2.16. By letter of 23 March 2020 Everts et al. among other things wrote as follows to Nordian:

4. In the Signing Protocol you undertook to take out W&I Insurance within 10 Business Days and to sign the SPA, in the agreed form, within 2 Business Days after the W&I Insurance being in place (the W&I Insurance Condition). Signing of the SPA is not subject to any other condition than the W&I Insurance. In your e-mail of 19 March 2020 you have not alluded to any issues out of your control which prevent that

the W&I Insurance Condition is satisfied. Therefore, we must assume that you have chosen not to satisfy the W&I Insurance Condition or have failed to notify us of its satisfaction.

(...)

6. In summary, you are obligated to use reasonable endeavours to satisfy the Finance Condition and to that effect procure financing from your initial financial institution or alternative sources.
7. First, we remind you that one of the reasons that you were chosen as a buyer was that you submitted a Commitment Letter from Idinvest of 24 February 2020. In your offer letter of 24 February 2020 you stated that "Option 1 (a transaction supported by Idinvest) assumes a debt level of EUR 40 million committed by Idinvest, which allows a fast execution." In the Commitment Letter, Idinvest "... agrees to fully provide the Facilities in the amount and as set out in the Commercial Grid." The Facilities set out in the Commercial Grid are sufficient to satisfy the Finance Condition. We obviously relied on your offer letter and the Commitment Letter when we turned down other competing offers and when we agreed to the Finance Condition in the SPA. You must have been well aware of this. Your casual remark that Idinvest is no longer willing to provide financing is not acceptable.
8. In order to fulfil your reasonable effort endeavours under Clause 4 SPA, you are obligated to seek specific performance from Idinvest, if necessary by filing legal proceedings. We are happy to support such an action. As a beneficiary of the Commitment Letter, we consider the Commitment Letter a "third party stipulation" as set out in Section 6:253 DCC, which is hereby accepted.
9. Second, we expect you to make every reasonable effort to seek alternative financing in parallel to your efforts to secure financing from Idinvest. We request you to keep us abreast of your efforts.
10. Third, we have offered you to increase our vendor loan. This would help you to satisfy the Finance Condition in all material aspects. We are demonstrably willing to accept more "skin in the game" in these challenging times. We feel encouraged by the mutual feeling of partnership which has grown over the past few months. This offer is still on the table.

2.17. By letter of 26 March 2020 Nordian's lawyer Leijten among other things wrote as follows to Everts et al.:

Nordian's position is as follows. The W&I Insurance Condition has not yet been satisfied, because the discussion with the insurer has not been finalized, despite Nordian Capital having used best efforts, as per Article 2.2 of the Signing Protocol, to fulfil the W&I Insurance Condition as soon as possible and in any event within 10 Business Days after 28 February 2020. The mere fact that this condition has not been fulfilled within that period, doesn't alter the fact that the obligation to sign the SPA within 2 business days is only triggered upon the W&I Insurance Condition being satisfied, which it is not.

(...)

Regarding Idinvest, Nordian's alternative (*subsidaire*) position is as follows. Idinvest has informed Nordian that its Investment Committee is concerned about the way the Covid-19 situation has been unfolding in Europe over the past few weeks, with store closures materially impacting revenues and liquidity for all retailers and the looming recession putting pressure further on retailers as well as on consumer spending going forward.¹ Therefore and according to common practice (not just under such circumstances but generally for these type of deals where the commitment to fund is subject to satisfaction of agreed conditions precedent such as satisfactory vendor and purchaser due diligence and an appropriate model with a current reflection of the business and appropriate forecasting), Idinvest's Investment Committee has requested that the due diligence reports and the base case model (which Idinvest had received when signing the Commitment Letter in then-current draft form) to be updated with the most recent information available and standard sensitivities for a prolonged downturn. Idinvest has indicated it will need this for assessing whether the initial conditions precedent for funding the Transaction can be satisfied.

2.18. By e-mail of 27 March 2020 Bos (managing partner of Nordian) informed S. Everts and Van Doorn (Everts et al.) that Nordian had been requested by Idinvest to carry out additional due diligence activities on account of the Corona crisis.

2.19. By letter of 27 March 2020 Everts et al's lawyer Olden among other things wrote as follows to Nordian, or their lawyer:

7. You then move to argue that the W&I Condition has not been satisfied, because the discussion with the insurer has not been finalized, despite Nordian Capital having used best efforts as per Article 2.2 of the

Signing Protocol. This is a blatant misrepresentation of the facts. The record shows that Nordian *chose* not to fulfil the W&I Condition: there are no circumstances out of Nordian's control which prevented its satisfaction.

(...)

10. W&I policies typically contain exclusions. Apparently the W&I insurance offered to Nordian on or before 12 March was no exception. The words "would like to" (in Dutch "graag", translator) illustrate that on 12 March 2020 W&I insurance was already readily available at that time, but for some "nice to haves" Nordian was hoping to (re)negotiate. This was repeatedly confirmed after 12 March 2020, until Diederik Baas informed Jeroen Preller on 19 March 2020 that Nordian had stayed further talks with the insurer. Nordian's e-mail of 19 March 2020 however indicates that finalization of the W&I insurance is a formality.
 11. In view of these facts, Nordian cannot hope to be protected by the W&I Condition. Nordian, being a professional party boasting a track record of similar transactions, assisted by multiple experts, would also be ill-advised to rely on "unforeseen circumstances" in this respect. As set out in Sellers' letter of 23 March 2020, Nordian can no longer invoke the W&I Condition and the Signing Protocol is unconditional as of 16 March 2020.
 12. Notwithstanding the above, the Sellers are happy to accommodate Nordian if a couple of additional days would help it to finalize the W&I Insurance without these exclusions. In its e-mail of 19 March 2020, Nordian stated that the insurer was conducting a further investigation into "transfer pricing" and "IT software". J-Club is happy to reach out to the W&I insurer together with Nordian to further finalization, should Nordian wish so.
- 2.20. By e-mail of 30 March 2020 Bos (Nordian) informed S. Everts and Van Doorn (Everts et al.) what information Idinvest wanted to be provided with for an additional due diligence investigation. By e-mail of 31 March 2020 S. Everts replied to Bos that Idinvest had stated in their letter of 24 February 2020 that their due diligence investigation had been completed, that there was no continuing obligation to provide information and that Idinvest had to perform.
- 2.2.1. By letter of 1 April 2020 Leijten on behalf of Nordian among other things informed Everts et al., or their lawyer, as follows:
- Nordian's position regarding the W&I Insurance Condition (as defined in the Signing Protocol) should be seen in light of the events above. After notifying Sellers on Thursday 12 March 2020 of several outstanding issues, reality had been so profoundly altered by the COV-19 related measures that as of Thursday 19 March 2020, Nordian felt compelled to suspend its efforts to obtain W&I insurance and focus on assessing the implications of these measures on the Company and the Transaction. In view of all relevant circumstances, the standards of reasonableness and fairness do not warrant the W&I Insurance Condition to be deemed fulfilled.
- Additionally, the recent events in relation to COVID-19, the various government responses, and – specifically - the implications of these events and responses for the Company's business are precisely the kind of circumstances that the legislator had in mind when drafting Article 6:258 DCC. Sellers' expectation regarding Nordian being clairvoyant does not have a basis in reality, since even the WHO and national governments were unable to predict and anticipate the speed of the spread of COVID-19 and related developments on retail business. The only sensible expectation at the time of Nordian's Binding Offer and the Signing Protocol could not have included the pitch-black scenario that has developed since then. Consequently, The Sellers cannot reasonably expect Clauses 2 and 3 of the Signing Protocol to remain unaltered or be enforced unaltered.
- 2.22. By e-mails of 6 and 10 April 2020 S. Everts sent Nordian an update about the situation at J-Club. He among other things wrote that stores were going to be reopened, that sales were increasingly picking up and that he expected that J-Club would end the month of April with a positive EBITDA. S. Everts furthermore expressed the hope that, despite the fact that the parties were briefly having 'a disagreement', they would nevertheless make a joint effort at 'taking J-Club to the next level'.
- 2.23. By e-mail of 10 April 2020 Bos (Nordian) among other things wrote as follows to S. Everts and Van Doorn (Everts et al.):

"Thank you for your updates of 6 and 10 April. (...)

We regret not seeing eye to eye with you at this moment. (...) It is a good thing in itself that you let us know that things are improving at J-Club, compared with what we saw in March, but your brief updates do not provide us with an insight into the real situation. In addition you have given us (far) too little input to put before Idivest. Their specific questions still have not been addressed by you and we really need your assistance in the matter, for we do not have the required data. (..)"

3. The dispute

3.1. Everts et al. - briefly put - request the court:

- I. to order Nordian to sign the SPA in a legally valid manner, or cause it to be signed, within two working days from the date of this judgment, subject to a periodic penalty payment of EUR 500,000 for each breach of this order, plus a penalty of EUR 50,000 for each day such breach continues, with a maximum of EUR 5,000,000;
- II. to forbid Nordian for a period of four months from the date of this judgment to invoke the Long Stop Date as referred to in article 4.5 of the SPA, on pain of an immediately payable penalty of EUR 25,000,000 for each breach of this order;
- III. to order Nordian to pay the costs of the proceedings and the subsequent costs, plus the statutory interest.

3.2. Nordian has put forward a defence.

3.3. The parties' arguments will hereinafter be discussed in greater detail, to the extent relevant for the examination of the case.

4. The examination of the dispute

4.1. Everts et al. demand performance of the Signing Protocol. A claim demanding performance may be allowed only in preliminary relief proceedings, if it has become sufficiently plausible that the court hearing the case on the merits will concur with the claimant's position, for example if the defendant conducts a manifestly unfounded defence and if the claimant cannot be expected to await the outcome of the proceedings on the merits.

4.2. In the Signing Protocol of 28 February 2020 the parties have committed themselves to signing the SPA subject to the condition precedent of W&I insurance being taken out by Nordian. Under the Signing Protocol Nordian had to use its 'best efforts' to take out W&I insurance within 10 working days, so on 16 March 2020 at the latest, which would cover the lion's share ('far majority') of any claims that might be brought under the warranties and indemnities in the SPA. After taking out W&I insurance, Nordian had to sign the SPA within two working days.

4.3. On 12 March 2020 news came on behalf of Nordian with regard to the W&I policy that the matter had nearly been completed, but that there were a number of tax exclusions that Nordian would like to see taken out of the policy. Everts et al. have argued that this concerned the transfer pricing. According to Everts et al. it is commonly known that this risk is among the standard exclusions in W&I insurance policies. Exclusions other than these few "tax exclusions" were not mentioned by Nordian on 12 March 2020. Annexes 9 and 11 of the SPA contain 13 pages with tax and non-tax warranties and indemnities, of which transfer pricing is only one element. It is likely that the draft policy that was submitted to Nordian on 12 March 2020 already satisfied the W&I condition. It was only in its e-mail of 19 March 2020 that Nordian mentioned that IT software of Everts et al. was also a point of discussion with the insurance company. Nordian did not take out the W&I insurance, because it wanted to postpone closing the transaction and wanted to wait and see what the impact of the Corona crisis would be for J-Club. This means that it was Nordian's choice not

to take out the W&I insurance. Nordian has neither submitted a draft policy nor the full correspondence with the W&I insurer. Also absent is the correspondence with other W&I insurers, thus making it impossible to verify Nordian's efforts. Nordian wrongly complains that no information was provided by Everts et al. that might have enabled Nordian to negotiate better policy conditions. Nordian fails to mention what information the insurer wanted to have, nor does it provide proof of having presented any specific questions from the W&I insurer to Everts et al.

It is Nordian itself that prevented the condition of the W&I insurance from being satisfied. It received an offer for W&I insurance on common terms and there was nothing to stop Nordian from accepting the policy that was offered to it. Reasonableness and fairness require that the condition qualifies as having been fulfilled within the meaning of article 23 (1) of Book 6 DCC, so that Nordian is under an obligation to sign the SPA, all this according to Everts et al.

4.4. Nordian has argued that it did not have to accept any insurance policy. According to Nordian it has fulfilled its 'best efforts' obligation. It contacted a number of insurance companies. There were warranties and indemnities in the SPA that were not covered by the policy that was offered, namely tax issues (transfer pricing) and warranties regarding the IT systems that had been developed by J-Club itself. As to the tax issues: these are the subject of standard provisions, due to the major financial consequences. As to the IT systems: these constituted a decisive factor for Nordian to make a binding offer. The reason why the insurance company approached by Nordian did not want to provide cover for this, was that these issues had not been studied sufficiently thoroughly. Nordian wanted to convince the insurer to nevertheless provide cover by means of an additional due diligence investigation. In substantiation Nordian has submitted an e-mail from AON dated 11 March 2020, in which this is pointed out. This further examination required the assistance from J-Club and Everts et al., because they are the parties that have access to the relevant information. Despite Nordian's requests no further information was provided by J-Club and Everts et al., meaning that no W&I insurance was available covering the bulk of the claims and the warranties in the SPA, meaning that the condition in the Signing Protocol was not satisfied and that Nordian was not under an obligation to sign the SPA.

To the extent that Nordian has prevented the W&I condition from having been fulfilled, it is not required by reasonableness and fairness that the condition concerned should nevertheless qualify as having been fulfilled, due to the uncooperative attitude adopted by Everts et al. by failing to provide any further information, all this according to Nordian.

4.5. Article 23 (1) of Book 6 DCC provides that, when the party that had an interest in the non-fulfilment of the condition, prevented its fulfilment, the condition is to be regarded as nevertheless having been fulfilled, if such is required in accordance with the standards of reasonableness and fairness. When assessing the reliance on article 23 of Book 6 DCC, all the relevant circumstances need to be considered for that purpose (Supreme Court 10 June 2011, ECLI:NL:HR:2011:BP6163). Hence what matters is whether the party that prevented the fulfilment of the condition was entitled to display such conduct, given the nature, the contents and the scope of the legal relationship between the parties and the parties' respective interests.

4.6. On 10 March 2020 Nordian informed Everts et al. that it expected to receive an update on the policy the next day, which should then be final, or as good as final. Although on 11 March 2020 AON wrote why it could provide no further insurance without due diligence having been performed on transfer pricing and without any further advice on the '*future tax relief*', Nordian in its message of 12 March 2020 did not ask Everts et al. any questions or make any comments regarding these issues. On the contrary: Nordian informed Everts et al. on 12 March 2020 that matters had nearly been resolved with the insurance company and that all that was left were a few tax exclusions which it wanted to be taken out of the policy. The words "would like to" (in Dutch "graag", translator) illustrate that Nordian preferred to further negotiate this issue with the insurer, but not that doing so was essential. It was not until 19 March 2020, after the deadline (16 March 2020) for taking out W&I

insurance had expired, that it was announced by Nordian without any further explanation, that, in addition to the transfer pricing matter, a follow-up investigation was also going on with respect to 'IT software'. In the meantime restrictions to contain the spread of the COVID-19 virus had been announced by the Dutch government on 15 March 2020. On 27 March 2020 Everts et al. offered Nordian to assist in the talks with the insurer on both points (see 2.19, no. 12). No evidence has been provided that Nordian availed itself of this offer by Everts et al. and that it sent a specific request for the provision of information to Everts et al. Indeed, on 1 April 2020 (see 2.21) Nordian informed Everts et al. that, due to the Corona crisis, it was forced to suspend its efforts to obtain W&I insurance and to start an investigation into the effects of the Corona crisis on J-Club and on the agreement between the parties. All that has been submitted by Nordian in connection with its efforts in the matter of the W&I insurance is the aforementioned e-mail from an insurance company (agent). It has rightly been argued by Everts et al. that on the basis of one e-mail it is impossible to verify Nordian's efforts. Lastly, the allegation by Everts et al. that annexes 9 and 11 of the SPA contain 13 pages with tax and non-tax warranties and indemnities, of which transfer pricing is only one element, has not been contradicted by Nordian. On the basis of the above Everts et al. have argued sufficiently convincingly for the present moment that Nordian did possess a draft policy that covered the overwhelming majority of the possible claims under the warranties and indemnities in the SPA. By not making use of the offer made by Everts et al. to assist Nordian and by not taking out W&I insurance, but by suspending their efforts instead, awaiting the effects of the Corona crisis, Nordian prevented the condition of taking out W&I insurance stipulated in the Signing Protocol from being fulfilled.

4.7. The next question that has to be answered is whether the condition should be regarded as having been fulfilled according to the standards of reasonableness and fairness.

4.8. This concerns a commercial transaction between professional parties, involving large financial interests. The total purchase price of the shares may amount to as much as EUR 125 million. The parties received assistance from experts and conducted extensive negotiations, with a view to entering into a long-term business relationship. All that the Signing Protocol obliges Nordian to do is sign the SPA. The signing of the SPA should be distinguished from its actual execution, which is subject to the condition precedent of the Finance Condition. Everts et al. have an interest in the SPA being signed by Nordian, since it obliges Nordian to use its best efforts to obtain the required funding. It has neither been argued nor become evident that Nordian will suffer damage if, despite having taken out W&I insurance, it does not have to give effect to the SPA in the end.

4.9. Given the nature, the contents and the scope of the legal relationship, the parties' respective interests and the above-mentioned circumstances, the conclusion is that Nordian could not reasonably decide not to take out W&I insurance and that, by the standards of reasonableness and fairness, the condition must be regarded as having been fulfilled.

4.10. Nordian has furthermore argued that, pursuant to article 258 of Book 6 DCC, the Signing Protocol cannot be maintained unaltered, in the sense that Nordian is no longer under an obligation to enter into the SPA in its present form. According to Nordian unforeseen circumstances have arisen as a result of the Corona crisis. Against this Everts et al. have rightly argued that Nordian's views on the matter relate to the SPA. As has been held above, all that the Signing Protocol obliges Nordian to do is to sign the SPA, not yet to actually give effect to it. Viewed in that light, it is difficult to see why, by the standards of reasonableness and fairness, Everts et al. cannot expect the Signing Protocol to be maintained unaltered.

4.11. The above means that Nordian will in principle have to sign the SPA.

4.12. Nordian has argued in its defence that Everts et al. have no (urgent) interest in this claim, because the Finance Condition in the SPA - a condition precedent - will not be fulfilled and the transaction will not be closed. According to Nordian, it is true that the undertaking given by Idinvest to provide funding was binding, but pursuant to article 2.2. (b) of the Commitment Letter it was given subject to the condition that no material changes would occur in the Base Case Model between 24 February 2020 - the date of the Commitment Letter - and the moment of the signing of the Facility Agreement or the moment of making a request for payment under it by Nordian. Due to the Corona crisis Idinvest considered both a short-term and a long-term change of the Base Case Model likely. Nordian wants to update the Base Case Model with recent information about, and (sales) figures of, J-Club, so that it will be able to continue its discussions with Idinvest, but Everts et al. refuse to provide this information. Everts et al. have put the relationship with Idinvest under pressure by, in a telephone call, threatening legal action if no funding is provided by it. On the basis of the current state of affairs Idinvest will not provide a credit facility of EUR 40 million. No final refusal has thus far been communicated by Idinvest, so that Nordian has not yet become obliged to approach other credit providers. This last-mentioned obligation makes no sense, however. A total of 34 credit providers were approached by Nordian with respect to Project Sparkle. The only parties responding positively were Idinvest and BlackRock. It is highly unlikely that, in the present situation, another credit provider does want to provide a credit facility subject to materially the same conditions, all of this according to Nordian.

4.13. The above has been disputed by Everts et al. Idinvest's commitment is a fact and Nordian has to do all that is in its power to make Idinvest perform its obligations. Only in the extreme impact scenario calculated by Nordian will J-Club achieve too low a debt/EBITDA ratio to satisfy the covenants with Idinvest. The figures up to and including 28 April 2020 are known and the extreme impact scenario has far from materialized. Everts et al. chose Nordian above all others because of Idinvest's commitment and the "deal certainty" offered by Nordian. The Base Case Model was devised by Nordian, not by Everts et al., who only became acquainted with it for the first time on 13 March 2020. In a footnote to article 2.2. of the Commitment Letter it is mentioned that this provision reflects the "anticipated status as at the date of the CL". Idinvest must have got the "final form" from Nordian when Idinvest gave its commitment on 24 February 2020 and the "then-current draft form" was replaced by the signed version. Otherwise the Commitment Letter is an empty shell. In the Commitment Letter Idinvest was not given the right to perform an ongoing due diligence investigation, since it had explicitly stated therein that the due diligence investigation had been completed successfully. Everts et al. are prepared to provide further financial information as soon as Nordian has signed the SPA. If Nordian should fail to make Idinvest observe its commitment for a reason outside Nordian's control, it will be protected by the Finance Condition in the SPA. Nordian will in that case have to start a search for alternative financing options and Everts et al. are prepared to provide these, if necessary for the full amount of EUR 40 million, all this according to Everts et al.

4.14. The court holds as follows. Idinvest has not yet communicated a final rejection to Nordian. Idinvest first of all wants to be provided with a recent financial update about J-Club. Although Everts et al. take the view that an additional due diligence investigation by Idinvest is no longer relevant, it is nevertheless prepared to provide additional information, after Nordian has signed the SPA. Nordian blames Everts et al. for having contacted Idinvest by telephone and for having threatened it with legal action, but it has neither been argued, nor become evident, that this is the reason why Idinvest no longer wants to finance the transaction. This means that for the present Nordian has failed to argue convincingly that the Finance Condition in the SPA is not going to be fulfilled. Moreover, in the event that Idinvest should withdraw as a credit provider, Nordian would be under an obligation to use its best efforts to approach a different credit provider. The mere claim that no credit provider will be prepared to provide financing is not enough. Nordian may be expected to actively start a search for alternative credit providers. This means that Everts et al. have a legitimate and urgent interest in the SPA being signed by Nordian.

4.15. Nordian has furthermore argued that pursuant to article 258 of Book 6 DCC the SPA cannot be maintained unaltered. Within that context it has argued that, following the signing of the Signing Protocol, unforeseen circumstances have occurred in the form of the Corona virus and the related government measures. According to Nordian, these circumstances are of such a nature that, by the standards of reasonableness and fairness, Everts et al. cannot expect the SPA to be maintained unaltered. In the course of the negotiations the parties briefly discussed how to deal with the halting production of J-Club's products in China further to the lockdown in China on 23 January 2020. On 28 February 2020, the date on which the Signing Protocol was signed, it could not have been foreseen that the circumstances as these unfolded afterwards were possible in Europe, so including in the seven countries where J-Club 80% generates its sales. For that reason it was impossible at the moment of signing the Signing Protocol to include a provision in relation to the consequences of Corona in the agreement. The Corona crisis has an enormous impact on J-Club, because its activities are entirely aimed at physical stores with large numbers of shoppers. This case does not, or no longer, concern a normal entrepreneurial risk.

4.16. In reply Everts et al. have argued that the parties did discuss the possible consequences of the Corona crisis and that they had agreed not to include any material adverse change clause or specific Corona clause in the SPA. For this reason Nordian cannot invoke the occurrence of unforeseen circumstances. To this is added that the impact of the Corona crisis on J-Club will be limited. J-Club is a flexible retail concept. As a result of the temporary shop closures in Europe sales have fallen slightly, but J-Club has at once managed to reduce its costs, by ceasing to supply the stores. If the one-and-a-half metre economy will result in an increase in online sales, this is what J-Club may switch to as well. Already it is having talks on this matter with Amazon in Italy and Germany. As a result of the reopening of stores, saving on costs and government support the impact of the measures on J-Club is smaller than had originally been thought. J-Club's figures show a recovery of the EBITDA and J-Club is able to achieve its financial covenants.

4.17. The various forces surrounding the Finance Condition in relation to the Corona crisis are yet to develop once Everts et al. provide Nordian with recent information about J-Club, which they have undertaken to do after Nordian has signed the SPA. However, a detailed due diligence investigation by Idinvest can no longer be on the agenda, since that party has already been able to carry out its investigations on the basis of the available data in the virtual data room. The Base Case Model was drafted between Nordian and Idinvest and without any direct interference from Everts et al. and apparently acted as the basis for Idinvest's Commitment Letter. The role played by the Base Case Model and by the new information about J-Club when the Commitment Letter was honoured by Idinvest is yet to materialise in the context of the Finance Condition. No views can be expressed about this issue at this moment. To this is added that attention was paid to the presence of Corona virus contamination by the parties, for by that time China had already seen tens of thousands of cases and thousands of deaths and the country had already gone into lockdown. On 27 February 2020 hundreds of cases of Corona had already been recorded in Italy, while the first cases were appearing in Germany, France, the Netherlands, Belgium, Switzerland and Austria. All this was no reason for the parties to include a Material Adverse Change clause in the SPA. Moreover, the European countries that have experienced an outbreak of the Corona virus are currently starting to ease their restrictions again. This means that for the moment Nordian has not argued convincingly that, due to the Corona crisis, the SPA must be amended before it can be signed.

4.18. The conclusion is that Everts et al.'s request to order Nordian to sign the SPA within two working days from the date of this judgment will be granted. The requested penalty payment will also be imposed, but it will be capped at a lower amount than the amount requested.

4.19. Everts et al. have argued that the purpose of the claim for the extension of the Long Stop Date is that Nordian must spend the same time on its efforts as the time originally agreed in the SPA. It would not be appropriate for Nordian to start making its first efforts after it has been ordered to sign the SPA and to subsequently invoke the Long Stop Date as early as on 1 July 2020, all this according to Everts et al.

4.20. Nordian has argued that it has explicitly been agreed by the parties that, if the Finance Condition in the SPA is not fulfilled before 1 July 2020, both parties have the right to cancel the agreement. This claim does not do justice to the nature of the Long Stop Date: a deadline of that nature is agreed within the context of the parties' legal certainty. This might also mean that Everts et al. will try and force Nordian to carry on looking for alternative funding. According to Nordian there is no ground for doing so.

4.21. What the parties has in mind was that the SPA would be signed by 18 March 2020 at the latest. In that case the parties would, have about 3½ months' time to either close the transaction or to cancel it after all. On the basis of this judgment Nordian has to sign the SPA on 16 May 2020 at the latest. Given the best efforts obligation that Nordian is under pursuant to the SPA and the far-reaching consequences of invoking the Long Stop Date, Everts et al. have an interest in extending the Long Stop Date by 3½ months, so until 1 September 2020. The above is entirely in line with the scope of this provision in the SPA. It is for this reason that this claim will be allowed. The requested penalty will be moderated in the manner set down hereafter in the decision.

4.22. Lastly it has been argued by Nordian that with their request for a change of the Long Stop Date and, if appropriate, an adjustment to the financing modalities and/or the ratchet, it is Everts et al. themselves who do not leave the SPA unaltered. However, adjusting the financing modalities and/or the ratchet, if appropriate, are concessions made by Everts et al. towards, but those too will have to materialise in the context of the Finance Condition and the compliance or non-compliance by Idinvest with the Commitment Letter.

4.23. As the party against which judgment is given Nordian will be ordered to pay the costs of the proceedings and the subsequent costs, both with the statutory interest.

5. The decision

The judge in preliminary relief proceedings

5.1. orders Nordian to validly sign the SPA or cause it to be signed on 16 May 2020 at the latest, subject to an immediately payable penalty of EUR 500,000, plus a penalty of EUR 50,000 for each day that Nordian fails to comply with this order, to a maximum of EUR 5,000,000;

5.2. forbids Nordian to invoke the Long Stop Date as referred to in article 4.5 of the SPA, or cause it to be invoked, before 1 September 2020, subject to an immediately payable penalty of EUR 10,000,000 for each breach of this order;

5.3. orders Nordian to pay the costs of the proceedings, thus far estimated on the part of Everts et al. at EUR 656 in court fees and at EUR 1470 in attorneys' fees, plus the statutory interest payable on those amounts, starting 14 days from the date hereof, until the date full payment is made;

5.4. orders Nordian to pay the costs incurred after these proceedings, estimated at EUR 157 in attorneys' fees, plus an amount of EUR 82 and the costs of the writ of service in the event that service of this judgment has to be effected, plus the statutory interest payable on those amounts, starting 14 days from the date of service of this judgment, until the date full payment is made;

5.5. declares this judgment enforceable with immediate effect to that extent;

5.6. dismisses all other applications.

This judgment was rendered by C.M.E. de Koning, judge in preliminary relief proceedings, assisted by M.F. van Grootheest, clerk of the court, and was pronounced in open court by R.A. Dudok van Heel on 14 May 2020.

(signature)

(signature)

ISSUED AS A TRUE COPY
The clerk of the
Amsterdam district court