Neutral Citation number: [2022] EWHC 1368 (Ch) BL-2021-001842

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS

OF ENGLAND AND WALES

BUSINESS LIST (ChD)

DEPUTY MASTER MARSH

BETWEEN:

DR ROHIT KULKARNI **Claimant**

and

(1) GWENT HOLDINGS LIMITED
(2) ST JOSEPH'S INDEPENDENT HOSPITAL LIMITED **Defendants**

JUDGMENT

handed down remotely

on 8th June 2022 at 10.30

DOMINIC CHAMBERS QC instructed by Douglas-Jones Mercer Solicitors appeared for the **Claimant**

DANIEL LIGHTMAN QC and THOMAS BRAITHWAITE instructed by Veale Wasbrough Vizards LLP appeared for the **First Defendant**

ANDREW THOMPSON QC and ANDREW BLAKE instructed by Clarke Willmott LLP appeared for the **Second Defendant**

HEARING

12 and 13 April 2022

DEPUTY MASTER MARSH:

1. This claim was issued on 13 October 2021. Without waiting for defences to be served the claimant's application for summary judgment under CPR 24.2 was issued on 1 November 2021 and was heard on 12 and 13 April 2022. The claimant's evidence in support of the application was contained in a witness statement of the claimant's solicitor, Christian Edwards, also dated 1 November 2021. On the basis that the witness statement reserved to the hearing detailed submissions concerning some aspects of the application, the parties agreed that skeleton arguments would be served sequentially with the claimant's skeleton being served first. This agreement, together with other directions, was recorded in an order made on 10 December 2021.
2. Dominic Chambers QC appeared for the claimant, Daniel Lightman QC and Thomas Braithwaite appeared for the first defendant ("Gwent") and Andrew Thompson QC and Andrew Blake appeared for the second defendant ("the Company"). I am grateful to counsel for their helpful submissions, both written and oral.
3. The claim is made pursuant to a shareholders' agreement ("the SHA") dated 13 February 2020 made between the claimant and the defendants. The SHA concerns shares held, or to be held, in the Company by the claimant and Gwent.
4. The claimant is a consultant orthopaedic surgeon who practised at St Joseph's Hospital in Newport, Gwent ("the Hospital") from about 2001 until 28 September 2021. The Company owns the Hospital.
5. Gwent is the corporate investment vehicle for Mr David Lewis and his family. Mr Lewis is the controlling mind of Gwent.
6. The Company has owned the Hospital since 14 February 2020 when it acquired the Hospital in a pre-pack administration from the administrators of its previous owner, St Joseph's Hospital Limited. The claimant had been a director of that company and held 22% of its

shares. At the time of the Company's purchase of the Hospital in 2020 the claimant and Mr Lewis had known each other for some years and, according to the claimant, were friends.

7. The Hospital got into financial difficulties and from 2018 the claimant and Mr Lewis held regular discussions on that subject and these discussions led to Mr Lewis agreeing that Gwent would invest £500,000 in the Hospital through an acquisition of shares and Gwent would loan the Company £2million. The claimant and Mr Lewis agreed that the Company would operate the Hospital and the claimant would become a director and employee of the Company and the Hospital's Medical Director.

8. The core elements of the deal were:

    (1) The Company, in which the claimant was already the registered owner of one share, would be used as the vehicle to own and operate the Hospital.

    (2) The Company would initially have one class of shares, described as A shares, limited to 3,370 A shares. Gwent would own 1,718 A shares, being 51% of the A shares, and the claimant would own the remaining 1,652 shares, being 49% of the A shares.

    (3) A class of shares, designated as B shares, would be issued so that the consultants who practised at the Hospital could subscribe for those and thereby have a financial stake in the Hospital. On the basis that 3,235 B shares were issued and allotted, as was the plan, Gwent would retain its majority holding in the Company diluted to 26% and the claimant's holding would be diluted to 25%.

    (4) The claimant was appointed one of the initial directors of the Company and had the right to appoint one additional A shares director. Gwent as the "Controlling Shareholder", as defined in the SHA, had a similar entitlement and it appointed Mr David Lewis' brother, Andrew Lewis, as it's A share director.

(5) Gwent had control of the board because the Controlling Shareholder's director was entitled to cast such number of votes as enabled him to carry or defeat any resolution of the directors.

9. On 13 February 2020 the board of directors of the Company met to approve the re-structuring that was necessary to implement the deal including approving new Articles of Association and reclassifying the two issued shares (one of which was held by the claimant) into A shares. In addition, the meeting approved:

    (1) The transfer of the one remaining A share to Gwent;

    (2) The issue of 3,368 Ordinary A shares;

    (3) The Company entering into the SHA;

    (4) The allotment of shares up to an aggregate nominal value of £3,368.

10. The minutes record that applications for the allotment and issue of shares were received from:

    (1) Gwent for 1,717 Ordinary A shares of £1.00 each for £526,987.82 aggregate subscription money;

    (2) The claimant for 1,651 Ordinary A shares of £1.00 each for £80,000 aggregate subscription money.

11. Subsequently Gwent paid £526,987.82 for its shares and became the owner of 1,718 A shares (including the one share that was transferred). The claimant remained the owner of one A share. He did not at that stage pay £80,000 for the issue of 1,651 shares to him in circumstances that are contentious. He says that Gwent had agreed to pay for his shares so that his A shares were to be, in effect, a gift from Gwent to him, and it failed to honour its agreement. That is one of the many issues of fact that will have to be resolved at a trial.

12. The SHA was executed by the Company, the claimant and Gwent on 13 February 2020, the same day as the board resolution. The events that then followed over the next few months are also contentious. The Company says that the claimant 'went to ground' and could not be

contacted. The claimant does not accept that this is accurate. It is unnecessary for the purposes of this judgment to consider the disputed facts any further.

The SHA

13. The SHA describes the claimant and Gwent as the Initial Shareholders and the claimant was one of the five directors on the board as at 13 February 2020. Consultants who were associated with the hospital would be entitled to subscribe for B shares in the Company and would be required to execute a Deed of Adherence in favour of the other parties to the SHA. It was therefore anticipated that the parties to the SHA would increase in number over time, albeit that the A shareholders would always retain ultimate control and Gwent would be entitled to appoint a Controlling Shareholder Director and thus maintain control of the board.

14. The recitals, and in particular recital (B), are central to the claimant's case:

> "BACKGROUND
>
> (A) The Company currently has an issued share capital of £3,370, divided into 3,370 A shares of £1.00 each, all of which are fully paid.
>
> (B) Each Initial Shareholder is the registered owner of the number and class of Shares set out opposite his name in Part 1 of Schedule 1.
>
> (C) The parties have agreed to enter into this agreement as a deed for the purpose of regulating the exercise of their rights in relation to the Company and for the purpose of making certain commitments as set out in this agreement."

15. Schedule 1 Part 1 of the SHA shows 1,718 A shares set out opposite Gwent's name and 1,652 A shares set out opposite the claimant's name.

16. Two points arising from the Recitals bear emphasis. First, Recital (A) records that all the A shares are fully paid. Secondly, Recital (B) when read with Part 1 of Schedule 1 records that the claimant was the registered owner of 1,652 shares. Neither of these statements was accurate at the date and time of execution of the SHA. The claimant was the registered

owner of one A share and Gwent did not become the registered owner of the 1,717 shares until the following day, the 14 February 2020. At the date of the hearing, it remained the case that the claimant was the registered owner of one A share. Although it only indirectly affects the disposal of the claimant's application, since the hearing the claimant has accepted an offer made by the Company and is now the registered owner of 1,652 A shares. The date of registration is the date in May 2022 when the claimant executed an agreement to acquire 1,651 A shares from the Company.

17. The SHA describes the business of the Company as the operation of the Hospital. The core obligations were that (1) the shareholders each agreed to use reasonable endeavours to promote the success of the business (clause 2.2), (2) the Company agreed not to take any of the actions set out in Schedule 2 without shareholder consent (clause 3) and (3) the shareholders agreed to use reasonable endeavours to procure that the Company would not take any such actions (clause 4).

18. The list of prohibited steps in Schedule 2 is conventional and includes such matters as charging the business, incurring borrowing in excess of £100,000, merging with another business, granting a licence over IP rights and passing a resolution for its winding up or its administration unless it had become insolvent.

19. Clause 6 governs the transfer of shares. Under clause 6.4(a), a shareholder wishing to transfer shares was required to give a Transfer Notice to the Company. The clause then sets out a machinery for the sale of such shares at a Fair Value, as defined in clause 8.

20. Clause 7.1(d) of the SHA is of central importance. It provides:

> "7.1 A Shareholder is deemed to have served a Transfer Notice under clause 6.4 immediately before any of the following events:
>
> …
>
> (d) the Shareholder committing a material or persistent breach of this agreement which, if capable of remedy, has not been so remedied within 10 Business Days of

notice to remedy the breach being served by the Board (acting with Shareholder Consent)."[1]

21. The remaining provisions of the SHA to be noted are:

    (1) Clause 6.13 which provides that a shareholder who sells its entire holding of shares automatically ceases to be a party to the SHA.

    (2) Clause 15 which provides that the SHA shall terminate in three circumstances: (i) upon either a resolution to wind up the Company being passed or a winding up order being made; (ii) the appointment of a receiver, administrator or administrative receiver and; (iii) when as a result of transfers of shares only one person remained the legal and beneficial holder of the shares.

    (3) Clause 19.1 which contains an entire agreement provision and clause 19.2 confirmation of non-reliance upon representations, assurances or warranties.

    (4) Clause 20.2 which provides that the waiver of any right or remedy is only effective if it is in writing.

22. It will be necessary to examine the proper meaning and effect of the SHA, and in particular clause 7.1(d) in more detail.

Events after 13 February 2020

23. Two crucial events took place in June and August 2020.

24. On 4 June 2020 Gwent procured the Company to allot the remaining 1,651 A shares to itself upon payment of £19.64993 per share with the consequence that Gwent became the holder of 3,369 A shares, that is all the A shares other than the one A share held by the claimant. It is now common ground that Gwent was not entitled to acquire those shares and the Company should not have allotted them to Gwent.

[1] "Shareholder Consent" is defined to exclude shares held by an "Excluded Shareholder" and the latter term is defined to mean a shareholder whose course of action is the subject of the relevant "Shareholder Consent".

25. Mr Chambers described Gwent's actions as an "appropriation of the shares and an assault on the SHA".

26. On 28 August 2020 Gwent wrote to the claimant giving notice:

> "… to terminate (or cancel) [the SHA] with immediate effect.
>
> Our termination is on the grounds that [the SHA] is based upon a fundamental flaw, namely, that the Initial Shareholders included [the claimant] owning 1,652 A Shares in the Company. By contrast, [the claimant] only owned 1 A Share and he did not properly subscribe for, nor was he issued with, an additional 1,651 A Shares."

27. There then followed a lengthy gap during which no formal steps were taken by either the claimant or Gwent. Although that may be puzzling, given the two events I have summarised, it is not material for the purposes of the claimant's application.

28. On 21 May 2021 Douglas-Jones Mercer (DJM), acting on behalf of the claimant, wrote lengthy letters of claim to Gwent and the Company. The claimant relied upon Recital (B) of the SHA and the doctrine of estoppel by deed to assert that he was to be treated as the owner of 1,651 A shares in the Company regardless of the fact that he had not paid for those shares. The letter also refers to the claimant's assertion that Gwent had agreed to gift the 1,651 A shares to him. Furthermore, and relying upon four breaches of the SHA by Gwent and the Company and clause 7.1(d) of the SHA, the claimant asserted that a Deemed Transfer Notice had been served and he was entitled to acquire Gwent's A shares at a Fair Value. It is common ground that, if the claimant is right, the price payable by him per share will be much less than their market value having regard to the Company's current financial position.

29. The breaches included the events of June and August 2020 noted previously and two further breaches in addition, namely the allotment of 2,000 B shares to Gwent and the failure to appoint Mr Hussain as the claimant's nominee director. The two additional breaches are not relied upon by the claimant for the purposes of his application for summary judgment.

30. The claimant's letter asserted that the breaches he relied upon, which included both the events of 4 June and 28 August 2020, were "material" breaches (within the meaning of that term in clause 7.1(d) of the SHA) and that they were repudiatory breaches of the SHA. However, the letter also states in clear terms that the claimant did not accept the repudiatory breaches and that the SHA continued in full force and effect.

31. On 10 June 2021 Veale Wasbrough Vizards LLP (VWV) replied on behalf of Gwent asserting that the claimant had misrepresented, either fraudulently or negligently, the position in Part 1 of Schedule 1 of the SHA and, as a consequence of Gwent relying upon the representation, it was entitled to rescind the SHA.

32. A rather more constructive note was sounded on behalf of the Company in the letter dated 24 September 2021 from Clarke Willmott LLP. The Company accepted there had been no misrepresentation by the claimant and that the purported termination of the SHA for a "fundamental flaw", due to the claimant not having paid for his A shares, had not taken place. The Company relied upon clause 15 of the SHA as a basis for saying no party was entitled to end the SHA unilaterally.

33. The letter recorded that the claimant had sent a cheque for £80,000 to the Company and on the basis that it cleared "… the issue of non-payment will cease to be longer relevant." [sic] As to ownership of the 1,651 A shares the letter stated:

> "23. The Hospital accepts that Mr Kulkarni is the rightful legal and beneficial owner of 1 A share. Further, the Hospital will treat him as the beneficial owner of the remaining 1,651 A shares which should have been allotted to him and were instead allotted to Gwent on 4 June 2020.
>
> 24. The Hospital has therefore invited Gwent to return the A shares to the company, so that they may be properly registered in Mr Kulkarni's name.
>
> 25. The Hospital will liaise with Gwent in order to restore the consideration paid by Gwent for the shares to be returned at the full price.

26. The process is likely to take a number of weeks, because as part of any buy-back, the Form SH03 will have to be sent to HMRC Stamp Office to be stamped before Mr Kulkarni's A shares can be allotted to him. Any delay in having the Form stamped will then be out of the Hospital's hands."

34. At paragraph 35 of the letter the Company invited Gwent and the claimant to cooperate in undertaking a series of steps that would lead to the claimant being registered as the owner of the 1,651 shares that had been allotted to Gwent in June 2020. It would involve Gwent returning the 1,651 A shares to the Company and the Company "allotting" them to the claimant. The Company now says using the term "allot" was an error because it was not in a position to allot the shares which by then were registered in Gwent's name and should have said the shares would be transferred by the Company to the claimant.

35. On 27 September 2021 VWV wrote to say that Gwent agreed the SHA had not been terminated and it would return the 1,651 A shares to the Company.

36. On 28 September 2021 the Company wrote to the claimant to withdraw his right to practise at the hospital with immediate effect relying upon the effect of the Private Healthcare Market Investigation Order 2014. The letter asserted that the claimant was the beneficial owner of 1,652 A shares in the Company "… with legal ownership to pass to you once the shares have been formally re-allotted and registered." Mr Thompson, who appeared for the Company, submitted that this statement was simply wrong because at the time the 1,651 A shares were registered in Gwent's name and could not be owned beneficially by the claimant until he (i) had paid £80,000 to the Company (his earlier cheque had by then been cancelled), (ii) the shares had been transferred to the Company by Gwent and (iii) the provisions of section 727(1)(a) of the Companies Act 2006[2] ("the Act") being implemented. The claimant would only become the legal owner of the shares upon registration of the shares in his name.

[2] Section 727 deals with the transfer of shares held in Treasury by a company.

37. On 12 October 2021 DJM gave notice that the claimant intended to issue a claim and the claim was issued the following day. The particulars of claim are also dated 13 October 2021.

The Particulars of claim

38. The claim relies upon the same four breaches of the SHA that were set out in the letter of claim:

    (1) The allotment of 1,651 A shares to Gwent.

    (2) The allotment of 2,000 B shares to Gwent.

    (3) The purported summary termination of the SHA by the letter dated 28 August 2020.

    (4) The failure to appoint Mr Hussain as the claimant's nominee director.

39. It is accepted that issues relating to breaches (2) and (4) will have to be tried.

40. It is unnecessary to set out lengthy extracts from the particulars of claim. It suffices to note:

    (1) At paragraph 21, the claimant relies upon a combination of recitals (A), (B) and Part 1 of Schedule 1 as stating that the claimant was the owner of 1,652 A shares. At the hearing, Mr Chambers who appeared for the claimant, disavowed reliance upon Recital (A).

    (2) At paragraph 22, the claimant refers to an agreement made between the parties on 7 February 2020 to the effect that from execution of the SHA on 13 February 2020 he was entitled to be registered as the owner of 1,652 A shares.

    (3) At paragraph 33 the claimant denies he is required to pay £80,000 for the 1,651 A shares relying upon an agreement made on 7 February 2020 to the effect that the shares would be gifted to him by Gwent.

    (4) At paragraphs 35 to 37 the claimant asserts a contractual entitlement to be registered owner of the 1,651 A shares. At paragraph 37 he says the sum of £80,000 has been paid by him under protest and he is entitled to the return of that sum in restitution, or in debt or as damages for breach of contract. The

claim in this paragraph was made against both Gwent and the Company. Furthermore, the prayers for relief included relief sought against the Company. In the course of the hearing, and without a formal application being made, permission was given to amend paragraph 38 and prayer (6) to add the words "from Gwent" so as to remove the claim against the Company.

(5) Paragraphs 38 to 46 set out the claim based upon the doctrine of estoppel by deed. It is said that at the time the SHA was executed the parties to the deed knew the statements of fact in Recital (B) were not accurate. The claim refers to Recital (A) and asserts that the original two shares in the Company were fully paid but makes no admissions about whether the statement about the remaining 3,368 A shares being fully paid was accurate. The heart of the estoppel by deed claim lies in paragraphs 41 and 42:

"41. Nevertheless, under the doctrine of estoppel by deed, just as [the Company] and the Claimant are bound by the statements of fact in Recital (A) and Recital (B) that Gwent is the registered owner of 1,718 fully paid 'A' shares as at 13 February 2020, so [the Company] and Gwent are bound by the statements of fact in Recital (A) and Recital (B) that the Claimant is the registered owner of 1,652 fully paid 'A' Shares as at 13 February 2020.

42. [The Company] and Gwent are estopped from denying the truth of those statements of fact, even if those statements of fact were not true either in whole or in part. The Claimant is entitled to, and hereby claims, a declaration to that effect."

(6) In the alternative, at paragraphs 47 and 48 the claimant seeks rectification of the register of members pursuant to section 125 of the Companies Act 2006 on the basis that he has, without sufficient cause, been omitted from the register. He

seeks an order for rectification of the register with effect from 13 February 2020.

(7) At paragraph 89, the claimant asserts that the breaches (all four of them) were not capable of remedy and goes on to say that the breaches "… were so serious and had such a negative effect on the Claimant that they could not be remedied." No particulars of the negative impact upon the claimant are pleaded.

(8) At paragraph 90, the claimant asserts that the relationship between the parties was one of quasi-partnership and was underpinned by the mutual trust and confidence which existed between them. Although Mr Chambers' skeleton argument relied upon this element of the claim and developed submissions about it (and his submissions were dealt with extensively by Mr Lightman who appeared for Gwent in his skeleton argument), it was not pursued at the hearing. Indeed, the revisions to the claimant's case in oral submissions led Mr Lightman to request time to consider his response to them. I considered this was a reasonable request and Mr Thompson proceeded to make submissions on behalf of the Company. This enabled Mr Lightman to make his submissions on the second day of the hearing.

41. The issues before the court on the claimant's application have been refined and now fall into two categories:

(1) The court is asked to make an order under section 125 of the Companies Act 2006 to rectify the Company's register of members to show him as the proprietor of 1,652 A shares as from 13 February 2020. **("Issue 1")** The issue remains live despite the fact that the claimant has become the registered owner of a further 1,651 A shares since the hearing.

(2) The court is also asked to grant relief in favour of the claimant pursuant to clauses 6.4 and 7.1(d) of the SHA which will have the effect of entitling the claimant to acquire Gwent's 1,718 A shares at the lower of the subscription price and the Fair Value of those shares. His case is that as a result of two breaches of the SHA by Gwent those provisions are triggered. The two breaches are those noted in paragraph 38(1) and (3) above, namely (i) Gwent procuring the Company to register it as the owner of 1,651 A shares without complying with the Shareholder Consent provisions of the SHA and (ii) the purported unilateral termination of the SHA by Gwent on 28 August 2020. For the purposes of the application, Gwent does not dispute (a) that these steps constituted breaches of the SHA, (b) that the breaches were "material" within the meaning of clause 7.1(d) and (c) that the breaches were repudiatory breaches. The remaining point in issue of substance is whether the breaches were "remediable" within the meaning of that term in clause 7.1(d) of the SHA. **("Issue 2")**

42. Although defences to the claim have not been served, it common ground that there are issues of fact and law between the parties and these issues will have to be resolved at a trial. The claimant's case is that the two issues before the court are suitable for determination on a summary basis under CPR rule 24.2 on the basis that the defendants have no real prospect of defending them at a trial and there is no other compelling reason why they should be disposed of at a trial.

Evidence

43. The application has led to a plethora of witness statements. However, given that (i) the witness statements deal with disputed issues that are no longer pursued on the application and (ii) the claimant does not rely upon disputed issues of fact, it is unnecessary to refer to them in great detail.

44. Two witness statements were served with the application, one from the claimant's solicitor, Christian Edwards, and one from the claimant himself. I note that Mr Edwards:

    (1) Sets out all four breaches of the SHA that are pleaded in the particulars of claim;

    (2) States that the claimant maintains his position that he is not liable to pay £80,000 for the 1,651 A shares although he acknowledges that the issue will have to go to trial;

    (3) Puts forward a submission about whether the breaches could be remedied that is not pleaded in the particulars of claim, namely that because only the claimant could direct the board to serve notice to remedy and the Company has not served such a notice, the breaches are not remediable within the meaning of clause 7.1(d) of the SHA.

45. The claimant says he confirms the contents of Mr Edwards' statement and that he limited his evidence to dealing with the nature of the relationship between the parties and how the four breaches of the SHA "… have in effect wholly undermined that relationship so that we have reached a position of irretrievable breakdown." He does not distinguish between the effect of the breaches that are relied upon for the purposes of the application and the other breaches. The claimant provides some background to the deal he made with David Lewis and Gwent and the events that followed in the initial months of the arrangement. He says after being told he would have to pay for his A shares and, in light of what he says was David Lewis' refusal to discuss the position with him, he felt he had moved away from a position of a trusted partnership and found himself on the outside. He says:

    "35. … My trust and faith in Gwent, [David Lewis and the Company] was at its lowest ebb. I felt betrayed by someone that I considered a good friend. This betrayal had a huge impact on me and almost made me lose faith in human nature."

46. He goes on in paragraphs 36 and 37 to refer to being sacked a Medical Director of the Hospital, being accused of lying when he entered into the SHA and not being offered any B shares when they were allotted.

47. He concludes this section of his evidence by saying:

> "40. The breaches of the SHA identified in Mr Edwards' witness statement have totally destroyed any (perhaps misguided) trust or confidence I had in [David Lewis] and Gwent. I will never be able to have any confidence or trust in [David Lewis] and Gwent to be able to work with them or their representatives. I will categorically state that there is nothing that can be done now to alter my opinion."

48. The claimant's evidence does not deal with a new case that emerged from Mr Chambers' skeleton argument that on 13 February 2020 the claimant offered to subscribe for 1,651 A shares at a subscription price of £80,000 and the Company accepted his offer on the same date. This is most likely to be because such a case is contrary to the claimant's case that he was not obliged to pay £80,000 for the shares.

49. Gwent has provided witness statements from David Lewis and Andrew Lewis, who is a director of the Company and his brother's appointee. It is clear from both statements, and particularly David Lewis's statement, that there are substantial issues of disputed fact between him and the claimant about payment for the claimant's shares and the breakdown of the relationship between him and the claimant.

50. Stuart Hammond, who is the Chief Executive of the Hospital, deals in some detail with the background to the SHA and his recollection that the claimant was expected to pay for his A shares. However, very little of his evidence is relevant to the application in its current form.

51. I need only mention for the sake of completeness that Gwent has produced witness statements from James Davies and Delyth Evans of RDP Law, who were involved with the transaction that led to the SHA, and the Company has produced a statement from James Marshall of Clarke Willmott.

Part 24

52. The principles that the court must apply on dealing with an application under CPR rule 24.2 are not in dispute. They were summarised in the judgment of Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. The summary was approved by the Court of Appeal in *AC Ward & Son v Catlin (Five) Ltd* [2009] EWCA Civ 1098 at [24] and has been cited in judgments on countless occasions. It is unnecessary to lengthen this judgment by setting it out. There are, however, two points that bear emphasis. First, the court is entitled to have regard to evidence that can reasonably be expected to be available at a trial. Secondly, although the court is encouraged, if it has all the necessary evidence before it, to 'grasp the nettle' and decide a short point of construction or law, it is not always obvious how 'short' a point has to be in order to be suitable for determination on an application for summary judgment. The court must always have in mind the second limb of CPR rule 24.2 and consider whether there is a compelling reason why the claim should be determined at a trial.

53. *Hughes and others v Colin Richards & Co* [2004] EWCA Civ 266 is a decision of the Court of Appeal of long standing authority that concerned striking out a claim under CPR rule 3.4(2)(a) on the basis that the claim showed no reasonable grounds. The court must not exercise its power to strike out unless the claim is 'bound to fail' and, even then, the court may decline to do so where the claim is made in an area of developing jurisprudence. It seems to me that either as an exercise of the discretion under CPR rule 24.2, or by applying the second limb of the rule, the court may wish to leave to a trial the determination of a point in an area of legal uncertainty where the determination will benefit from being undertaken against a backdrop of findings of fact.

54. The defendants invite the court to have regard also to the fact that regardless of the outcome of the application there will be a trial of the claim in any event and rely upon observations of Laddie J in *Barrett v Universal-Island Records Ltd* [2003] EWHC 625 (Ch) at

[47] and those provided by Floyd LJ in the Court of Appeal in *TFL Management Services Ltd v Lloyds Bank PLC* [2013] EWCA Civ 1415 at [27]. One of the concerns that is highlighted in the latter case is that the summary disposal of an issue or issues may ultimately delay the trial of the claim due to a bifurcated appeal process. There is no doubt, however, that the court has power to determine issues, rather than the claim, on an application for summary judgment. This is clear from the terms of CPR rule 24.2 itself and it will often be beneficial and desirable for the court to determine issues that are amenable to an application for summary judgment because this will normally simplify and shorten the trial and may also encourage settlement of the claim. Nevertheless, the court has a broad discretion under CPR rule 24.2 and there are circumstances in which related issues may be best dealt with at a trial rather than dealt with piecemeal.

Declaratory relief

55. The claimant seeks declaratory relief. Although it may at one time have been uncommon to grant declarations other than after a trial, that is no longer so. The principles were recently summarised by Miles J in *Brent v Malvern Mews Tenants* [2020] EWHC 1024 (Ch) at [13]-[14] and I gratefully adopt that summary for the purposes of this judgment.[3]

Contractual interpretation

56. The court is asked to construe the SHA and in particular clause 7.1(d). There is no dispute as to the approach the court should adopt. The claimant relied upon the recent summary provided by Carr LJ in *ABC Electrification Ltd v Network Rail Infrastructure Ltd* [2020] EWCA Civ 1645 (CA) at [18].

57. The claimant relies heavily upon the doctrine of estoppel by deed and contractual estoppel and I will come to their applicable principles when dealing with the second issue the court has to determine. The claimant's case is that the doctrines have special rules about the

[3] See also the judgment of Robin Vos QC sitting as a Deputy Judge of the High Court in *Abaidildinov v Amin* [2020] 1 WLR 5120 [47]-[49

admissibility of evidence. In my judgment the right approach, however, is to start by construing the SHA in accordance with the general principles of construction in order to determine whether the recitals were intended to give rise to an estoppel. To start with the principles of estoppel by deed is to put the cart before the horse.

Issue 1

58. The claimant seeks an order rectifying the register of shareholders to show him as the registered owner of 1,651 A shares as at the 13 February 2020.

59. Section 113 of the Act prescribes the matters that must be entered on the register. These include the date of registration (section 113(2)(b)) and the amount paid or the amount agreed to be considered as paid on the shares (section 113(3)(b)).

60. The claim is pleaded on the basis of either an agreement made on 7 February 2020 between the claimant and Gwent or an estoppel by contract or deed. The claimant has not relied upon the agreement dated 7 February 2020 because its existence is disputed. In his skeleton argument, Mr Chambers submitted that the claimant is also entitled to rely upon an agreement that is evidenced in the minutes of the meeting held on 13 February 2020 to the effect that the Company agreed the claimant could subscribe for the A shares at a subscription price of £80,000. However, that is not part of the claimant's pleaded case, indeed it is contradictory to it, and unsupported by any evidence from the claimant. It therefore cannot form a proper basis for granting summary judgment.

61. Section 125 of the Companies Act provides that:

> "(1) If—
>
> (a) the name of any person is, without sufficient cause, entered in or omitted from a company's register of members, or
>
> (b) …
>
> the person aggrieved, or any member of the company, or the company, may apply to the court for rectification of the register.

(2) The court may either refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved."

62. It is not in doubt that the power is a wide one and may be exercised by the court to rectify the register to show a position as it should have been at a past date. Thus, in principle, if it were right to do so, the court has power to order that the claimant be shown as the registered proprietor of a further 1,651 A shares with effect from 13 February 2020, or a later date.

63. The position at the date of the hearing was that the Company had acquired from Gwent the 1,651 shares and was holding the shares "in Treasury" pursuant to Chapter 6 of Part 18 of the Companies Act 2006 ("the Act"). Mr Thompson is plainly right, despite what was said by the Company's solicitors, that it was not open to the Company to allot or re-allot the shares to the claimant. It is common ground that they had been wrongly allotted to Gwent and, in order to reverse the allotment, either the shares had to be transferred by Gwent to the claimant or they had to be bought in by the Company and transferred to the claimant. The Company chose to adopt the latter route with the effect that its options are limited by section 727 of the Act which provides, so far as material, that the Company may sell the shares held in Treasury for a cash consideration.

64. For some time, the claimant and the Company were in dispute about the implementation of the proposal put forward in September 2021, although since the hearing the dispute has been resolved. There were two impediments to reaching an agreement. First, although the claimant had paid £80,000 to the Company, it was not willing to accept the payment as being unconditional because the particulars of claim included a claim seeking the return of the payment. As I have indicated, that impediment has been resolved (but only in the course of the hearing) by an amendment to the particulars of claim. I would observe, although it is not a matter I need to determine, that the Company's position appears to have been a

reasonable one. It was entitled to receive the payment on an unconditional basis. The second impediment concerned the Company's requirement that the claimant enter into a sale and purchase agreement as evidence of the 'sale' of the shares for a cash consideration under section 727 of the Act. I was not asked to consider the draft sale and purchase agreement that was provided to the claimant but I observe that the Company was bound to operate under, and only under, the power provided by section 727 of the Act. However, there was no requirement arising from the Act for a formal sale and purchase agreement and a simple form of agreement, evidenced in an exchange of correspondence would have sufficed.

65. Although the point was not conceded, it appeared that the claimant would be content with registration with effect from 14 February 2020 which would match the date of registration of Gwent's shares. At one time, the claimant proposed 4 October 2021 or later the 22 March 2022. However, the Company had no entitlement to choose a date of registration that is backdated. The only way in which the claimant is able to be registered as the owner of the shares in February 2020, or a date up to the date of the hearing, is by an order made by the court pursuant to section 125 of the Act.

66. Before dealing with the legal submissions, it is right to record that the date of registration is said to be a matter of importance to the claimant and the court in the exercise of its discretion whether to grant rectification is invited to have regard to two factors:

    (1) The Company withdrew the claimant's practising privileges on the basis that he was the owner of more than 5% of the issued share capital of the Company and it is right that the register of members reflects his true entitlement. The Company's letter dated 28 September 2021 was unequivocal in saying that as at that date the claimant was the beneficial owner of the shares although it now says the assertion was wrong.

(2) Rectification will give effect to Recital (B). If the register is not rectified the claim will proceed to trial on an unequal footing.

67. Although there is no difficulty in principle in the court making an order to rectify the register retrospectively[4], it is necessary to consider what the register, if rectified, would show about the amount paid or considered to be paid at the date of deemed registration. The claimant's case is that as at 13 February 2020 the shares had not been paid up and it is his primary case that he was not obliged to pay for them. The shares were to be a gift from Gwent and he had, he says, no obligation to pay £80,000 or any other sum for the shares. That issue is in dispute.

Estoppel by contract and Estoppel by deed

68. The claimant's pleaded case relies upon Recitals (A) and (B). He contends that the Company cannot be heard to say:

(1) He is not the owner of the A shares with effect from 13 February 2020;

(2) He is not entitled to be registered as the owner of the A shares with effect from that date;

(3) He owes the Company any monies in respect of the A shares.

69. The claimant's case is put on the basis that a contractual estoppel arises when contracting parties have, in their contract, agreed that a specified state of affairs is to form the basis on which they are contracting, or they have agreed that a specified state of affairs is to be taken, for the purposes of the contract, to exist. Because the specified state of affairs constitutes the basis upon which the parties have agreed to contract with one another, all parties are bound by the agreed state of affairs as set out in the contract, whether it represented the truth or not. The claimant relies upon statements of the law in *First Tower Trustees Ltd. v CDS (Superstores) International Ltd* [2019] 1 WLR 637 (CA):

[4] See *Re Sussex Brick Company* [1904] 1 Ch 598

> "47. It is now firmly established at this level in the judicial hierarchy that parties can bind themselves by contract to accept a particular state of affairs even if they know that state of affairs to be untrue. This is a particular form of estoppel which has been given the label 'contractual estoppel'. Unlike most forms of estoppel, it requires no proof of reliance other than entry into the contract itself. Thus, as a matter of contract parties can bind themselves at common law to a fictional state of affairs … " (per Lewison LJ)

70. In the same case Leggatt LJ at [91-95] said:

> "91. It is worth examining exactly what is meant in this context by describing a clause as a 'basis clause'. The term reflects language used in the cases which have recognised the principle of 'contractual estoppel'. The first of these was *Peekay Intermark Ltd. v Australia and New Zealand Banking Group Ltd* [2006] 2 Lloyd's Rep. 511…
>
> 95. … The statements in the Peekay case and subsequent cases that the parties have agreed that a particular state of affairs is to form the 'basis' on which they are contracting use the word in a different sense to mean an assumption that it is agreed for the purposes of the transaction. Such statements are just another way of saying that the parties have agreed to assume that the relevant state of affairs is true, whether or not it is in fact true."

71. The claimant submits that the principle applies equally to recitals in a deed. In *Prime Sight v Lavarello* [2014] AC 436 (PC), a recital in a deed of assignment stated that the sum of £499,950 had been paid in respect of the assignment of the unexpired term of a lease, when in fact it had not been. The Privy Council, relying upon the decision of the House of Lords in *Greer v Kettle* [1938] AC 156, held that the recital estopped the assignor's trustee in bankruptcy from asserting that the payment had not been made (see paras. 28 – 49).

72. Similarly, in *Brudenell-Bruce v Moore* [2012] EWHC 1024 (Ch), a case which preceded *Prime Sight v Lavarello* Newey J held (at paras. 23 - 24) relying on *Greer v Kettle*, that the statement in the recital to a deed "the Assets of the Trusts are identified in the Second Schedule" estopped the claimant from arguing that the items listed in the second schedule were not assets of the trust because the unambiguous statement in the recital was intended to be the statement of both parties to the deed. He said:

> "The position, accordingly, is that, if a recital contains a statement which a party to the deed is to be taken to have agreed to admit as true, the statement is binding on him."

73. It seems to me the right starting point is the proper construction of the SHA. As Lord Russell of Killowen put it in *Greer v Kettle* [1938] AC 156 (at 167):

> "Where a recital is intended to be an agreement of both parties to admit a fact, it estops both parties, but it is a question of construction whether the recital is so intended."

74. It is trite that the court must have regard to the contract as a whole and construe it by reference to, amongst other considerations, the facts and circumstances known or assumed by the parties at the time it was executed. It is far from clear, given the limited evidence that has been provided to the court, just exactly what those facts and circumstances will prove to be and how they will inform the proper construction of the SHA. It seems to me that the Company has a real prospect of successfully arguing at a trial, when all the admissible evidence is considered, that Recital (B), whether or not taken with Recital (A), was not intended to be a statement of fact but rather was a statement of intent. In other words, the defendants have a real prospect of successfully arguing that "is the registered owner" in Recital B should be read as "is intended to become the registered owner". Such a construction would make sense in an SHA that was being executed as the Company and the other parties to the SHA were in the course of taking the necessary steps to allot and

register shares. Similarly, there is a real prospect of the court construing Recital (B) along similar lines so that "are fully paid" in Recital A should be read as "are intended to be fully paid".

75. It follows that the court, at a trial, will have to reach a conclusion on the intention of the parties with the benefit, which this court does not have, of the relevant admissible facts and circumstances.

76. The claimant's case also suffers from a number of other difficulties, not least of which is what exactly should, on the claimant's case, appear on the register in its rectified form? The claimant's primary case is that he was entitled to be allotted the shares without any payment made by him. I do not understand Mr Chambers to say that the register could lawfully state the sum treated to be paid was £80,000, such sum to be paid by a third party, Gwent.

77. It is not an answer to say that the court may order rectification to show that the shares were fully paid up on the basis of payment made long after the proposed date of registration. The effect of rectification is to change the register in a manner that is treated as if it were for all purposes accurate at the date of registration. Unless the claimant is able to rely upon an estoppel, rectification is not open to him.

78. In any event, the position now is that the register shows the claimant as the registered proprietor of the 1,652 A shares. He is entitled to exercise his powers as a shareholder prospectively. Leaving aside the determinations made above, it would in my judgment be inappropriate for the court to grant summary judgment to rectify the share register in the exercise of its discretion because the issue warrants being fully explored at a trial.

79. The Company has raised a series of additional points each of which has a real prospect of success. (Mr Thompson's submissions were adopted on behalf of Gwent). To take them briefly in turn:

(1) Section 580(1) of the Act provides that shares must not be allotted at a discount. The claimant's case as pleaded relies upon both Recitals (A) and (B). It is not open to the claimant to ignore Recital (A) for the purposes of the Application. The estoppel would prevent the Company from contending that the claimant owes any money in respect of the shares which is contrary to section 580(1) and contrary to public policy. It is not open to the Company to arrange with its shareholders that they will not be liable for the amount unpaid on shares.[5] Estoppels by deed are subject to the same limitations so far as public policy is concerned as contractual provisions.[6]

(2) The doctrine of estoppel by deed may only be used in actions on the deed in which the statement relied upon was contained. The point is made in Spencer Bower: Reliance Based Estoppel 5th ed. at 8.86:

> "The operation of an estoppel by deed is limited to actions founded on the deed because the agreement of the parties made by assent to the relevant recital is interpreted as agreement to admit the proposition recited only for the purposes of the deed and the transaction effected thereby …".

It is by no means certain that the claimant's case in relation to registration of shares (unlike the claim in respect of clause 7.1(d)) is properly regarded as an action on the SHA. The estoppel is not a claim made under the operative provisions of the SHA, or a response to a claim made against him under the SHA. In fact, he seeks to rely upon an estoppel by deed to prevent the defendants from relying upon the true facts regarding the allotment and payment for the A shares.

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[5] Orregum Gold Mining Co of India v Roper [1892 AC 125 at 133 and Randt Gold Mining Co v New Balkis Ersteling [1903] 1 KB 461 at 465.

[6] Prime Sight v Lavarello [2013] UKPC 22 at [47]

(3) There is uncertainty about the extent to which, if at all, the defendants are entitled to adduce evidence to contradict the recital. The issue is discussed in Spencer Bower at paragraphs 8.77 to 8.78 in light of the fact that the decision of the Court of Appeal in *Close Asset Finance Ltd v Taylor* [2006] EWCA Civ 788 was not cited to the Privy Council in *Prime Time v Lavarello* [2014] AC 436. In *Close Asset Finance* the mortgage deed acknowledged receipt of £54,000. Lloyd LJ concluded, relying upon *Maitland v Upjohn* (1889) 41 Ch D 126 and obiter dicta from Lord Maugham in *Greer v Kettle*, that evidence could be admitted to show the true position. At paragraph 8.78 of Spencer Bower, the editors say:

> "The tension between the Privy Council and the Court of Appeal decisions is yet to be definitively addressed, but it is submitted that it may be resolved on the basis that *prima facie* a receipt in a contract or deed is understood as intended by the parties only to establish a presumption as to its accuracy, which may be displaced by evidence as to its accuracy sufficient to rebut the presumption, *unless* the parties … are precluded from adducing such evidence because it is established that they intended to contract or make their deed on the counterfactual basis that the money had been paid or was due, whether or not it was true …".

The qualification at the end of this passage brings the debate back to what evidence is admissible for the purposes of determining this point (if the Spencer Bower suggestion proves to be a correct interpretation of the law). On any view faced with considerable legal uncertainty and an uncertain factual platform, the point is unsuitable for determination on an application for summary judgment.

(4) The defendants have not yet served defences and it is not known whether they, or one of them, will counterclaim for rectification of the recitals. Indeed, it is not

certain that such a counterclaim is needed in light Lord Maugham's view expressed in *Greer v Kettle* at 171-172 that in a simple case a counterclaim for rectification may not be needed. Nevertheless, the evidence that is admissible in a claim for rectification is much wider than that which is admissible when dealing with an issue of construction and of necessity includes evidence about the existence of a common continuing intention. There is therefore another basis upon which the court should require the claim to be tried to ensure that relevant and admissible evidence is available when determining the estoppel claim

80. I am satisfied that the court should not grant summary judgment on Issue 1.

Issue 2

81. Issue 2, as it has narrowed, concerns whether one or both breaches of the SHA, which are admitted, were "capable of remedy" (put otherwise 'remediable') on a proper construction of the SHA and, if so, have the effect of triggering the deemed service of a transfer notice. I have concluded that this issue should go to a trial and therefore it is unnecessary to consider alternative submissions based upon the premise that the breaches were remediable.

82. Gwent's concession that the two breaches the claimant relies upon for the purposes of the application were 'material' is obviously a sensible one. Both breaches were significant. Gwent conceded at an early stage in correspondence that it had no entitlement to receive the A shares that were due to be allotted to the claimant and there was no basis for asserting that the SHA had terminated due to a fundamental flaw.

83. During the course of his submissions, Mr Chambers put forward ten propositions he relied upon (albeit they had not been set out in his skeleton argument):

    (1) In all cases it is necessary to interpret the relevant remediability provision in its particular contractual and factual context. There is no one universal concept of remediability which applies in all cases.

(2) The answer to the question whether these two breaches are capable of remedy depends on the true interpretation of clause 7.1(d).

(3) The exercise in interpretation is affected by a whole range of different factors none of which were present in *Schuler v Wickman* [7]or *the Force India* [8]case or any other cases relied upon by Gwent and there are three particular factors which are relevant:

(i) The SHA is a relational contract between the two shareholders with a 51/49 split.

(ii) The express terms of the SHA, in particular clauses 2.2, 16.1 and 16.3 necessarily required Gwent and the claimant to work closely together to promote the Hospital for their mutual benefit and that necessarily required a certain minimum level of trust and confidence in one another.

(iii) The SHA cannot be terminated by an innocent shareholder under the common law for a repudiatory breach committed by the defaulting shareholder.

(4) The exclusive remedy for a repudiatory breach of the SHA is confined to the remedy in clause 7.1(d).

(5) The remedy in clause 7.1(d) is intended to give the innocent shareholder at least the same level of protection as he would have been entitled to under the common law.

(6) This is achieved by interpreting clause 7.1(d) to mean that material breaches of the SHA which are repudiatory are not capable of remedy with the consequence that the notice to remedy provision does not apply to repudiatory breaches.

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[7] *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235

[8] *Force India Formula One Team Ltd v Etihad Airways PJSC* [2010] EWCA Civ 1051

(7) Even if the notice to remedy provision applies to repudiatory breaches, a repudiatory breach will not be remediable when the breach has caused the innocent shareholder to lose trust and confidence in the defaulting shareholder.

(8) The question whether the innocent shareholder has lost trust and confidence in the defaulting shareholder does not depend on the state of the parties' relationship at the time of the breach; it depends only on the impact of the breach on the innocent shareholder.

(9) The court can draw the inference of a loss of trust and confidence by the action of the innocent shareholder enforcing his rights under clause 7.1(d).

(10) Evidence from the innocent shareholder that he has lost trust and confidence in the defaulting shareholder, consequent on a repudiatory breach, is conclusive in circumstances where the innocent shareholder has acted to enforce his right under clause 7.1(d) and he does so at a time when the defaulting shareholder remains in repudiatory breach and has made no attempt to remedy that breach.

84. The first two propositions are uncontroversial, subject to the gloss added by Mr Lightman that there is no reason to ignore altogether the way in which expressions such as 'capable of remedy' or 'failed to remedy' have been interpreted in the authorities. Mr Chambers referred in his decalogue to two of the principal authorities dealing with remediability. Before going further, it is useful to examine them and, in addition, the decision of the Supreme Court in *Wickland (Holdings) Ltd Telechadder* [2014] 1 WLR 4004.

85. In *Schuler v Wickman* the agreement permitted either party to serve notice to terminate it in the event of a material breach of the agreement and the other party had failed to remedy it within 60 days of being required to do so. At p249G to 250A Lord Reid considered what was meant by "remedy" in the context of that agreement. He said:

> "It could mean obviate or nullify the effect of a breach so that any damage already done is in some way made good. Or it could mean cure so that matters are put right

> for the future. I think the latter is the more natural meaning. The word is commonly used in connection with diseases or ailments and they would normally be said to be remedied if they were cured although no cure can remove the past effect or result of the disease before the cure took place. And in general it can only be in a rare case that any remedy of something that has gone wrong in the performance of a continuing positive obligation will, in addition to putting it right for the future, remove or nullify damage already incurred before the remedy was applied. To restrict the meaning of remedy to cases where all damage past and future can be put right would leave hardly any scope at all for this clause. On the other hand, there are cases where it would seem a misuse of language to say that a breach can be remedied. For example, a breach of clause 14 by disclosure of confidential information could not be said to be remedied by a promise not to do it again."

86. The agreement Lord Reid was considering was a distribution agreement and he construed "remedy" for the purposes of that agreement as putting things right for the future, rather than removing entirely the effect of the breach. However, he considered that some breaches, he instanced a breach of an obligation not to disclose confidential information, cannot be remedied by merely promising not to repeat the breach. The example he gives may be seen as an occasion of it being impossible to put the genie back in the bottle, to borrow the metaphor used by Rix LJ in *Force India*. Mr Chambers submitted that in this case the bottle was broken by the defendants and thus there is no bottle into which the genie can be restored.

87. In *Wickland (Holdings) Ltd v Telechadder* the Supreme Court was required to consider provisions of the Mobile Homes Act 1983 which permitted a site owner to terminate an agreement permitting a person to station a mobile home on a particular site where there was a breach of the agreement and after service "of a notice to remedy the breach" the notice had not been complied with. Although the context is somewhat different to the

present one, the judgments are of assistance both for the full review of the authorities and observations made about the proper approach for the court.

88. The discussion in the judgments in *Telechadder* included a consideration of whether there is a difference of approach between positive and negative covenants and, inevitably focussed on the landlord and tenant cases. This case is quite different because the two breaches that are relied upon are not breaches of a specific term of the SHA, which was drafted on the premise that the A shares had been or would be allotted between the claimant and Gwent. Its principal terms, as Mr Chambers points out, concern the way in which the A shareholders should behave between themselves and between themselves and the Company. It was assumed for the purposes of the application that the allotment of the claimant's shares to Gwent was a breach of the SHA albeit that the claimant's case is based upon a prior contract (which he did not rely upon for the purposes of the application) and/or estoppel by contract or deed. The second breach relied upon, namely the assertion that the SHA had been terminated is more closely related to the provisions of the SHA, given the limitations of clause 15, but the breach is related to the premise of the letter, that the agreement itself was flawed, rather than a breach of one of its terms.

89. With the circumstances of this claim in mind, it seems to me that the discussion of the authorities in *Telechadder* is of limited assistance with two exceptions. First, reference is made to the judgment of Staughton LJ in *Savva v Hussein* (1996) 73 P & CR 150 at P150 where he says "… it is a remedy if the mischief caused by the breach can be removed." Secondly, *Rugby School (Governors) v Tannahill* [1935] 1 KB 87 concerned use of premises as a brothel in breach of a covenant in a lease. Despite the brothel being closed down, the Court of Appeal accepted that the stigma attached to the property rendered the breach irremediable.

90. I accept as Mr Chambers submits that the notion of remediablity must be construed in light of terms of the contract in question looked at in its relevant context. However, it is clear

from the authorities that the court must look to see whether the breach "can be put right for the future" or put another way, the mischief can be removed or whether there remains a stigma.

91. Both Lord Wilson and Lord Toulson in *Telechadder* accepted the need for an inquiry to be made whether the mischief caused by the breach could be redressed.[9] As a minimum it seems to me that the defendants have a real prospect of establishing at a trial that this is the right approach in this case. A full factual enquiry is needed at a trial. The claimant's evidence is nowhere near sufficient for the court to decide the point on a summary basis. Indeed there is a tension in the claimant's evidence between his decision to treat the SHA as continuing (after a lengthy gap between the events of 2020 and his response in 2021) and his evidence that the breaches led to an irretrievable breakdown in relations and a complete loss of faith in Gwent and David Lewis. Furthermore, his evidence about reaching that conclusion is based upon what he says was the effect of all four breaches and not severally in relation to the two breaches he relies upon now.

92. In my judgment, the issue of remediability is unlikely to be suitable for determination in most cases on a summary basis because, as in this case, the court does not have all the evidence it needs to make a determination about the proper construction of the contract and whether on the specific facts the breach was remediable.

93. Although it is not strictly necessary to do so, I now turn to deal with the more controversial propositions in Mr Chambers decalogue. I can take firstly propositions 4, 5, 6 and 7 together because they are essentially issues of construction of the SHA. I will then deal with propositions 8, 9 and 10 which concern evidence.

94. It is clearly right that, although it is helpful to consider the authorities the court must focus on clause 7.1(d) in the SHA and form a view about what "if capable of remedy" means for the purposes of this agreement. It is also right to have regard to the nature of the agreement

[9] Lord Wilson [31]. Lord Toulson [52].

and what it requires of the two shareholders in their dealings together and with the Company. It adds little to say it is a relational contract but it is useful to have in mind the joint obligations that are contained in clauses 2.2, 2.3, 16.1 and 16.3. These are standard obligations to find in a shareholders' agreement.

95. Mr Chambers relies upon the provisions of clause 15.1 concerning termination. Termination only takes place under the express provisions in the SHA if one of the three events specified there occurs. Mr Chambers submits that on a proper construction of the SHA termination by acceptance of a repudiatory breach is excluded which leaves a shareholder solely with the remedy under clause 7.1(d). If a shareholder opts to rely upon clause 7.1(d) and acquires the defaulting shareholder's shares, if there are only two shareholders, then the agreement will terminate automatically under clause 15.1(c). On the basis of Mr Chambers' construction of the SHA, in light of the exclusion of common law rights to terminate in the event of a repudiatory breach, clause 7.1(d) should be construed to give the innocent shareholder at least the same level of protection as he would have been entitled to at Common Law and therefore repudiatory breaches are to be treated as being incapable of remedy. This is a convenient edifice for the claimant but it appears to me that the defendants have a real prospect of demolishing it, starting with its foundations.

96. It is convenient to adopt the discussion in Chitty on Contract 34th ed. at paragraph 25-61. The key passage is the following:

> "The general approach of the courts is that the existence of an express power to terminate in the contract in the event of a breach by the other party does not preclude that party from treating the agreement as discharged by reason of the other's repudiatory breach at common law, unless the agreement itself expressly or impliedly provides that it can only be terminated by exercise of the contractual right. The courts are in general reluctant to infer that a contracting party has agreed to give up a valuable right arising by operation of law "unless the terms of the contract

make it clear that that was intended".[10] This being the case, the courts have typically inclined to the view that the express termination clause has not displaced the right to terminate at common law."

97. It seems to me that the claimant's case on construction faces two major hurdles that mean the defendants have a real prospect of success on this point at a trial. First, as Chitty explains the terms of the contract need to make it clear that the common law right was being given up. There is nothing in the SHA that lends support to the claimant's construction and, if anything, the terms of the SHA point in the opposite direction. Secondly, and more fundamentally, clause 15 is not a termination clause as such in the sense that it provides the parties with a right to terminate. It provides only that that the agreement will terminate if one of the three events takes place. It is in my judgment unlikely to be right that an innocent shareholder can only terminate the agreement by buying out the defaulting shareholder when faced with a repudiatory breach. There is no reason to take a narrow reading of the SHA, particularly bearing in mind that the innocent shareholder may well wish to end the relational contract and seek a remedy in damages. The innocent shareholder may not wish to be forced to acquire more shares. As Mr Chambers pointed out, the SHA envisages that the B shareholders will become parties by executing deeds of accession. A remedy under clause 7.1(d) would only remove the defaulting shareholder and not the other shareholders.
98. I do not accept that properly construed clause 7.1(d) means that a repudiatory breach is never remediable. Although the breaches that are relied upon are undoubtedly serious, it is possible to envisage a repudiatory breach which is transitory; a repudiatory act that was corrected before any harm was caused.
99. I can also see no good reason to construe clause 7.1(d) of the SHA as meaning that particular consequences flow when the innocent shareholder has lost trust and confidence (proposition 7).

[10] *Stocznia Gynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75 at [23].

100. Propositions 8, 9 and 10 invite the court to focus solely upon the effect of the breach upon innocent shareholder. I do not accept proposition 9 is right. The innocent shareholder might well (and entirely properly) act in a way that is opportunistic by relying upon clause 7.1(d). There is no compelling reason to infer that the enforcement of rights under clause 7.1(d) necessarily is based upon a loss of trust and confidence.

101. Although it is convenient for the claimant to focus attention on his position, whether a particular breach is remediable involves the court construing the agreement in light of that breach and the overall position. Evidence about the effect of the breach on the innocent shareholder may be admissible. However, the court will determine whether the breach is remediable not just by considering a statement by the claimant about a loss of trust and confidence. The enquiry into whether the mischief caused by the breach has been remedied or whether, for example, there is a residual stigma involves much more than receiving self-serving evidence from the claimant.

Conclusion

102. This claim should proceed to trial when all the issues of fact and law raised by the particulars of claim can be determined in light of findings of fact made by the trial judge. Neither of the issues placed before me are suitable for summary determination because the defendants have a real prospect of success. Were it to have been necessary to do so, I would also have concluded that the issues of law relating to contractual estoppel and estoppel by deed are best determined against findings of fact at a trial.

103. The application for summary judgment will be dismissed.