Neutral Citation Number: [2025] EWHC 352 (Ch)

IN THE HIGH COURT OF JUSTICE **No.BL-2023-000652**

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

DEPUTY MASTER HENDERSON

20th February 2025

BETWEEN:

ANTHONY FANE

Claimant

-and-

(1) GRAHAM WELLESLEY
(2) ANDREW TURNBULL
(3) CHALET VALENTINE LIMITED
(4) WELLESLEY GROUP INVESTORS LIMITED

Defendants

Counsel and solicitors:

The Claimant represented by Mr Paul Burton instructed by Richard Slade & Partners LLP

The Defendants represented by Mr Thomas Horton by Public Access

Hearing date: 18th September 2024

JUDGMENT

1. This is my judgment on the Claimant's application ("the Application") made by an application notice dated 1 February 2024 for judgment on admissions pursuant to CPR 14.4 and/or for summary judgment pursuant to CPR 24.2, providing for judgment on part of the claim against the Defendants and dismissing the 1st, 2nd and 3rd Defendants' Counterclaim.

2. The Application was supported by a witness statement made by the Claimant on 1 February 2024. The Defendants relied on a witness statement in response dated 22 April 2024 of Mr Henry Warren. At the time he made the statement Mr Warren was a senior associate solicitor employed by Shoosmiths LLP who then acted on behalf of the Defendants.

3. The Claimant and the 1st, 2nd and 3rd Defendants are the registered shareholders in the 4th Defendant ("the Company").

4. The shareholders' rights as between themselves are governed by the articles of association of the Company ("the Articles") which were adopted by a special resolution dated 5th December 2018 and by a shareholders' agreement ("the SHA") made on about 30 October 2015 between the then shareholders in the Company and the Company.

5. The dispute is as to the Claimant's rights under the Articles and the SHA.

6. Except for a minor quibble as to whether there are 2,350,520 or 2,350,000 issued preference shares in the Company, the shareholdings in the Company, as alleged in paragraphs 2 and 3 of the Particulars of Claim ("the PoC") are admitted in the Defence. As regards the ordinary shares, the shareholdings were and are as follows:

Shareholder	**Number of Shares**	**Percentage of the Ordinary Shares (%)**[1]
Chalet Valentine Limited (3rd Defendant)	394,690	16.9
Michael Dudley	44,000	1.9
Anthony Fane (Claimant)	229,672	9.8
Andrew Turnbull (2nd Defendant)	96,569	4.1
Graham Wellesley (1st Defendant)	1,576,589	67.3
TOTAL	2,341,520	100

7. As alleged in paragraph 4 of the PoC and admitted in paragraph 4 of the Defence, there are currently three directors of the Company:
   7.1. The 1st Defendant, who was appointed a director on 1 May 2013.
   7.2. The 2nd Defendant, who was appointed a director on 8 April 2014.
   7.3. Mr Mark Winlow, who was appointed a director on 3 July 2018.

8. Paragraph 6 of the PoC alleges that the SHA provided, "inter alia, and so far as is relevant to the Claimant's claim", as follows:

   "**1. DEFINITIONS AND INTERPRETATION**
   1.1 **Definitions**
   The definitions and rules of interpretation which apply to this Agreement are set out in Schedule 2.

[1] Rounded to one decimal place.

1.2 **Principal Shareholder**

(a) To qualify as a Principal Shareholder for the purposes of this Agreement a person must, subject to paragraph (g) below, have become, together with its Permitted Assignees, a holder of Shares representing not less than seven point four nine, nine (7.4999)% per cent of the issued ordinary share capital, or following Completion of the Share Purchase Agreement, not less than nine (9)% per cent (the '**Initial Threshold**').

(b) In the event that a Principal Shareholder, together with its Permitted Assignees, shall for whatever reason case to hold at least the Initial Threshold but shall continue to hold not less than five (5) per cent of the issued ordinary share capital from time to time it shall continue to be treated as a Principal Shareholder for the purposes of this Agreement.

[…]

(g) Any Third Party Proposed Purchaser who acquires Shares from a party who at that time is a Principal Shareholder shall qualify to become a Principal Shareholder for the purposes of this Agreement. The Principal Shareholder rights of such Third Party Proposed Purchaser shall be determined by the holding of Shares of such acquiring Shareholder on the basis provided in this clause 1.2. The Principal Shareholder transferring Shares to the Third Party Proposed Purchaser, if it shall retain any Shares, shall continue to be a Principal Shareholder with the Principal Shareholder rights determined by its retained holding of Shares on the basis provided in the foregoing provisions of this clause 1.2.

[…]

3. SHARE CAPITAL AND CONSTITUTION

3.1 **Share Capital**

(a) Details of the issued share capital of the Company are set out in Part A of Schedule 3.

[…]

4. BOARD MATTERS

4.1 **Nominated Director appointment and removal**

(a) Each Principal Shareholder shall at all times and from time to time while holding at least five (5) per cent of the issued ordinary share capital from time to time (which for the avoidance of doubt shall not include the Growth Shares) be entitled in its sole discretion to appoint and remove and to appoint in his place one (1) Nominated Director to the Board and the Shareholders shall be bound to act in accordance with such appointment or removal, as the case may be. […]

(b) Notice of the proposed appointment of any replacement Nominated Director or Nominated Director of a new Principal Shareholder shall be given to all Principal Shareholders with details including the name, occupation, regulatory or other recognised status and such other details as any Principal Shareholder shall reasonably request. Any Principal Shareholder shall be entitled within 10 Business Days of the giving of such notice to make a written objection to such appointment (which shall include the reasons therefor) to the person proposing such an appointment and to the

Company whereupon the person proposing such appointment shall either promptly withdraw such proposed appointment and if appointed remove that Nominated Director from such office and propose and appoint a replacement Nominated Director (after giving notice of the proposed appointment) or refer the object to the Nominations Committee for its determination. […]

11. ACCOUNTS AND INFORMATION

[…]

11.2 **Financial accounts, annual Budget and Business Plan**

The Company shall provide to the Shareholders:

(a) within fifteen (15) Business Days after the end of each month, monthly management accounts for the Group;

(b) within twenty (20) Business Days after the end of each financial quarter, consolidated quarterly accounts for the Group;

(c) within four (4) months after the end of each financial year, audited consolidated accounts for the Group prepared in accordance with UK GAAP and IFRS; and

(d) within two (2) Business Days of its approval as a Shareholder Reserved Matter, the Annual Budget and Business Plan.

(e) details of any indebtedness of any member of the Group to any Principal Shareholder or its connected persons.

(f) the daily peer to peer incoming report of cash in and out;

(g) the daily loans report;

(h) the weekly cash flow report;

(i) all emails sent for information to all Directors;

(j) within two (2) Business Days of their approval, copies of all minutes of the Committees of the Board including but not limited to those Committees constituted pursuant to clause 4.3(d) (*Board Proceedings, Committees of the Board*) above; and

(k) a report detailing all credit card expenditure incurred by Group Directors within twenty (20) Business Days of receipt by the relevant Group company of a credit card statement or expense receipts detailing the same.

11.3 **Access to information**

If reasonably requested by a Shareholder, a Shareholder shall be entitled to be supplied with such information relating to the Group as it reasonably requires from time to time:

(a) in connection with the preparation and filing of tax returns or other as filings or correspondence with a tax Governmental Authority of that Shareholder (or any of its Affiliates);

(b) for the purposes of disclosure by a Principal Shareholder (or its Representatives) on a strictly confidential basis to potential purchasers of Shares in connection with and for the purposes only of a proposed sale pursuant to the transfer provisions in the Articles;

11.4 **Assistance with information in relation to any proposed sale of Shares**

In connection with any proposed sale of Shares by a Principal Shareholder the Company shall provide, without cost to any Shareholder, all reasonable co-operation of its executive team or other relevant employees in responding to requests for information typically requested by any potential purchaser of shares in connection with a proposed purchase of shares in a private company, such requests to be met without undue delay and such information to be provided on a confidential basis in accordance with clause 13.2(c).

[…]

15. TERM AND TERMINATION EVENTS

[…]

15.2 The provisions of this Agreement (other than the Surviving Clauses) [shall cease to] apply to a Shareholder in the event that the Shareholder and each of its Permitted Assignees ceases to hold any Shares in a manner permitted by or consistent with the terms of this Agreement and the Articles.

[…]

17. Permitted Assignment

17.1 The Parties agree that a Principal Shareholder may, without the consent of the other Parties:

(a) assign the benefit of all but not some only of its right under this Agreement to any Permitted Assignee, who may enforce the same, as if it were such Principal Shareholder under this Agreement;

[…]

17.3 For the purposes of this clause 17, a "Permitted Assignee" means a person to whom a transfer of Shares can be made under Article 49.2 of the Articles without being subject to the requirements of Article 50 (Voluntary Transfers) of the Articles.

[…]

17.6 Except as provided in this clause 17 (or under or pursuant to the Charge Agreements no person may assign, hold on trust or otherwise transfer its rights or benefits under this Agreement without the written consent of all other Parties or mortgage or otherwise charge its Shares unless the terms of the Articles apply on any crystallisation of such mortgage or charge and provided always that all terms of the Articles and this Agreement affecting such Shares continue to apply.

[…]

19. Jurisdiction and Disputes

[…]

19.11 The Parties hereby irrevocably agree to submit to the exclusive jurisdiction of the Court of England in respect of any dispute which may arise in connection with the validity, effect, interpretation or performance of, or the legal relationships established by, this Agreement or otherwise arising in connection with this Agreement and irrevocably agree not to commence proceedings in any other jurisdiction in connection with such matters.

SCHEDULE 2 (DEFINITIONS AND INTERPRETATION)

[…]
"Articles" means the proposed new Articles of Association of the Company in the Agreed Form as supplemented or replaced from time to time;
[…]
"Completion" has the meaning given to Completion in the Share Purchase Agreement;
[…]
"connected" means in relation to a shareholder: any individual who is a Privileged Relation of such shareholder or a Privileged Relation of any connected person of such shareholder…
[…]
"Permitted Assignee" has the meaning given to it in clause 17.3;
[…]
"Principal Shareholder" has the meaning given to it in clause 1.2;
"Privileged Relation" has the meaning given to it in the Articles;
[…]
"Share Purchase Agreement" means the share sale and purchase agreement between Milner Limited, Chalet Valentine Limited, Graham Wellesley, Andrew Turnbull and Anthony Fane relating to the sale by Milner and the purchase by Chalet Valentine Limited, Graham Wellesley and Andrew Turnbull of Shares in the Agreed Form".

9. Paragraph 6 of the PoC is admitted by paragraph 6 of the Defence. However, in the course of argument it appeared that Clause 3.2(a) of the SHA might be relevant to the issues between the parties.

10. Clause 3.2(a) of the SHA provides that in the event of any inconsistency between the provisions of the SHA and the Articles, save as expressly provided by the SHA, the provisions of the SHA shall prevail.

11. The admission of paragraph 7 of the PoC by paragraph 6 of the Defence that "so far as is relevant to the Claimant's claim" the provisions of the SHA were set out in paragraph 7 of the PoC arguably prevents reliance on Clause 3.2(a) or other non-pleaded clauses of the SHA by the Defendants or the court. In my judgment it does not have that effect. I consider that the clauses of the SHA pleaded in the PoC as "relevant to the claim" are so pleaded because they are the clauses which are alleged to give rise to the claim. They are not pleaded as those which are relevant to the interpretation of the clauses which give rise to the claim. My judgment in that regard is reinforced by the considerations:
    11.1. That it is fundamental to the interpretation of a particular clause in a contract the court must consider the contract as a whole. An interpretation of the PoC and of the Ds' admission that "so far as is relevant to the Claimant's claim" the provisions of the SHA were set out in the PoC which forbade reference to other terms of the SHA for the purpose of interpreting those relied upon by the Claimant would be inconsistent with that principle.
    11.2. Mr Burton on behalf of the Claimant referred me to clause 3.2 of the SHA in the course of his oral opening submissions.

12. I reach the same conclusion for the same reasons in respect of the admissions in the Defence of the similar pleas in the PoC as to "so far as is relevant to the Claimant's claim" in relation to the Articles and the Deed. The terms of the Charge pleaded in the PoC are not admitted in the Defence.

13. Paragraph 7 of the PoC alleges that the Articles "inter alia, and so far as is relevant to the Claimant's claim, provide as follows":

"PART 1
INTERPRETATION AND LIMITATION OF LIABILITY
1 Defined terms
1.1 In these Articles, unless the context requires otherwise:
[…]
Charge means a mortgage or other security on or over securities including any Encumbrance;
[…]
Encumbrance means any interest or equity of any person (including any right to acquire, option or right of pre-emption) or any mortgage, charge, pledge, lien, assignment, hypothecation, security interest, title retention or any other security agreement or arrangement;
[…]
Principal Shareholder means any person who, together with his Permitted Transferees, has at any time become the holder of Ordinary Shares representing not less than 9 per cent of the total issued Ordinary Shares (Initial Threshold) and either, together with his Permitted Transferees, (i) continues to hold Ordinary Shares representing not less than 5 per cent of the total issued Ordinary Shares (General Threshold) or (ii) continues to hold Ordinary Shares representing less than 5 per cent but holds any Ordinary Shares (Limited Threshold) or a person, together with his Permitted Transferees, who has received a transfer of Ordinary Shares from a Principal Shareholder (including from his Permitted Transferees) where the Ordinary Shares transferred qualify the transferor(s) as a Principal Shareholder;
[…]
Privileged Relation has the meaning given in Article 49.1.2;
[…]
APPOINTMENT AND TERMINATION OF APPOINTMENT OF DIRECTORS
[…]
20 Methods of appointing Directors
20.1 Any person who is willing to act as a Director, and is permitted by law to do so, may be appointed to be a Director:
20.1.1 by ordinary resolution, or
20.1.2 by a decision of the Directors,

20.1.3 for so long as a Principal Shareholder holds Ordinary Shares at or above the General Threshold, by notice in writing to the Company to appoint one person as a director

[…]

48 Transfer of shares – general

48.1 In these Articles, a reference to the transfer of or transferring shares shall include any transfer, assignment, disposition or proposed or purported transfer, assignment or disposition;

48.1.1 of any share or shares of the Company; or

48.1.2 of any interest of any kind in any share or shares of the Company; or

48.1.3 of any right to receive or subscribe for any share or shares of the Company.

48.2 The Directors shall not register the transfer of any share or any interest in any share unless the transfer is made in accordance with the applicable requirements of Article 49 (Permitted Transfers), Article 50 (Voluntary Transfers), Article 51 (Compulsory Transfers), Article 52 (Drag Along), Article 53 (Tag Along on acquisition of a Controlling Interest), Article 54 (Partial Tag Offers) and Article 62 (Compulsory Transfers of Growth Shares) and, in any such case, is not prohibited under Article 51 (Prohibited Transfers).

[…]

49 Permitted Transfers

49.1 For the purposes of this Article:

49.1.1. the expression "Family Trusts", as regards or in relation to any particular individual member or deceased or former individual member, means trusts (whether arising under a settlement, declaration of trust or other instrument made or under a testamentary disposition or an intestacy) under which the only beneficiaries are that individual or the Privileged Relations of that individual or any charitable entity, and for those purposes a person shall be deemed to be beneficially interested in a share if the share or the income on it is or may become liable to be transferred or paid or applied or appointed to or for the benefit of such person or any voting or other rights attaching to it are or may become liable to be exercisable by or as directed such person pursuant to the terms of the relevant trusts or in consequence of an exercise of a power or discretion conferred by it on any person or persons;

49.1.2 the expression "Privileged Relation", as regards or in relation to any particular individual member or deceased or former individual member, means and includes the husband or wife or civil partner or any parent of such husband or wife or civil partner or the widower or widow or surviving civil partner of the individual or any parent of such widower or widow or surviving civil partner of the individual and all the lineal descendants and ascendants in direct line of the individual and the brothers and sisters of that individual and their lineal descendants and a husband or wife or civil partner or former husband or wife or civil partner or widower or widow or surviving civil

partner of any of the above persons, and for those purposes a step-child or adopted child or illegitimate child of any person shall be deemed to be a lineal descendant of such person and of the lineal ascendants of such person;

[…]

49.2 The Ordinary shares may at any time be transferred without being subject to the requirements set out in Article 50 (Voluntary Transfer)

49.2.1 by any individual member (not being in relation to the shares concerned a holder of them as a trustee of any Family Trusts) to a Privileged Relation of such member; or

49.2.2 by any such individual member to trustees to be held upon Family Trusts related to such individual member;

[…]

49.2.7 by any member to another person as security pursuant to the terms of a Charge; or 49.2.8 with the consent in writing of all the Principal Shareholders (which consent may be unconditional or subject to any terms or conditions and in the latter case any share so transferred shall be held subject to such terms and conditions) to any person.

[…]

49.5 Where Ordinary Shares have been transferred under Article 49.2.7, upon release of the Charge pursuant to which they were transferred or upon any proposed exercise of a power of sale pursuant to such Charge, it shall be the duty of the holder to notify the Directors in writing that such event has occurred and (unless the Relevant Shares are then transferred to the member from whom such Ordinary Shares were transferred pursuant to the Charge or a Permitted Transferee thereof (other than a Permitted Transferee pursuant to Article 49), any such transfer being deemed to be authorised under the foregoing provisions of Article 49) the holder shall be bound to give a Transfer Notice (as defined in Article 50.1) in respect of the Relevant Shares.

[…]

50 Voluntary Transfers

50.1 Any member who wishes to transfer any Ordinary Share, B Ordinary Share or other share (Seller) other than pursuant to a Permitted Transfer shall before transferring or agreeing to transfer such Ordinary Share, B Ordinary Share or share or any interest in it, serve notice in writing (Transfer Notice) on the Company of his wish to make that transfer.

[…]

50.9 The Directors shall no more than ten working days after:

50.9.1.1. the Sale Price has been agreed or determined in the case of Sale Shares other than Principal Sale Shares, give an Offer Notice in respect of such shares to all Ordinary Shareholders and B Ordinary Shareholders (other than the Seller) in accordance with these Articles; or

50.9.1.2. the service of the Transfer Notice in respect of Principal Sale Shares, give an Offer Notice (First Principal Shares Offer Notice) in respect of such shares to all Principal Shareholders (other than the Seller) in accordance with these Articles. For the avoidance of doubt, no Sale Shares may be offered or

sold to any transferee pursuant to Article 50.15 or 15.18 unless an Offer notice has first been given to those Ordinary Shareholders and B Ordinary Shareholders entitled to receive the same hereunder in accordance with the pre-emption provisions set out in this Article and Articles 50.10 to 50.14 inclusive."

14. Paragraph 7 of the PoC is admitted in paragraph 6 of the Defence. However, in his skeleton and orally, in the context of the issue as to whether the former wife of the Claimant was a "Privileged Relation" within the meaning of Article 49.1.2, Mr Horton sought also to rely on Article 49.6 in support of the Defendants' pleaded interpretation of Article 49.1.2 that former spouses were not included within the Article 49.1.2 definition. Article 49.6 provides:

    "49.6 Where Ordinary Shares have been transferred under Article 49.1.2 to a husband or wife or civil partner of the particular individual member or former individual member referred to in Article 49.1.2 or any parent of such husband or wife or civil partner (whether directly or by a series of transactions under Article 49) and such husband or wife of civil partner ceases to be married to, or in civil partnership with (as the case may be), the relevant individual, other than by reason of death of such individual, then it shall be the duty of the member which is the former husband, or wife or civil partner or parent of any such person to notify the Directors in writing that such event has occurred and such member shall (unless the relevant shares are then transferred to a Permitted Transferee of the particular individual member or former individual member referred to in Article 49.1.2) be bound to give a Transfer Notice in relation to the Ordinary Shares held by such member."

15. Paragraph 8 of the PoC alleged that in or around 7 March 2017, the Claimant entered into an agreement by way of deed with Plutus Estates Limited ("Plutus") ("the Charge") and that a copy of the Charge was attached to the PoC. Unfortunately, a copy of the wrong document was attached to the PoC. The Defence did not admit that the Claimant executed the Charge and denied that a copy of the Charge was annexed to the PoC. However, a copy of the Charge was annexed to the Reply and Defence to Counterclaim and in Mr Warren's statement on behalf of the Defendants it is accepted that the Charge was a "Permitted Transfer" under Article 49.

16. Paragraph 9 of the PoC alleges that the Charge provided "so far as is relevant to the Claimant's claim", as follows:

    "1. **DEFINITIONS AND INTERPRETATION**

    1.1 **Definitions**

    The following definitions in this clause apply in this deed:

    […]

Event of Default: has the meaning given to that expression in the Facility Agreement.

Facility Agreement: the facility agreement dated 2017 between the Chargor and the Lender for the provision of the loan facilities secured by this deed.

[…]

Related Rights: any:

(a) dividend, interest or other distribution paid or payable in relation to any Share; and

(b) right, money or property accruing, offered or issued at any time in relation to any Share by way of redemption, substitution, exchange, conversion, bonus, preference or otherwise, under option rights or otherwise.

[…]

Secured Assets: all the assets, property and undertaking for the time being subject to any Security created by, or pursuant to, this deed (and references to the Secured Assets shall include references to any part of them).

Secured Liabilities: all present and future monies, obligations and liabilities of the Borrower to the Lender, whether actual or contingent and whether owed jointly or severally, as principal or surety or in any other capacity, under or in connection with the Facility Agreement or this deed (including, without limitation, those arising under clause 25.3(b)), together with all interest (including, without limitation, default interest) accruing in respect of such monies or liabilities.

[…]

Shares: all of the shares in the share capital of Wellesley Group Investors Limited incorporated and registered in England and Wales with company number 08478238.

2. **COVENANT TO PAY**

2.1 **Covenant to pay**

The Chargor shall, on demand, pay to the Lender and discharge the Secured Liabilities when they become due.

3. **GRANT OF SECURITY**

3.1 **Fixed Charge**

As a continuing security for the payment and discharge of the Secured Liabilities, the Chargor with full title guarantee charges to the Lender by way of a first fixed charge:

(a) all the Shares owned by it; and

(b) all Related Rights.

[…]

7. **VOTING RIGHTS AND DIVIDENDS**

7.1 **Voting rights and dividends – before enforcement**

(a) Before the security constituted by this deed becomes enforceable, the Chargor may exercise all voting and other rights and powers in respect of the Secured Assets or, if any of the same are exercisable by the Lender or any of its nominees, direct in writing the exercise of those voting and other rights and powers provided that:

(i) it shall not do so in any way that would breach any provision of the Facility Agreement or this deed or for any purpose inconsistent with the Facility Agreement or this deed; and

(ii) the exercise of, or failure to exercise, those voting rights or other rights and power would not, in the Lender's opinion, have an adverse effect on the value of any of the Secured Assets or otherwise prejudice the Lender's security under this deed.

(b) Before the security constituted by this deed becomes enforceable, the Chargor may retain and apply for its own use all dividends, interest and other monies paid or payable in respect of the Secured Assets and, if any are paid or payable to the Lender or any of its nominees, the Lender will hold all those dividends, interest and other monies received by it for the Chargor and will pay them to the Chargor promptly on request.

[…]

7.2 **Voting rights and dividends – following an Event of Default**

After the security constituted by this deed has become enforceable, the Lender may at its discretion (in the name of the Chargor and without any further consent or authority from the Chargor and irrespective of any direction given by the Chargor):

(a) exercise or refrain from exercising (or direct its nominee to exercise or refrain from exercising) all voting rights and any other powers or rights in respect of the Secured Assets, and the Chargor shall comply, or procure compliance, with any directions the Lender may give, in its absolute discretion, in respect of the exercise of those voting and other rights and powers;

(b) apply all dividends, interest or other monies paid or payable in respect of the Secured Assets in accordance with clause 14 and, if any such dividends, interest or other monies are received by or on behalf of the Chargor, the Chargor shall hold all such dividends, interest and other monies on trust for the Lender and shall immediately pay them to the Lender or as it may direct;

(c) complete all instruments of transfer held by it in relation to the Secured Assets in favour of itself or such other person as it may select and have the Secured Assets transferred into its name or the name of its nominee or, as applicable, into an account in its own name or the name of its nominee; and

(d) in addition to any other power created under this deed, exercise or refrain from exercising (or direct its nominee to exercise or refrain from exercising)

all the powers and rights conferred on or exercisable by the legal or beneficial owner of the Secured Assets.

[…]

9. **WHEN SECURITY BECOMES ENFORCEABLE**

9.1 **Event of Default**

The security constituted by this deed shall become immediately enforceable if an Event of Default occurs.

9.2 **Discretion**

After the security constituted by this deed shall become immediately enforceable, the Lender may, in its absolute discretion, enforce all or any part of that security at the times, in the manner and on the terms it thinks fit, and take possession of and hold or dispose of all or any part of the Secured Assets."

17. The Defence makes "no admissions" as to paragraph 9 of the PoC.

18. Paragraph 10 of the PoC alleges that the Charge secured the Claimant's liability to repay to Plutus a loan facility of £300,000, advanced to the Claimant by Plutus pursuant to an agreement dated 14 June 2016 (the "**Facility Agreement**"). In the Defence, the Defendants make "no admissions" as to whether (i) the Facility Agreement was a genuine transaction; (ii) the Facility Agreement was entered into between the Claimant and Plutus; (iii) the loan alleged in the sum of £300,000 was paid by Plutus to the Claimant or (iv), if paid, it had not been repaid.

19. Following the provision by the Claimant of evidence, it was accepted by the Defendants that the Charge was executed and contained the terms set out in paragraph 9 of the PoC and that a genuine loan was made by Plutus to the Claimant.

20. Paragraph 11 of the PoC alleges that "to the best of the Claimant's knowledge, and as at the date of these Particulars of Claim, Plutus have not made any demand under the Facility Agreement and/or otherwise indicated an intention to enforce their security pursuant to the terms of the Charge."

21. Paragraph 10 of the Defence alleges that if the Facility Agreement was a genuine agreement and a loan of £300,000 was advanced pursuant to clause 8.1 of the Facility agreement, the loan should have been repaid on 14 March 2017 and that the Charge would have been enforceable from that date.

22. Paragraph 12 of the PoC alleges that the Claimant's marriage to Ms Emma Fane was dissolved on 30 January 2019 by an order of the Family Court at Bury St Edmunds. This paragraph was "not admitted" by the Defence. A copy of a certificate of the Family Court dated 30 January 2019 is exhibited to the Claimant's witness statement. This certifies that, no cause having been shown why an earlier decree of dissolution should not be made

absolute, the marriage was dissolved on 30 January 2019. There is no doubt about the date of the dissolution and the hearing before me proceeded on that basis.

23. Paragraph 13 of the PoC alleges that on or around 20 October 2020, the Claimant and Ms Emma Fane entered into a "Deed of Confirmation and Undertaking" ("the Deed").

24. Paragraph 14 of the PoC alleges that "inter alia, and so far as is relevant to the Claimant's claim," the Deed provided as follows:

"**Anthony Fane** … (**Registered Owner**)

and

Emma Fane … (**Beneficial Owner)**

It is Agreed

1. The Registered Owner confirms, represents and warrants to the Beneficial Owner that:

a. the shares consist of 229,672 ordinary shares of £1.00 each in WGIL (constituting 10.875% of the issued ordinary share capital of WGIL);

b. he acknowledges she has a beneficial interest in 50% of the Shares as to both capital, income and all associated rights attached to the Shares;

c. the facts stated in this sub-paragraph 1(a) of this deed are correct in all material respects; and

d. in respect of –

i. the Shares, or any other shares in the Companies he has at any time owned; or

ii. any interest therein, he has at no time prior to the date of this deed allowed any dealing with or disposal of such, in the manner cited in clause 2 or otherwise, to have occurred since he acquired such shares other than the purported pledge of shares to Plutus Estates Limited ("**Plutus**") in March 2017 and the purported sale of 44,000 shares in WGIL to Mr Michael Dudley on or around 8 January 2019 (resulting in the current holding by the Registered Owner of 229,672 Shares in WGIL).

[…]

6. Subject to any consent required from Plutus (which is required the parties shall collaborate in good faith to try and secure promptly), the Registered Owner confirms and represents he shall transfer the Shares into the joint names of him and the Beneficial Owner or transfer 50% of the Shares to the Beneficial Owner subject to both the Beneficial Owner and the Registered Owner agreeing that:

a. any such transfer shall not dilute the rights of the Shares as stipulated in the Shareholders' Agreement, nor

b. remove the status of Principal Shareholder currently conferred in the Shareholders' Agreement; nor

c. in both the Registered Owners and Beneficial Owners opinion [sic] such action does not reduce the value of the shares as a single block of shares.

The Registered Owner shall promptly sign, deliver and execute all relevant documentation to affect [sic] such transfer at the Beneficial Owner's direction subject to the caveat's [sic] listed above, such caveats being valid only after the Registered Owner and the Beneficial Owner jointly seeking formal binding dispensation from all parties to any Shareholders' Agreement that –

i. joint ownership of the Shares be voted by both holders rather than the first named on the share register; and/or

ii. 50/50 ownership of shares shall be aggregated for the purposes of maintaining Principal Shareholder status and rights for the aggregate holding and holders when voted the same way."

25. Paragraphs 13 and 14 of the PoC are admitted by paragraph 12 of the Defence.

26. Paragraph 15 of the PoC, which is admitted by paragraph 13 of the Defence, sets out that on 14 March 2021, the 1st Defendant sent an email to the Claimant with the subject "Shareholder Complaint".

27. Paragraph 16 of the PoC states that the Shareholder Complaint made a number of allegations in relation to the Charge and the Deed. In particular it alleges that:
    27.1. The Charge, and/or the alleged failure to comply with the terms of the Facility Agreement, constituted a breach of clause 17.6 of the Shareholders' Agreement.
    27.2. The Claimant had breached the terms of clause 49.5 of the Articles by failing to inform the directors of the Company under that provision and serve a transfer notice in respect of the shares subject to the Charge.
    27.3. The Deed constituted a breach of clause 17.6 of the Shareholders' Agreement.
    27.4. The Deed requires and/or required the Claimant to serve a transfer notice pursuant to clause 50 of the Articles in respect of the shares over which he declared a trust in favour of Ms Fane.

28. Paragraph 16 of the PoC is admitted by paragraph 13 of the Defence, with the additional averment that the Shareholder Complaint alleged that the grant of the Charge (if the Charge was granted which, at that stage was not admitted) was also in breach of the Articles.

29. Paragraph 17 of the PoC, which is admitted by paragraph 14 of the Defence, set out the terms of a letter dated 15 March 2021 received by the Claimant and written with reference to the Shareholder Complaint by some or all of the Defendants or other shareholders in the Company. The terms of the letter include a statement that "in view of the continuing situation and letter which points to *prima facie* breaches of the articles of association and shareholders [sic] agreement, we consider that the suspension of your rights as a Principal Shareholder should remain in place. We consider the suspension to be permitted by clause 15.2 of the SHA and warranted to preserve the status quo until the

matter can be resolved. There is also no suggestion that the suspension is causing you any prejudice."

30. Paragraphs 18, 19 and 20 of the PoC, all of which are admitted in the Defence, set out that:
    30.1. One of the then Principal Shareholders, Mr Naldini in respect of his 318,973 shares; and non-Principal Shareholders, Mr Godfrey in respect of his 57,035 shares and Mr Hatchard in respect of his 14,259 shares, sent transfer notices in accordance with Article 50.2.
    30.2. Pursuant to Article 50.9.2, the Company sent its Principal Shareholders, including the Claimant, a "First Principal Shares Offer Notice" in respect of Mr Naldini's shares, setting the price for them at £250,000 and naming Mr Turnbull (the 2nd Defendant) as the proposed transferee.
    30.3. Pursuant to Article 59.2, the Company sent "Non-Principal Shares Sales Offer Notices to its shareholders in respect of Mr Godfrey's and Mr Hatchard's shares, setting prices for them of £44,702 and £11,176 respectively.
    30.4. The Company, by an email from the 1st Defendant of 17 August 2021 to Mr Naldini, the Claimant and the 2nd Defendant, sent a "Second Principal Shares Offer Notice" inviting the Principal Shareholders to apply in writing for those of Mr Naldini's shares which had not been taken up which, so far as the Claimant was aware, was all of them. Paragraph 16 of the Defence adds the averment that the Second Principal Shares Offer Notice was sent by the Company and was signed by the 1st Defendant on behalf of the Company and that it was addressed to the Principal Shareholders, including the Claimant.
    30.5. The Second Principal Sale Share Offer was stipulated to expire 30 days after the date of the offer, i.e. on 16 September 2021.

31. Paragraph 21 of the PoC, which is admitted in the Defence, sets out the following contents of a letter dated 23 August 2021 from the Claimant's solicitors addressed to the "Directors and Principal Shareholders" of the Company:

    "Turning to the offer of shares, Mr Fane is seriously interested in exercising his pre-emption rights as a Principal Shareholder. But there are three practical difficulties. The first is that, pending the appointment of Mr Rajani, Mr Fane has not had access to the board papers, including, for example: (i) up-to-date management accounts, including a profit and loss account, a balance sheet, a cash flow forecast and a one-year projection showing the anticipated position at the end of the year, including budgeted overhead; (ii) a business plan for the current and, if available, next financial years; (iii) draft statutory accounts for the financial year ended 31 December 2020; (iv) a projected outcome statement in relation to the CVA; (v) a detailed loan data tape, including provisions (if any), and a schedule of any off-balance sheet assets and liabilities; (vi) a detailed note relating to investments in other companies, including numbers of shares owned at present, current valuations and supporting information and documents.

> The second difficulty is that the notice provisions in relation to the pre-emption rights have been implemented at a time when Mr Fane's Principal Shareholder status is said to have been "suspended".
> The third difficulty is that, as I have mentioned, no-one could seriously say that Mr Fane could exercise his legal rights and, potentially, spend money acquiring further shares if his status as a Principal Shareholder remains in doubt. For that reason alone, the present disagreement over his status will need to be clarified.
> Taking, once again, the pragmatic approach, in order to avoid any prejudice to Mr Fane arising from the disagreement which has occurred, one way of dealing with the matter would be for the information and documents outlined above to be provided to him; for the notice provisions to be rerun, starting from the date on which the information and documents are provided; and for the issue of Mr Fane's status as a Principal Shareholder to have been resolved 7 days prior to the date on which the notices are agreed to expire."

32. Paragraph 23 of the PoC makes allegations as to the transfers of Mr Naldini's, Mr Godfrey's and Mr Hatchard's ordinary shares in the Company to the 1st and/or the 2nd Defendants in or around December 2021 and February 2022.

33. Paragraph 18 of the Defence makes more detailed averments as to the transfers of those shares, but subject to those more detailed averments, admits paragraph 23 of the PoC.

34. Paragraph 24 of the PoC alleges, amongst other things, that the Charge was a "permitted transfer" within the meaning of Article 49.2.7 and that the Charge does not contravene clause 17.6 of the Articles.

35. Paragraph 19 of the Defence admits that if, which was not admitted, the Charge was executed and contained the terms set out in paragraph 9 of the PoC and a genuine loan was made by Plutus to the Claimant, then it was a "permitted transfer" within the meaning of Article 49.2.7 and would not have contravened clause 17.6 of the SHA.

36. Paragraph 19.3 of the Defence alleges that in the event that any steps were taken by Plutus with a view to selling the Claimant's shares or any part of them, then such steps would have triggered the obligation under Article 49.5 to serve a transfer notice in respect of those shares.

37. Paragraph 25 of the PoC alleges that "in the premises", the Claimant seeks declarations that (1) the Charge is a "permitted transfer" pursuant to Article 49; (2) unless and until Plutus gives notice of any intention to enforce the terms of the Charge, the Claimant is not obliged to serve a Transfer Notice pursuant to clause 49.5 of the Articles and (3) the Charge did not and does not contravene clause 17.6 of the SHA.

38. In paragraph 20.1 of the Defence it is averred that if, which is not admitted, the Charge was executed and secured a genuine loan made by Plutus, then, in Shoosmith's letter

dated 3 November 2021 to the Claimant's solicitors, the Defendants accepted that by granting the Charge, the Claimant did not breach the Articles or the SHA; that being an admission which was acknowledged by the Claimant's solicitors in their letter of 20 December 2021. Paragraph 20.2 of the Defence alleges that "in the premises", the claim made and the relief sought in respect of the Charge are "wholly unnecessary" and that the Defendants will seek their costs of and occasioned by it.

39. Paragraph 20.3 of the Defence provides that "save as aforesaid", no admissions are made as to whether the Claimant is entitled to the declaratory relief claimed in paragraph 25 of the PoC.

40. Paragraph 26 of the PoC states that the Claimant's case in respect of the Deed is that:
    40.1. As a matter of construction, Article 49.1.2 includes the former wife of a member of the Company within the class of individuals who are "Permitted Transferees".
    40.2. The disposition of the Claimant's interest in his shares effected by any declaration of trust in favour of Ms Fane and as recorded by the Deed is therefore a "permitted transfer" within the meaning of Article 49.2.1.
    40.3. The Deed does not contravene clause 17.6 of the SHA because the Deed does not purport to assign, declare a trust of and/or otherwise transfer the Claimant's rights under the SHA.

41. Paragraph 21.1.1 of the Defence alleges that as a matter of construction, Article 49.1.2 does not include the former wife of a member of the Company within the class of individuals who are "Permitted Transferees".

42. In support of that construction, paragraph 21.1.2 of the Defence alleges that the reference in Article 49.1.2 to "a husband or wife or civil partner or former husband or wife or civil partner or widower or widow or surviving civil partner of any of the above persons" means a husband or wife or civil partner or former husband or wife or civil partner or widower or widow or surviving civil partner of: (i) any of the lineal descendants and ascendants in direct line of the member; (ii) the brothers and sisters of the member; and (iii) their lineal descendants.

43. Paragraph 21.2 of the Defence alleges that "in the premises", the purported disposition by the Claimant of a 50% beneficial interest in the Claimant's Shares ("50% of the Claimant's Shares") to Mrs Fane pursuant to the Deed was not a Permitted Transfer falling within Article 49.

44. Paragraph 21.3 of the Defence alleges that because the transfer was not a Permitted Transfer, the Claimant should, pursuant to Article 50, have served a transfer notice on the Company in respect of 50% of the Claimant's Shares so that the Principal Shareholders were given the opportunity to acquire those shares.

45. Paragraph 21.4 of the Defence alleges that in breach of Article 50, no transfer notice was served by the Claimant on the Company in respect of 50% of the Claimant's Shares,

despite there being an email from the 1st Defendant dated 14 March 2021 and an email from the 2nd Defendant dated 17 August 2021 requiring that the Claimant serve such a notice pursuant to his obligation under Article 50.

46. Paragraph 21.5 of the Defence alleges that "in the premises", the transfer of a beneficial interest in 50% of the Claimant's Shares to Mrs Fane, and the Deed, are "invalid" and that the Claimant is obliged to serve a transfer notice on the Company in respect of those shares.

47. Paragraph 21.6 of the Defence provides that "save that the reference to the Charge should be to the Deed, paragraph 26.3 [of the PoC] is admitted."

48. Paragraph 21.7 of the Defence provides that "save as aforesaid", paragraph 26 of the PoC is denied.

49. Paragraph 27 of the PoC provides that the Claimant seeks declarations that the Deed is a "permitted transfer" and that it did not and does not contravene clause 17.6 of the SHA.

50. Paragraph 22 of the Defence admits that the Claimant is entitled to the declaration sought as to the Deed not contravening clause 17.6 of the SHA, but, for the reasons set out in paragraph 21 of the Defence, denies that the Claimant is entitled to a declaration that the deed is a "permitted transfer."

51. Paragraph 28 of the PoC sets out the Claimant's case that he remains a "Principal Shareholder" within the meaning of the Articles and the SHA.

52. In paragraph 23 of the Defence it is admitted that Claimant is a "Principal Shareholder" because he continues to hold not less than 9% of the total issued ordinary shares in the Company; but denies the Claimant's alternative case that Ms Emma Fane is a Permitted Transferee and that she holds any percentage of the issued ordinary shares in the Company.

53. Paragraph 29 of the PoC states that "in the premises", the Claimant seeks a declaration that he is and has at all material times been a "Principal Shareholder". In paragraph 24 of the Defence, it is admitted that the Claimant is entitled to that declaratory relief.

54. Paragraph 30 of the PoC sets out the terms of clause 11.2 of the SHA. These are admitted by paragraph 25 of the Defence.

55. Paragraph 31 of the PoC alleges that since in or around 2019, and in breach of its obligations under clause 11.2 of the SHA, the Company has failed to provide the Claimant with any of the information required by clause 11.2 of the SHA.

56. Paragraph 26.1 of the Defence alleges that prior to 2019 the Company provided the Claimant with director packs which contained the information required to be provided

under clause 11.2, and when any pack was not provided on time to the Claimant, he would make a specific request for the same.

57. Paragraph 26.2 of the Defence alleges that by 2019, to the knowledge of the Claimant, the Company and companies within the Group were experiencing severe financial difficulties and, in the case of Wellesley & Co., a company regulated by the FCA, any information derived from communications between the company and the FCA was confidential and could not be shared by the company with any third parties, including non-director shareholders.

58. Paragraph 26.3 of the Defence alleges that as a result of the substantial insolvency of the Company and the Group companies, whilst the board sought to restructure the businesses and rescue them, the Claimant ceased to take any interest in the Company and the Group and, although financial information ceased to be provided to him from the beginning of 2019, he did not request the provision of any such information.

59. Paragraph 26.4 of the Defence alleges that during 2020 the Group underwent a major restructuring, which culminated in Wellesley Finance Limited ("**WF**"), a subsidiary of the Company, entering into a company voluntary arrangement ("**CVA**")with its creditors and a newly formed group subsidiary acquiring the loan book from secured creditors of WF and investors in products secured against loans originated and serviced by WF. The CVA was completed in August 2022. In his Reply the Claimant admits that WF entered into the CVA on 13 October 2020 and that it was completed on 23 August 2022.

60. Paragraph 26.5 of the Defence alleges that as a result of the restructuring, the business of the Group changed its operations which were substantially reduced such that by 31 December 2021 the average number of staff had reduced from 29 to 5 and has since reduced to 3 and the Company and the Group no longer operate from any business premises.

61. Paragraph 26.6 of the Defence alleges that by reason of the matters set out above, since about October 2020, the Company has ceased to produce much of the information referred to in clause 11.2 of the SHA, as it is no longer relevant, and only produces management accounts every 6 months.

62. Paragraph 26.7 of the Defence alleges that in January 2021, after a period of silence for about two years, the Claimant requested information from the Company so that he could understand the loan book value acquired by the new subsidiary, which was duly provided. In particular, the Defendants rely on two emails dated 25 January 2021, an email dated 27 January 2021, an email dated 1 February 2021 and an email dated 10 February 2021.

63. Paragraph 26.8 of the Defence provides that, save as aforesaid, paragraph 31 of the PoC is admitted.

64. Paragraph 32 of the PoC, which is admitted by paragraph 27 of the Defence, sets out that by a letter dated 17 January 2023, the Claimant's solicitors sent to the Company a request for information pursuant to the Shareholders' Agreement and that so far as relevant, the letter read as follows:

"We therefore request that the Company provide to [the Claimant] abovenamed categories of documents for the period from 1 January 2019 to date. We ask that you do so by **16:00 on 24 January 2023**. If the Company refuses to provide those documents, please set out the basis on which it does so." (The "above-named categories of documents" were those referred to in clause 11.2 of the SHA).

65. Paragraph 33 of the PoC, which is admitted by paragraph 27 of the Defence, sets out that the Claimant's solicitors received letters from Shoosmiths LLP, acting on behalf of the Company, dated 24 January 2023 and 27 February 2023. Neither letter provided any (or any substantive) response to the Claimant's request for information pursuant to clause 11.2 of the SHA.

66. Paragraph 34 of the PoC alleges that the Claimant is entitled to and seeks an order compelling the Company to provide him with the information to which he is entitled pursuant to clause 11.2 of the SHA.

67. The Defendants plead to paragraph 34 of the PoC in paragraph 28 of the Defence as follows:

"28.1 it is averred that by reason of the matters set out in paragraph 26 above, the provision of substantial historic information from 1 January 2019 to October 2020, when the company voluntary arrangement for WF was entered into, would be pointless and oppressive and that no order for specific performance in this respect should be made;

28.2. the Company is willing and able to provide to the Claimant such information within clause 11.2 from November 2020 that is relevant and has been produced. For example, no management accounts were produced from about October 2020 to the end of December 2022, although there are audited accounts for the years ended 31 December 2020 and 31 December 2021. The Company has resumed producing management accounts from January 2023 and, depending on the capacity of its accountant, it is the Company's intention for these to be produced on about a 6 monthly basis;

28.3. in the premises, no order should be made as claimed in paragraph 34."

68. Paragraphs 36 to 39 of the PoC allege breaches of clause 11.4 of the SHA, consequent loss and an assessment of damages. These are denied in the Defence. The Claimant does not by the Application seek judgment in respect of the clause 11.4 allegations or damages. It therefore not necessary for me to consider these here.

69. Paragraph 40 of the PoC, which is admitted by paragraph 34 of the Defence provides:

"By notice dated 16 January 2023 addressed to the Company and the Company's Principal Shareholders (the "16 January Notice"), the Claimant sought the appointment of Mr Pankaj Rajani as his Nominated Director of the Company. The 16 January Notice, a copy of which appears at Annex F to these Particulars of Claim, was

sent under cover of the letter from RSCo [the Claimant's solicitors] dated 17 January 2023, addressed to the Company and its Principal Shareholders."

70. Paragraph 41.1 of the PoC summarises part of Clause 4.1(a) of the SHA and Article 20.1.3 as providing that the Claimant as Principal Shareholder, is entitled to appoint a director of his choice to the Board and that the 1st, 2nd, and 3rd Defendants are obliged to act in accordance with the Claimant's appointment.

71. Paragraph 41.2 of the PoC summarises clause 4.1(b) of the SHA as providing that if any Principal Shareholder was to object to the 16 January Notice and/or the appointment of Mr Rajani, such objection had to be given to the Claimant in writing by 30 January 2023.

72. Paragraph 35 of the Defence admits that the provisions of clauses 4.1(a) and 4.1(b) of the SHA are as set out in paragraph 41 of the PoC.

73. The Defence does not expressly refer to Article 20.1.3. However, as set out above, they have admitted its terms.

74. Paragraph 42 of the PoC alleges that "to date" [which I read as the date of the PoC, which was 11 April 2023] "no substantive response, and no notice of objection within the meaning of clause 4.1(b) of the Shareholders' Agreement, has been received by the Claimant from any Principal Shareholders and/or the Company regarding the 16 January Notice and/or the proposed appointment of Mr Rajani."

75. Paragraph 43 of the PoC alleges that "in the premises" the 1st, 2nd and 3rd Defendants are in breach of their obligation under clause 4.1(a) of the SHA to act in accordance with the Claimant's appointment of Mr Rajani; and that the Claimant is entitled to and seeks an order enforcing the Claimant's right to appoint Mr Rajani and/or an order that the 1st, 2nd and 3rd Defendants concur in and/or procure his appointment.

76. In paragraph 36 of the Defence, the Defendants take issue with paragraph 42 of the PoC. They there allege that:
    - 76.1. In their letter dated 24 January 2023, Shoosmiths, on behalf of the Defendants, made it clear that the Defendants did not consent to the appointment of Mr Rajani as a director of the Company.
    - 76.2. In the Company's letter dated 8 January 2021 and in the First Defendant's email dated 14 March 2021, it had already been made clear to the Claimant that the proposed appointment of Mr Rajani as a director of the Company was objected to with reasons for the objections being given;
    - 76.3. In the premises, the Claimant should not have served the 16 January Notice.

77. Paragraph 37 of the Defence denies paragraph 43 of the PoC by reasons of the matters set out in paragraph 36 of the Defence.

78. Paragraph 38 of the Defence alleges that, further or alternatively, the court should not make an order for specific performance of clause 4.1(a) of the SHA on the grounds that:
    78.1. "38.1. the Claimant, in breach of Article 50 of the Articles, failed to serve on the Company a transfer notice in respect of 114,836 shares held by him. The Defendants repeat and rely on the matters set out in paragraphs 21.1 to 21.5 above;"
    78.2. "38.2. had the Claimant served a transfer notice in respect of 114,826 shares held by him, these shares would have been purchased by the First, Second and/or Third Defendants;"
    78.3. "38.3. the consequences of the First, Second and/or Third Defendants acquiring 114,826 shares from the Claimant would have been that:"
        78.3.1. "38.3.1. the Claimant's holding would have been reduced to less than 5% of the issued share capital of the Company; and"
        78.3.2. "38.3.2. the Claimant would have ceased to have had the right to appoint a director of the Company pursuant to clause 4.1(a);"
        78.3.3. "38.4. in the premises, it would be inequitable for the Claimant to benefit from his own wrong and for an order for specific performance of clause 4.1(a) to be made."

79. Paragraph 39 of the Defence contains a general denial in the traditional form.

80. The 1st, 2nd and 3rd Defendant's Counterclaim starts at paragraph 40 of the Defence and Counterclaim.

81. In paragraph 40 the 1st, 2nd and 3rd Defendants "repeat and rely on the matters set out in paragraph 20 above". In the context of paragraph 40, the reference to paragraph 20 of the Defence is clearly a mistake and it is reasonably clear that what was intended to be referred to was paragraph 21. That is because paragraph 41 of the Defence and Counterclaim claims an entitlement to relief "by reason of the matters aforesaid" that is to say the matters set out in the paragraph intended to be referred to in paragraph 40. The relief claimed in paragraph 41 is an order that the Claimant serve a transfer notice in respect of 50% of the Claimant's shares; alternatively damages, in that the 1st 2nd and 3rd Defendants allegedly lost the opportunity to acquire 50% of the Claimant's shares and that, had they been offered to them, they would have purchased them. Paragraph 20 of the Defence has nothing to do with the Deed or with any event which might be alleged to have triggered an obligation to serve a transfer notice in respect of 50% of the Claimant's shares. The document which might have had that effect was the Deed, which is referred to in paragraph 21 of the Defence. In my judgment the mistaken reference to paragraph 20 instead of paragraph 21 is so clear that even without an amendment of the Counterclaim I interpret the reference as being to paragraph 21 of the Defence. Even paragraph 36.2 of the Reply and Defence to Counterclaim recognises that as a possibility.

82. To the extent that the Defendants intended the reference to paragraph 20 of the Defence to be a reference to paragraph 21, the Claimant denies the facts pleaded in paragraph 21 of the Defence. The Defence to Counterclaim alleges that the Counterclaim as pleaded discloses no reasonable grounds for bringing the Counterclaim.

83. I have set out the allegations in the PoC and the responses to them in the Defence at length because they substantially explain what the issues are and because the Application and Mr Burton's skeleton argument and submissions rely in part on admissions in the

pleadings, and that reliance extends in places to the Claimant's case insofar as the Application is put by way of summary judgment.

84. I turn now to the law as to judgment on admissions, summary judgment and the making of declarations otherwise than at trial.

Admissions

85. CPR 14.2.(1) provides that "after commencement of proceedings, a party may admit, by notice in writing, the whole or any part of another party's claim or case."

86. CPR 16.5(1) provides that "in the defence, the defendant must deal with every allegation in the particulars of claim, stating— (a) which of the allegations are denied; (b) which allegations they are unable to admit or deny, but which they require the claimant to prove; and (c) which allegations they admit."

87. CPR 16.5(2) provides that "where the defendant denies an allegation— (a) they must state their reasons for doing so; and (b) if they intend to put forward a different version of events from that given by the claimant, they must state their own version."

88. CPR 16.5(3) provides that "if a defendant— (a) fails to deal with an allegation; but (b) sets out in the defence the nature of their case in relation to the issue to which that allegation is relevant, the claimant is required to prove the allegation."

89. CPR 16.5(5) provides that "subject to paragraphs (3) and (4) [(4) concerns money claims], a defendant who fails to deal with an allegation shall be taken to admit that allegation."

90. Note 14.2.4 in the White Book explains:
"The principle remains that an admission may be express or implied but must be clear (*Ellis v Allen* [1914] 1 Ch. 904 at [909]; *Ash v Hutchinson & Co (Publishers) Ltd* [1936] Ch. 489 at [503]; *Technistudy v Kelland* [1976] 1 W.L.R. 1042; *Murphy v Culhane* [1977] Q.B. 94). Where the defendant admits a document but does not admit that its terms are fully or correctly pleaded, the claimant may obtain judgment if the document, on production, clearly establishes the claim (*Barnard v Wieland* (1882) 30 W.R. 947; but see *Rutter v Tregent* (1879) L.R. 12 Ch.D. 758 and *Smith v Davies* (1885) L.R. 28 Ch. D. 650)."

91. CPR 14.4(1) provides that where a party applies for judgment on an admission, the court shall give such judgment as it considers the applicant is entitled to.

92. CPR 14.4(2) provides that if the claim is not admitted in full, the claimant may give written notice that the claim is to continue in relation to the balance not admitted to be due.

93. It is apparent from the above that the claim is not admitted in full. However, the Claimant's application does not contain a notice that the claim is to continue in relation to the balance not admitted to be due.

94. CPR 14.4(3) provides that the court shall give appropriate directions for determination of any outstanding issues.

95. Note 14.4.2 in the White Book explains:

> "Some guidance on the courts' likely approach may be derived from cases under the old Pt 14. For example, in *Akhtar v Boland* [2014] EWCA Civ 872 it was held that where a defence contains an admission of part of a claim, the claimant is entitled to judgment on that admission. However, if the admission was equivocal or inconsistent with other parts of the defence, the claimant could seek clarification by way of a Pt 18 request or the judge could ask for clarification at a hearing."

Summary Judgment

96. CPR 24.3 provides that the court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if— (a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial.

97. Where, as here, declarations are sought on an application for summary judgment, note 24.3.1 in the White Book explains:

> "In *Abaidildinov v Amin* [2020] EWHC 2192 (Ch) the court (Judge Robin Vos) considered the proper approach to deciding whether summary judgment should be granted where the relief sought was a declaration. The court could give summary judgment where the defendant had no real prospect of successfully defending the claim or issue; "claim or issue"in CPR r.24.2(a)(ii) referred to the underlying facts or matters which were the subject of the declaration. However, once it was shown that the defendant had no real prospect of showing that those matters were wrong, the court should exercise its discretion as to whether to make the declaration in the normal way, not by reference to the summary judgment test."

98. The principles applicable to the determination of whether there is "no real prospect of succeeding" in CPR 24.3(a) were formulated by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] and approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098; [2010] Lloyd's Rep. I.R. 301 at [24] as follows:

> "i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All E.R. 91;
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*;
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also

the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No.5)* [2001] EWCA Civ 550;
vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] F.S.R. 3;
vii) On the other hand it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

99. A number of the issues before me turn on whether Ms Emma Fane is or was a "Privileged Relation" within the meaning of Article 49.1.2. Because the Articles are required to be registered, and are addressed to anyone who wishes to inspect them, the admissible background for the purposes of construction is limited to what any reader would reasonably be expected to know. It cannot include facts which were known only to some or all of the persons involved in the creation of the Articles (see *Attorney General of Belize v Belize Telecom Limited* [2009] UKPC 10, per Lord Hoffman at paragraph 36). Neither Mr Burton nor Mr Horton argued that there were or that there was any real likelihood of any extrinsic evidence relevant to the interpretation of Article 49.1.2 emerging if the issue went to trial following disclosure and with oral evidence. I consider that there is no real possibility that there would be any admissible material which would materially affect the interpretation of the Articles. I therefore consider that the interpretation of Article 49.1.2 is something which I should determine summarily.

100. The SHA, the Deed and the Charge are not public documents in the way that the Articles are. The possibility is therefore greater of there being admissible extrinsic evidence to assist in their interpretation than it is in respect of the Articles. Accordingly, I tread more cautiously in interpreting those documents on the Application.

101. The paucity of the evidence on some points means that I will have to consider points (v) and (vi) of Lewison LJ's statement of the principles applicable to summary judgment applications. Note 24.3.2.3 in the White Book expands on those points as follows, under the heading: "Whether evidence can reasonably be expected to be available at trial":

"In *Okpabi*, [*Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3; [2021] Bus. L.R. 332] at [127]–[128] Lord Hamblen JSC stated that the correct approach, when asking whether the position might change from how it appears at the summary judgment stage, was not to ask whether there was:

> "… a clear prospect that new material will become available before the trial which is likely to give the claimants a real prospect of success"

but rather to ask whether there are reasonable grounds for believing that disclosure may materially add to or alter the evidence relevant to whether the claim has a real prospect of success. In *King v Stiefel* [2021] EWHC 1045 (Comm) Cockerill J held as follows:

> "21. The authorities therefore make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence, and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be cases where the Court will be entitled to draw a line and say that - even bearing well in mind all of those points - it would be contrary to principle for a case to proceed to trial.
>
> 22. So, when faced with a summary judgment application it is not enough to say, with Mr Micawber, that something may turn up."

In *Duchess of Sussex v Associated Newspapers Ltd* [2021] EWHC 273 (Ch) Warby LJ said this:

> "14. Easyair principles (vi) and (vii) contain echoes of the law's traditional disapproval of 'a desire to investigate alleged obscurities and a hope that something will turn up…' as a basis for defending a summary judgment application; a case that is 'all surmise and Micawberism' will not do: see *The Lady Anne Tennant v Associated Newspapers Ltd* [1979] FSR 298, 303 (Sir Robert Megarry V-C). The focus is not just on whether something more might emerge, but also – and crucially – on whether, if so, it might 'affect the outcome of the case'; and the court's task is to assess whether there are 'reasonable grounds' for believing that both these things would occur: see *Doncaster Pharmaceuticals Group Ltd v The Bolton Pharmaceutical Company 100 Ltd* [2006] EWCA Civ 661; [2007] FSR 63, [18] (Mummery LJ).
>
> 15. As Mummery LJ warned in the *Doncaster* case at [10], on applications for summary judgment the court must be alert to 'the defendant, who seeks to avoid summary judgment by making a case look more complicated and difficult than it really is'. But as he also said at [11], the court should beware 'the cocky claimant who …confidently presents the factual and legal issues as simpler and easier than they really are and urges the court to be efficient…'. Efficiency is not a ground for entering summary judgment. Judgment without a trial may sometimes result in huge savings of time and costs; that would have been so in the hugely expensive litigation in *Three Rivers District Council v Bank of England*. But neither Part 24, nor the overriding objective, permits the court to enter judgment on the basis that the claimant has a strong case, the defence is not likely to succeed, and the time and costs involved in a trial are disproportionate to the potential gains.

16. The overriding objective of 'deciding cases justly and at proportionate cost' does have a role to play if the court concludes there is no realistic prospect of a successful defence, and the question arises whether there is 'some other compelling reason' for a trial. At that point, the court would be bound to have regard to considerations such as saving expense, proportionality, and the competing demands on the scarce resources (CPR 1.1(2)(b), (c) and (e)). It is rare for the court to find a compelling reason for a trial, when it has concluded there is only one realistic outcome. The defendant has not suggested that this is such a case. My focus must be on whether it is realistic or fanciful to suppose the claims might fail at trial."

Declarations

102. The following parts of notes 40.20.2 and 40.20.3 in Vol.1 of the White Book explain the discretionary nature of declaratory relief:

40.20.2:

"...

The power to make declarations is a discretionary power. As between the parties to a claim, the court can grant a declaration as to their rights, or as to the existence of facts, or as to a principle of law (*Financial Services Authority v Rourke* [2002] C.P. Rep. 14 (Neuberger J)). When considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose, and whether there are any other special reasons why or why not the court should grant the declaration (ibid.). ...

...

In the several judgments delivered by the Court of Appeal in the case of *Rolls-Royce Plc v Unite the Union* [2009] EWCA Civ 387; [2010] 1 W.L.R. 318, CA, there are extended discussions of the power of courts to grant declaratory relief as a final remedy in the context of a claim proceeding under the CPR Pt 8 alternative procedure and raising issues under the Employment Equality (Age) Regulations 2006 likely to affect persons other than the parties before the court. In succinctly stating and explaining the principles to be applied, Aiken LJ noted that the circumstances in which the court will be prepared to grant declaratory relief have been widened considerably in modern times (ibid. at paras 118 to 120). There is nothing in the general statements found in the modern authorities as to the general principles applicable that requires that a declaration may not be granted unless there is an actual or imminent threat to a legal right (*Pavledes v Hadjisavva* [2013] EWHC 124 (Ch) (David Richards J)). A declaration may be granted where the dispute relates to a legal right which might come into existence in the future (*Milebush Properties Ltd v Tameside MBC* [2011] EWCA Civ 270; [2012] 1 P. & C.R. 3, CA; and see *Guide Dogs for the Blind Association v Box* [2020] EWHC 1948 (Ch), grant of declaratory judgment where a declaration was not available under the Third Parties (Rights against Insurers) Act 1930). Those authorities demonstrate a willingness by the courts in appropriate cases to make declarations as regards rights which may arise in the future or which are academic as between the parties, but the court may refuse a declaration on grounds of prematurity, or because it would serve no useful purpose (no practical utility) (*Pavledes v Hadjisavva* op cit).

The matters to be taken into account by the court in considering the exercise of the discretion were summarised in *Bank of New York Mellon, London Branch v Essar Steel India Ltd* [2018] EWHC 3177 (Ch) (Marcus Smith J) at para.21. In that case the

claimant's (C) claim for a declaration against foreign defendants (D), who had taken no steps in the proceedings, to the effect that amounts were payable by D under a trust deed (that being the only remedy sought by C), was refused at a trial held in the absence of D. Matters particularly taken into account by the court were: (1) that both sides of the argument would not be put, (2) the potential effect of a declaration on a third party not before the court, (3) the existence of a real and present dispute, and (4) the potential for interference in a foreign process.
...
In considering whether or not to grant a declaration as to the proper construction of a contract, the court should, at the very least, proceed with caution and in accordance with the principles referred to in the notes and authorities referred to above (*Thomas Brown Estates Ltd v Hunters Partners Ltd* [2012] EWHC 21 (QB) (Eder J), where held it was not an appropriate use of the court's discretion to make a declaration as to the proper construction of a franchise agreement where the substantive issues had been agreed between the parties)."

40.20.3: "In *Wallersteiner v Moir* [1974] 1 W.L.R. 991, CA, the Chancery case of *Williams v Powell* [1894] W.N. 141, was cited as authority for the proposition that a declaration is a judicial act and ought not to be made on default of pleading, or on admissions of counsel, or by consent, but only if the court is satisfied by evidence. Buckley LJ explained (at p.1029) that this rule is "a practice of very long standing" (see also *New Brunswick Railway Co Ltd v British & French Trust Corp Ltd* [1939] A.C. 1, and *Metzger v Department of Social Security* [1977] 3 All E.R. 444, at p.451, per Megarry VC). In his lordship's opinion, where relief is to be granted without trial, whether on admissions or by agreement or in default of pleading, and it is necessary to make clear on what footing the relief is to be granted, the right course is not to make a declaration "but to state that the relief shall be upon such and such a footing without any declaration to the effect that that footing in fact reflects the legal situation". This rule of practice has been justified on various grounds, including the ground that declarations of legal right may affect third parties who are not bound by the declaration (a consideration that may have particular relevance in judicial review proceedings).
The rule is a rule of practice and not of law. In *Wallersteiner v Moir*, Scarman LJ said (at p.1030) that the power of the court to give declaratory relief without trial undoubtedly exists "but should be exercised only in cases in which to deny it would be to impose injustice on the claimant". Cases in which applications have been made for declarations without trial, and in which the court has held that the remedy should be granted because to deny it would impose injustice on the claimant, include *Patten v Burke Publishing Co Ltd* [1991] 1 W.L.R. 541 (Millett J) (declaration that contract at end by reason of defendant's repudiation), *Aitbelaid v Nima*, The Times, 19 July 1991 (Leonard J) (declarations as to certain documents and shares involved in the action).
In *Financial Services Authority v Rourke* [2002] C.P. Rep. 14 (Neuberger J), the claimants claimed both injunctive and declaratory relief and applied for summary judgment. The declaration sought was to the effect that on numerous occasions the defendant had acted in breach of the Banking Act 1987. The judge held that the declaration could be granted provided the facts were established to the court's satisfaction on a balance of probabilities (and bearing in mind that the court would have to be strongly persuaded as to allegations of dishonesty). The judge found that, in the circumstances, there was no realistic possibility of the defendant showing that

the facts alleged were wrong; consequently, although at the hearing of the summary judgment application there had been no disclosure of documents, no exchange of witness statements and no examination and cross-examination of witnesses, the factual basis for the declarations sought had been made out.
In *Lever Faberge Ltd v Colgate-Palmolive Co* [2005] EWHC 2655 (Pat); [2006] F.S.R. 19 (Lewison J), a patent case, the judge noted that, since the coming into effect of the CPR, grounds of invalidity must each be supported by a statement of truth and it is not sufficient simply to allege facts, and expressed the opinion that for this reason the reluctance of the court to grant declarations without a full investigation of the facts is less strong than was formerly the case. In *Hayim v Couch* [2009] EWHC 1040 (Ch) (Stephen Smith QC) it was stated that the modern authorities support the conclusion that, where the parties consent to (or agree not to oppose) the grant of declaratory relief and that consent forms part of a bona fide commercial bargain entered into between them to avoid the need for a trial, the court is likely to consider it necessary to grant the declarations sought in order to do justice between them. See also, *Re Shree Swaminarayan Satsang* [2012] EWHC 1645 (Ch) (Richard Snowden QC). ..."

103. Mr Horton picked up a phrase from Marcus Smith J's judgment in paragraph 21(5) of *Bank of New York Mellon, London Branch v Essar Steel India Ltd* [2018] EWHC 3177 (Ch) where he said that "the court ought not to make declarations without trial". Accordingly, argued Mr Horton, because the hearing before me was not a trial, I ought not to grant declaratory relief. There is no such absolute rule, as is shown by the notes from the White Book. Mr Horton's argument in its absolutist form goes too far. The context in which Marcus Smith J used the quoted phrase makes that clear. Thus, the whole of paragraph 21(5) of his judgment reads:

> "The court must be satisfied that all sides of the argument will be fully and properly put. It must, therefore, ensure that all those affected are either before it or will have their arguments put before the court. For this reason, the court ought not to make declarations without trial."

Relief sought, analysis and conclusions

104. The Application sought an order for judgment on admissions pursuant to CPR 14.4 and/or summary judgment pursuant to CPR 24.2 "in terms of the attached draft, providing for judgment for the Claimant on part of the claim against the Defendants, and dismissing the Defendants' counterclaim against the Claimant".

105. Paragraph 1 of the draft order ("the Draft Order") annexed to the Application is an order that "the Application is allowed". As will become apparent from what follows, I am not going to make an order wholly in the form and to the effect of the Draft Order. Therefore paragraph 1 of the Draft Order, if I make such an order at all, should be an order that the Application is allowed in part. However, except possibly for prejudicing any argument as to costs, I fail to see that paragraph 1 of the Draft Order, either in its original form or as amended to by the addition of the words "in part" would do anything of substance. Therefore, I will not make the order sought in paragraph 1 of the Draft Order.

106. Under paragraph 2 of the Draft Order an order is sought that the Company "shall, within 28 days, provide the Claimant with the information set out in clause 11.2" of the SHA "for the period 1 January 2019 to the date when the information is provided."

107. Mr Burton's simple and powerful argument for my making such an order, was that by the SHA the Company had agreed with, amongst others, the Claimant, to provide the information, and that therefore the Claimant was entitled to an order enforcing his right to that contractual entitlement.

108. The Defendant's response, in correspondence, in the Defence, in Mr Warren's statement and by Mr Horton in his skeleton argument and orally had the following limbs:

108.1. The obligation under clause 11.2 of the SHA was, generally, to provide copies of documents, not information, albeit that the documents would provide information.

108.2. Where clause 11.2 imposes an obligation in respect of documents using the definite article "the", that obligation is limited to documents which exist or at least have existed; so where there are no such documents, there is no obligation to create or provide them.

108.3. Given (i) the change in the Company's circumstances since 2019; (ii) the failure by the Claimant to ask promptly for the information; the past provision of information to the Claimant; (iii) the amount of time and effort which, according to Mr Warren, would be entailed in producing the historical documents; specifically that previous board reporting would have involved approximately 10 different types of submission every second month across 7 areas, including new lending, fundraising and portfolio management; system generated reports such as daily loan reports in cash in/cash out reports would (says Mr Warren) be in addition to that; and (iv) the irrelevance now of some of the information means that no purpose would be served by ordering the creation of the relevant documents and/or that it would be harsh or oppressive to do so.

108.4. In this context reference was made to passages in Chitty on Contracts (35th ed) which supported the propositions that the equitable remedy of specific performance may be refused where:

108.4.1. The cost of performance is wholly out of proportion to the benefit which the performance will confer on a claimant.

108.4.2. The performance would be pointless or in vain.

108.4.3. A claimant has done something wrong that relates to the contract which the claimant seeks to enforce, such that it would be against conscience for the court to grant the specific performance sought.

108.4.4. The claimant has acquiesced in the right underlying the claim for specific performance.

108.5. It is pleaded in the Defence and Mr Warren says that any information derived from communications between Wellesley & Co Ltd and the FCA remains confidential and cannot be shared by the Company with any third parties, including non-director shareholders such as the Claimant. Assuming in the Defendants' favour that that is correct as a matter of law, the pleading and the evidence do not identify which classes of the information specified in clause 11.2 of the SHA are affected nor how or to what extent. Further, the alleged confidentiality does not appear to have caused a problem in the production of the audited accounts for the Group for the period own to 31 December 2022. I bear in mind that I must not conduct a mini-trial and the cautionary words of Cockerill J in *King v Stiefel* [2021] EWHC 1045 (Comm) set out above; but in my judgment a wholly unparticularised allegation to the effect that some of the

information sought was confidential, with confidentiality belonging to the FCA, is insufficient by itself to raise a realistic prospect of a successful defence. That conclusion is reinforced by the consideration that there is no evidence as to the possibility of getting the FCA's consent to the use of the allegedly confidential information or of any attempt to do so.

109. An argument that the Claimant had done something wrong that related to the contract which the Claimant sought to enforce, such that it would be against conscience for the court to grant the specific performance sought was not run by the Defendants in respect of the claims to enforce clause 11.2 of the SHA.

110. Acquiescence primarily means conduct from which it can be inferred that a party has waived his rights. Mere inactivity is insufficient. It has to be established by showing that it has become unconscionable on the part of the owner of the right to press for its enforcement.

111. The Defendants, by Mr Warren, say that the Claimant did not complain about the provision of documentation under clause 11.2 of the SHA from 2019 until 17 January 2023. The allegation in paragraph 26.3 of the Defence that the Claimant did not request the provision of any information is not expressly denied in the Reply, nor does the Claimant deny it in his statement in support of the Application. The Claimant does exhibit what he describes as relevant correspondence wherein he sought the information and the Company's response. However, the first item of this exhibited correspondence is a letter from the Claimant's solicitors dated 23 January 2023. Therefore, in my view the Defendants have a prospect, which is better than the real prospect standard, of establishing the allegation in clause 26.3 of the Defence that the Claimant did not complain about the provision of documentation under clause 11.2 of the SHA from 2019 until 17 January 2023. What is more doubtful is whether the Defendants can show that there is a real prospect of it being established that it has become unconscionable for the Claimant to enforce his rights under clause 11.2 or any of its individual sub-clauses.

112. The only evidence which goes to unconscionability of that nature is (i) the fact that the Claimant did not seek the information until 23 January 2023; (ii) the disputed allegation that there was a "period of silence" during which the Claimant ceased to take any interest in the Company; coupled with (iii) the fact that the Company did not produce some of the documents or information and might be argued to have changed its position by its not doing so because it would now be more difficult and expensive for it to do so. It appears to me that on the evidence before me and the way in which the Defence is pleaded that such an argument and therefore a defence based on acquiescence is so speculative as to have no real prospect of success.

113. In his oral submissions Mr Burton emphasised that the Claimant was entitled to enforce his contractual rights and that, for the Claimant, the lack of the information to which he was entitled was a serious matter. Mr Burton submitted that the information sought was essential because currently the Claimant has no idea of the value of his shares. On the evidence there appeared to have been a diminution in value of the shares in the Company. The Claimant, submitted Mr Burton, is entitled to the information pursuant to clause 11.2 which would enable him to or assist him in determining the value of his shares.

114. It is unclear to me whether, insofar as the order sought in respect of the Clause 11.2 obligations was concerned, the Claimant is seeking specific performance or a mandatory injunction in respect of them. In my judgment that lack of clarity is not especially important because in view of the similarity of those orders, analogous practices frequently apply to them. In particular I have in mind the statement in paragraph 31-050 of Chitty on Contracts to the effect that the court may, instead of denying specific performance, make adjustments to the specific performance order to mitigate its harshness, taking into account the proportionality between the adverse consequences of specific performance without adjustment, the defendant's degree of fault, and the adequacy of damages to compensate the claimant for any variation of its entitlement.

115. It appears to me that the application for an order for performance of the clause 11.2 obligations starts on the back foot because it was not relief which was sought in the Claim Form or in the Prayer for Relief in the PoC.

116. The Claim Form states:

> "The Claimant seeks declaratory relief to clarify certain questions in relation to his rights under the SHA and the Company's articles of association, and an order appointing his nominated director to the board. The Claimant also seeks damages and/or other relief for breach of his information rights under the SHA.
>
> The Claimant's claim is further particularised in the attached Particulars of Claim."

117. In the Prayer for Relief in the Particulars of Claim there is no order sought for specific performance or for an injunction. In that Prayer, the Claimant seeks:

(1) Declaratory relief.
(2) An order for the assessment of damages for the Company's breach of contract.
(3) An order that Mr Rajani be appointed a director of the Company and/or that the 1st, 2nd and 3rd Defendants concur in and/or procure his appointment.
(4) Costs.
(5) Further or other relief as the Court in its discretion deems appropriate.

118. The lack of a claim for specific performance or an injunction in the prayer is not fatal to the Claimant's claim for that relief, especially as paragraph 34 of the PoC alleges that the Claimant is entitled to, and seeks, an Order compelling the Company to provide him with the information to which he is, pursuant to clause 11.2 of Shareholders' Agreement, entitled. However, the lack of such a claim in the Prayer, and the contents of the Prayer are some indication that the equitable relief in respect of the clause 11.2 obligations were not of primary importance to the Claimant and that damages for breach of them or some of them might be an adequate remedy.

119. Clause 18.14 of the SHA provides that each Party acknowledges that damages alone would not provide an adequate remedy for any breach by a Party of the provisions of the SHA and that accordingly without prejudice to any other right or remedy that any party might have upon a breach of the provisions of the SHA, it shall be entitled without proof of special damages to the remedies of injunction or other equitable relief for any threatened or actual breach of such provisions.

120. It is clear, however, that the discretion whether to grant specific relief is that of the court, and that discretion cannot be ousted by agreement. Nevertheless, agreements of the

sort contained in clause 18.14 of the SHA may in cases of doubt inform the court's discretion. See *Contractual Duties: Performance, Breach, Termination and Remedies*, 4th ed, Andrews, Tettenborn and Virgo, 4th ed (2023) at 27-021 for the above and for its reference to the Australian decision in *Lionsgate Australia Pty Ltd v Macquarie Private Portfolio Management Ltd* [2007] NSWSC 371 where the issue was whether an agreement by a substantial minority shareholder to accept a bid should be specifically enforced. There was a contractual term to the effect that the parties agreed that damages would not be an adequate remedy for certain breaches. At paragraph 63 of his judgment in that case Barrett J said: "The court must have regard to the circumstances as a whole. In doing so, it will recognise that [the defendant], which now seeks to resist specific performance, saw fit to give an express contractual acknowledgment of the inadequacy of damages as a remedy."

121. Neither the PoC nor the Reply and Defence to Counterclaim attempt to explain why the Claimant needs the clause 11.2 information. In effect the PoC states baldly that the Claimant is entitled to that information and requires it to be provided. The nearest the Claimant comes to giving such an explanation in his pleadings is in paragraphs 22.3 and 22.7 of his Reply where he denies that he "ceased to take any interest in the Company" and that there was a "period of silence" as alleged by the Defendants. It is pleaded by the Claimant that, at the material time, the Claimant was obtaining information about the company from a Mr Orrell, whom the Claimant had nominated to, and who did attend meetings of the Board of Directors.

122. Similarly in the Claimant's statement in support of the Application he does not say why he wants or needs the clause 11.2 information.

123. In his statement the Claimant does refer to the correspondence in which his solicitors sought the clause 11.2 information. There is only one letter from the Claimant or his solicitors in the correspondence there referred to. That is the letter from the Claimant's solicitors dated 17 January 2023 to the Defendants' then solicitors and to the Defendants in person (then the prospective Defendants). That letter asks for the clause 11.2 information, but does not state why it is needed. The 17 January 2023 letter refers back to an earlier letter dated 23 August 2021. The 23 August 2021 letter refers to the Claimant not having been provided with information as a result of which he lost the opportunity to exercise his pre-emption rights in respect of Mr Naldini's shares. That indicates that at that time the Claimant required the information so as to assist him in valuing Mr Naldini's shares and the value of shares in the Company before and after any potential purchase. That is a different reason from the reason submitted to me as to why the Claimant needs the clause 11.2 information now, which was so that he could assess the value of his own shares.

124. The letter of 17 January 2023 states that if the Defendants do not agree to compensate the Claimant for that loss (i.e. the lost opportunity in respect of Mr Naldini's shares), an additional claim would be added to the "attached" complaint" and the Claimant would seek an award of damages to be assessed by the court to compensate him for the loss. The "attached complaint" referred to were draft Particulars of Claim. These did not include a complaint about the failure to provide the clause 11.2 information.

125. From the letter dated 17 January 2023 and the draft Particulars of Claim I assess that there is at least a real prospect of its being established that, as late as 17 January 2023, the

obtaining of the clause 11.2 information was of little importance to the Claimant except as grounding a claim for compensation in respect of the disposal of Mr Naldini's shares. This assessment also indicates that there is a real prospect of it being held that, at least for the period prior to 17 January 2023, damages would be an adequate remedy for the failure to provide the clause 11.2 information. If damages were an adequate remedy, that would be a reason for not granting specific performance of or an injunction in respect of the clause 11.2 obligation. However, whether "damages would be an adequate remedy" was not argued before me, and I do not put any weight on it.

126. Subject to a number of points, the Defendants admitted paragraph 30 of the PoC, and thereby admitted that the obligation under clause 11.2 of the SHA was to provide the Claimant with "the following information". In this context the "following information" was the material specified in clause 11.2 of the SHA. The material specified in clause 11.2 of the SHA comprised the documents specified in clause 11.2, which themselves would have contained information or, in the case of clause 11.2(e), the details of the indebtedness of any member of the Group to any Principal Shareholder or its connected persons. Accordingly, the admission of paragraph 30 of the PoC does not prevent the Defendants from arguing that, where it is apparent on the face of clause 11.2, that that clause refers to documents containing information, it is the documents containing the information, if the documents existed to which the Claimant is contractually entitled. In my opinion that argument is correct.

127. Despite the lack of pleading or evidence as to why the Claimant needs the clause 11.2 information, I recognise that there must be a fair probability that from time to time and in various different sets of circumstances, at least some of the clause 11.2 information would be useful to the Claimant in assisting him to assess the value of his or other persons' shares or interests in shares in the Company, actual or prospective, as illustrated by the complaints in the letter dated 23 August 2021 mentioned above. However, this point is not as strong as it might appear when looked at in isolation. That is because clauses 11.3 and 11.4 of the SHA give the Claimant rights to information relevant to prospective sales of his shares. However, on a summary judgment application by a Claimant, a fair probability that the Claimant's case is correct is insufficient. There has to be no real prospect that a defence to it would be successful.

128. I bear in mind that what is sought by the Application in respect of the clause 11.2 obligations is in substance an order for specific performance or a mandatory injunction. That has the following consequences:

128.1. The order should not require the court constantly to have to supervise compliance with it. In this context there is a distinction between orders to carry on an activity and orders which require a result to be achieved. In the latter case, the court has only to examine the finished work, so that compliance can be judged after the event. In my judgment an order requiring compliance with the clause 11.2 obligations would be one which required a result to be achieved, so this possible consequence does not assist the Defendants.

128.2. The terms of the order need to be clear, so that the Company knows what it is obliged to do and, thereby reduce the risk of its being in contempt of court for failure to comply.

129. The Draft Order provides that the Company shall, within 28 days of the order being made, provide the Claimant with the information set out in clause 11.2 of the SHA "for

the period 1 January 2019 to the date when the information is provided." The fact that the provision would have to be made within 28 days of the order being made means that the Draft Order cannot be interpreted as giving rise to an obligation to provide information which comes into existence after that 28 day period has elapsed. To my mind that then gives rise to some uncertainty as to what is intended by "the date when the information is provided" as the end of the period for which the order would require the information to be provided. I consider that in context it makes sense if it is read as meaning; "the *last* date *prior to the order* when the information *should have been* ~~is~~ provided." If that is the way in which it is intended to take effect that would require clarification in any order which I might make.

130. The fact that words need to be read into the Draft Order make it uncertain in its operation. It is therefore unsatisfactory in respect of the clause 11.2 information.

131. Further, if an order in the form sought has the meaning which I consider is intended, then the information provided pursuant to it would soon be out of date and would only help the Claimant with the purpose for which it was submitted he needed the information, that is to say for assessing the value for his shares, for a fairly short time, and hence would reduce the benefit which performance of the order would provide to the Claimant.

132. I accept Mr Horton's submission that where clause 11.2 imposes an obligation in respect of documents using the definite article "the", that obligation is limited to documents which, at the time or times when it arises, exist or at least have existed. I consider that although the use of the definite article implies an assumption that the documents concerned will come into existence, it does not imply or otherwise create an obligation to create them. Thus, where there are no such documents, there is no obligation to create or provide them.

133. Mr Warren says that there has been a change in the Company's circumstances since 2019, in particular the fact that when the SHA was entered into, the Group of which the Company formed part had approximately 60 staff, including a chief financial officer and a "finance function" of 7 to 8 people, whilst now the Group only employs a total of 3 people with no designated finance staff.

134. Mr Warren says that "much of" the information set out at clause 11.2 "is therefore now not practicable or indeed relevant for the Group to produce and provide." Unsatisfactorily, he does not specify which information is and which is not practicable to produce.

135. Aside from (i) the possible defences of confidentiality and acquiescence, which I have already held to have no realistic prospect of success and (ii) the possible adequacy of damages which was not advanced as a defence, the possible defences or reasons for not making the order sought are:
    135.1. Use of the definite pronoun in respect of classes of document which do not exist.
    135.2. Order would be pointless or would serve no purpose.
    135.3. Cost of performance out of proportion to benefit which performance of the obligation would provide to the Claimant.
    135.4. In particular a lack of evidence as to why the Claimant requires the information; the implication that it is not important to him; the availability of

the information relevant to a possible sale of the Claimant's shares under clauses 11.3 and 11.4 of the SHA and the short term nature of any possible benefit to the Claimant under the terms of the order sought by him.

135.5. Unsatisfactory form of the order sought.

135.6. Order would cause hardship or oppression.

136. Against that background and those conclusions, I consider in respect of each of the individual sub-clauses of clause 11.2 whether there is a realistic prospect of a successful defence in respect of the order sought in respect of the information or documents referred to in the sub-clause, or some of it.

137. As regards the monthly management accounts for the Group due under clause 11.2(a): paragraph 28.2 of the Defence pleads that no management accounts were produced from about October 2020 to the end of December 2022 and that the Company has resumed producing management accounts from January 2023. It is pleaded that "depending on the capacity of its accountant", it is the Company's intention for the post-January 2023 management accounts to be produced "on about a 6 monthly basis". Mr Warren says that no management accounts were produced from about October 2020 to the end of December 2022. He says that the Company has resumed producing management accounts from January 2023 and "depending on the capacity of its accountant, it is the company's intention for these to be produced on a 6 monthly basis".

137.1. In respect of the period down to the end of December 2022: this is now covered by the audited annual accounts which have been provided, albeit that the audited accounts for the year ended 31 December 2022 were only provided on 22 April 2024, after the Application had been made. The management accounts might provide more detail than the audited annual accounts, but they appear to me to be substantially historical documents. No reason or evidence was given as to why the Claimant needed, additionally to the audited annual accounts, the management accounts for this period. In these circumstances it appears to me that there is at least a realistic prospect that no purpose would be served by ordering the provision of the management accounts for the period down to 31 December 2022. Further, although there was no evidence as to how much it would cost to produce these accounts, clearly it would cost something and, coupled with Mr Warren's evidence referred to above as to the time and effort which production of historical documents would entail, in my judgment there is a realistic prospect that, balanced against the provision of audited yearly accounts and the lack of evidence as to why they are needed by the Claimant, the cost of performance would be wholly out of proportion to the benefit which the performance would confer on the Claimant. For each of those two reasons I consider that there is a real prospect of a successful defence in respect of the monthly accounts for the period down to 31 December 2022.

137.2. In respect of the period after 31 December 2022, Mr Warren's evidence is that the Company intends to produce management accounts for the Company at 6 monthly intervals. Accordingly, there appears to be no real objection to the provision of these to the Claimant and substantially discounts the possibility of Mr Warren's evidence as to the impracticability of producing and providing "much of the information" sought under clause 11.2 from applying in this context. However, what the Company was saying it would do is not what clause 11.2(a) requires. Clause 11.2(a) requires the provision of monthly (not

6 monthly) management accounts within 15 business days after the end of each month for the Group (not just for the Company). The audited annual accounts for the year ended 31 December 2023 have yet to be provided. In these circumstances the two arguments that no purpose would served by ordering provision of the monthly accounts and that the cost of performance would be wholly out of proportion to the benefit which the performance would confer on the Claimant are not strong. It is difficult to see that no useful purpose would be served by ordering the production of monthly management accounts for the period after 31 December 2022. Although no doubt it would cost more in terms of employee time and accountant's time to produce monthly Group management accounts than it would to produce 6 monthly management accounts for the Company alone, on the existing evidence, the cost of performance is very unlikely to be wholly out of proportion to the benefit which the performance would confer on the Claimant. Is there a realistic prospect of an argument to the contrary being successful? In my judgment if and insofar as the required monthly management accounts cover periods covered by other accounts, there would be a real prospect of success on the basis that the provision of the monthly management accounts for that period would be of historical interest only, and would not assist the Claimant in his desire to ascertain the value of his shares. In respect of periods which are not covered in that way, if the existing evidence was the only evidence, there would not be a realistic prospect of a successful defence to this element of the claim on the grounds that provision of the accounts would serve no purpose or that the cost of performance would be wholly out of proportion to the benefit which the performance would confer on the Claimant. Monthly management accounts for the Group were what were contracted to be provided; they would assist the Claimant is assessing the value of his shares; no good reason has been advanced in evidence or in argument as to why the Company could not provide monthly management accounts for the Group at reasonable cost or that the cost would be out of proportion to the benefit which the Claimant would obtain from receiving these management accounts. However, that is not the end of the matter so far as possible judgment on clause 11(2)(a) is concerned.

137.3. That leaves the question of whether, in respect of the period after 31 December 2022, further evidence can reasonably be expected to be available at trial which would affect the conclusions which I have reached if the existing evidence is the only evidence. Relevant evidence which is not currently before the court would be evidence as to the practicability and cost of producing monthly management accounts for the Group, both in direct financial terms and in terms of employee and management time. Further, if and when the audited annual Group accounts for the year ended 31 December 2023 are provided, the management accounts for 2023 will become substantially of historical interest only. However, the Defendants have had an opportunity to put in evidence of this nature. They have failed to do so. Given the Company's intention to produce 6 monthly management accounts for itself, I consider that further evidence as to the practicability and cost of producing monthly Group management accounts, if any, if available at trial, is not reasonably likely to affect the result.

137.4. Accordingly, in respect of periods not covered by the provision of other accounts I will order the provision of monthly Group management accounts as

sought on the Application, but with the form of the order changed so as to make it clear that it only covers the period down to the last date prior to the date of the order when the information should have been provided. Further, if, within 28 days after this Judgment is handed down, the Company has provided the Claimant with the audited consolidated Group accounts for the year ended 31 December 2023 as required by clause 11.2(c) of the SHA, the order as to the monthly management accounts will apply to the period commencing 1 January 2024. If not, this part of the order will apply from 1 January 2023.

138. As regards the quarterly consolidated Group accounts due under clause 11.2(b): Mr Warren says that these do not exist. They have not been provided.

138.1. In respect of the period down to 31 December 2022: the Claimant has been provided with yearly audited accounts for the period down to 31 December 2022. Accordingly, my analysis and conclusions are the same as those set out above in respect of the monthly management accounts for this period and I will not make an order in respect of them for that period.

138.2. In respect of the period after 31 December 2022 my analysis and conclusions are also the same as for the provision of monthly accounts for this period, except that if as I intend to do (see above) I order the provision of monthly Group management accounts for the periods beginning either 1 January 2023 or 1 January 2024, the accounts for the component months of each quarter will exist and although it should be fairly straightforward to combine them into quarterly Group accounts, in my judgment there is a real prospect that no useful purpose would be served by, additionally, ordering the provision of quarterly accounts and I will not do so.

139. Clause 11.2(c) of the SHA requires the Company, within 4 months after the end of each financial year, to provide audited consolidated accounts for the Group prepared in accordance with UK GAAP and IFRS. The Defendants admit that the Company has not provided the Group accounts for the financial year ended 31 December 2023. In his statement of 22 April 2024 Mr Warren said the Claimant will be provided with these "once these are finalised". They had still not been provided at the time of the hearing before me. No reasons or excuses for the delay were given.

139.1. I consider that in the case of the annual accounts which are already in the course of preparation, realistically there can be no real prospect that a defence to their production would be successful. Accounts of this nature are required by law and their production provides the information and protection which the law considers that shareholders and other persons dealing with a company should be able to obtain.

139.2. The only possible doubt that there might be is whether the 28 days from the date of the order for their provision is practicable. No argument was presented as to why that was not the case.

139.3. Accordingly I consider that there is no realistic prospect of a successful defence of the order sought in respect of the clause 11(2)(c) obligation; no other compelling reason why the issue should be disposed of at a trial and that summary judgment should be given in respect of it pursuant to CPR 24 in respect of the Group accounts for the financial year ended 31 December 2023.

140. Clause 11.2(d) of the SHA requires the Company within two Business Days of its approval as a Shareholder Reserved Matter, to provide the Annual Budget and Business

Plan. Mr Warren's evidence is that there have been no approved Annual Budgets or Business Plans in the relevant period. He says that is because the Group's priority has been navigating through the CVA, which, he says, is prescriptive as to what steps Wellesley Finance can take. Whatever the reasons, the existing evidence is that there are no Budget or Business Plans on which clause 11(2)(d) can bite. In my judgment clause 11.2(d) does not impose an obligation to create Annual Budgets or Business Plans or to get them approved as Shareholder Reserved Matters. Accordingly, on the existing evidence there is no breach and no existing obligation under clause 11.2(d) and I will not make an order in respect of it.

141. Clause 11.2(e) requires the Company to provide details of any indebtedness of any member of the Group to any Principal Shareholder or its connected persons. It does not specify any time within which this must be done. Mr Warren says that no Group entity, including the Company, is indebted to any Principal Shareholder or its connected persons. So far as summary judgment is concerned, that is the end of the application for an order under clause 11.2(e). On Mr Warren's evidence, there is no existing obligation under it which has not been complied with.

142. Clause 11.2(f) requires the Company to provide "the daily peer to peer incoming report of cash in and out". It does not specify any time within which this must be done. Mr Warren says that all peer to peer activities stopped when the CVA was approved and that no such reports have, therefore, been produced since that date. The CVA was entered into in October 2020 and was completed in August 2022. In accordance with my above conclusion as to the effect of the use of the definite article, "the", in my judgment there is no obligation on the Company to create and provide copies of reports under this head which do not exist. On the basis of Mr Warren's evidence that is the case, and therefore there is at least a real prospect of a successful defence of the claim under this head for the period after August 2022.

143. As regards the period before August 2022, Mr Warren does not state that the daily peer to peer reports do not exist. The emails of January and February 2021 referred to in paragraph 26.7 of the Defence are not in the evidence. If there are any pre-August 2022 peer to peer reports in existence which have not yet been provided, they may now be only of historic relevance, possibly with the key information contained in them having been incorporated into the audited accounts for the Group, which have been provided for the period down to and beyond August 2022, so that accordingly they may now be of so little relevance that the cost of performance would be wholly out of proportion to the benefit which the performance would confer on the Claimant and/or that performance would be pointless. In my judgment, having regard to the time which has gone by since they were due, the lack of early requests for them and the lack of importance apparently attached to them by the Claimant, those possible defences have a real prospect of success and I will not give summary judgment for the provision of the peer to peer reports.

144. Clause 11.2(g) requires the Company to provide "the daily loans report". Mr Warren says that no daily loan reports have been produced since August 2020. In accordance with my above conclusion as to the effect of the use of the definite article, "the", in my judgment there is no obligation on the Company to create and provide copies of reports under this head which do not exist. On the basis of Mr Warren's evidence that is the case, and therefore there is at least a realistic prospect of a successful defence of the claim

under this head for the period after August 2020. That leaves any reports which might exist and not already have been provided for the period from 1 January 2019 to August 2020. For the same reasons as those which I have just given for refusing summary judgment in respect of the pre-August 2022 peer to peer reports, I consider that there is a real prospect of success in respect of the defence of the claim for the daily loans reports for this period, and I will not give summary judgment for their provision.

145. Clause 11.2(h) requires the Company to provide "the weekly cash flow report". Mr Warren says that a weekly cash flow report has not been produced since October 2020 and that "cash-flow modelling is now undertaken on an ad hoc basis". In his statement Mr Warren says that the Claimant will be provided with a copy of any report as and when these are produced. In accordance with my above conclusion as to the effect of the use of the definite article, "the", in my judgment there is no obligation on the Company to create and provide copies of reports under this head which do not exist. On the basis of Mr Warren's evidence that is the case, and therefore there is at least a real prospect of a successful defence of the claim under this head.

146. Clause 11.2(i) requires the Company to provide "all emails sent for information to all Directors". Mr Warren says:

> "This category of information (which is limited to Directors of the Company) is intended to capture all emails which were sent to a previously live director email distribution group. No such distribution group has been used since September 2020. Communications between the two remaining Group directors Graham Wellesley and Andrew Turnbull typically take place via Teams meetings."

147. Mr Warren's statement as to what, subjectively, was intended is inadmissible as evidence which goes to the meaning of clause 11.2(i).

148. The point sought to be made by Mr Warren as to the intention being that this clause should capture "all emails which were sent to a previously live director email distribution group" raises a point of construction of the SHA. The Defendants have produced no admissible extrinsic evidence to oust the usual and natural meaning of the words of clause 11.2(i). Those meanings are that it applies to all emails which were sent for information to "all directors". What clause 11.2(i) does not do is to state from whom the emails referred to in it have to come from. Is it the Company only or is it any person, including shareholders and third parties? That is some context indicating that a particular class of emails, possibly those sent on the director email distribution group was intended. A further consideration for restricting the scope of clause 11.2(i) is that if it was not restricted, it would be difficult or impossible for the Company to comply if, as is likely, it was not copied in on all the emails which were sent by third parties to all the directors, especially where directors have retired safter the emails were received by them.

149. If that context and that consideration is sufficient to restrict the clause 11.2(i) obligation to emails sent to the email distribution group by the Company, then in my judgment Mr Warren's evidence as to that email distribution group not being used after September 2020 means that there is a realistic prospect of an order in respect of that restricted class of emails being pointless or serving no purpose or of the cost of performance out of proportion to benefit which performance of the obligation would provide to the Claimant.

150. In the alternative that the context is not sufficient to restrict the clause 11.2(i) obligation in that way, then:

150.1. If the class of senders was to be restricted in some other way, there is no indication as to what that way is, and the clause would be too vague to be specifically enforced. And

150.2. If the class of senders was not to be restricted in any way, prima facie there would be a fair amount of work to be done to ascertain what emails had been send to all the directors "for information", from any sender and the difficulty or impossibility of compliance by the Company mentioned above would come into consideration.

150.3. In my judgment, those considerations, against the background of the lack of evidence as to why the Claimant requires the information; the implication that it is not important to him; the availability of the information relevant to a possible sale of the Claimant's shares under clauses 11.3 and 11.4 of the SHA and the short term nature of any possible benefit to the Claimant under the terms of the order sought by him means that there would be a real prospect of successfully defeating a claim based on the wide interpretation of clause 11.2(i).

150.4. Even if my decisions as to "no real prospect of success" in the event of a particular interpretation of clause 11.2(i) were to the opposite effect, I would still refuse the order sought in respect of clause 11.2(i) because it would leave it unclear which interpretation was correct, and hence what the Company was obliged to do under the Draft Order.

151. Clause 11.2(j) requires the provision within two Business Days of their approval, of copies of all minutes of the Committees of the Board including but not limited to those Committees constituted pursuant to clause 4.3(d) (*Board Proceedings, Committees of the Board*). Mr Warren says that the Company no longer has any Board Committees and has not had a Board Committee since the commencement of the CVA. There are, says Mr Warren, therefore no documents created within this category since September 2020. So far as summary judgment is concerned that evidence is conclusive to the effect that there is a real prospect of it being established that an order in respect of these documents in respect of the period after September 2020 would serve no useful purpose. As regards the period between January 2019 and September 2020 is concerned: any committee minutes for this period are prima facie likely to be of historical interest only. No reason was given as to why the Claimant required these. Accordingly, in my judgment there is a real prospect of it being established that an order for the provision of the pre-September 2020 committee minutes would be pointless or would serve no purpose or that the cost of performance of it would be out of proportion to benefit which performance of the obligation would provide to the Claimant. Accordingly, I will not make an order requiring compliance with the clause 11.2(j) obligation.

152. Clause 11.2(k) requires the provision of a report detailing all credit card expenditure incurred by Group Directors within twenty (20) Business Days of receipt by the relevant Group company of a credit card statement or expense receipts detailing the same. Mr Warren says that the Group did not hold any company credit cards between entering the CVA, when its Barclaycard credit accounts were revoked, and November 2020 when it acquired new accounts with American Express. He says that "an expenditure report for these new cards will be provided." Given the willingness of the Company to provide a report in respect of the post-November 2020 period, in my judgment despite the lack of

evidence as to why the Claimant wants these reports and the implication that they are not important, even if they are of little importance and will not provide the Claimant with much benefit in comparison with cost of their production, there is no real prospect of a defence on those bases and I will order that the reports be provided in respect of the period after November 2020; but with the form of the order changed so as to make it clear that it only covers the period down to the last date prior to the date of the order when the reports should have been provided.

153. Paragraph 3 of the Draft Order is an order that the Counterclaim be dismissed.

154. The Counterclaim is a Counterclaim by the 1st, 2nd and 3rd Defendants (i.e. the Defendants other than the Company) for:
- 154.1. (1) A declaration that Mrs Fane is not a "Privileged Relation" within the meaning of Article 49.1.2.
- 154.2. (2) A declaration "that the transfer by the Claimant of a 50% beneficial interest in the Claimant's shares to Mrs Fane, and the Deed are invalid."
- 154.3. (3) An order that the Claimant do serve a transfer notice in respect of 50% of the Claimant's shares in the Company pursuant to Article 50.1.
- 154.4. (4) Alternatively, damages and interest.

155. The key commercial consequences of the rival interpretations of Article 49.1.2 are that if Ms Emma Fane was a Privileged Relation at the time of the Deed, the Claimant could have effected a transfer to her without first serving a transfer notice and giving the other shareholders a right to buy the shares. If Ms Emma Fane was not a Privileged Relation, then a transfer notice should have been served; the other shareholders would have had a right to buy the shares and any transfer to Ms Emma Fane might have been invalid.

156. The relevant chronology in this regard is:
- 156.1. The SHA was entered into on or around 30 October 2015.
- 156.2. The Articles in their relevant form came into existence on 10 December 2018.
- 156.3. The Claimant's marriage to Ms Emma Fane was dissolved on 30 January 2019, so as from that date she was a "former spouse" of the Claimant.
- 156.4. The Deed was entered into on or around 20 October 2020.

157. Mr Burton submitted that the interpretation was simple. He submitted that:
- 157.1. Where the definition of "Privileged Relation in Article 49.1.2 referred to the "former husband or wife ... of any of the above persons", that referred to all of the persons referred to earlier in clause 49.1.2.
- 157.2. Those persons included members of the Company such as the Claimant.
- 157.3. Therefore, Ms Emma Fane as a former wife of the Claimant was a Privileged Person within the definition.

158. Mr Horton's submission as to how clause 49.1.2 should be interpreted was in essence that clause 49.1.2 should be broken down as follows:
- 158.1. "Privileged Relation", as regards or in relation to any particular individual member or deceased or former individual member, means and includes:
  - 158.1.1. the husband or wife or civil partner or any parent of such husband or wife or civil partner or the widower or widow or surviving civil partner of the individual or any parent of such widower or widow or surviving

civil partner of the individual and all the lineal descendants and ascendants in direct line of the individual and the brothers and sisters of that individual and their lineal descendants [I refer to these persons as "the first group of persons"],

158.1.2. and a husband or wife or civil partner or former husband or wife or civil partner or widower or widow or surviving civil partner of any of the above persons [I refer to this group of persons as "the second group of persons"],

158.1.3. and for those purposes a step-child or adopted child or illegitimate child of any person shall be deemed to be a lineal descendant of such person and of the lineal ascendants of such person."

159. Mr Horton's submission was that the reference to "the above persons" was only a reference to the persons mentioned in or after the part of the clause which begins "includes" and did not include "the individual member or deceased or former individual member" the relationships with whom are specified in the clause after the words "means and includes". Ms Emma Fane was not the former wife of any of the persons specified in the clause after the words "means and includes". Accordingly, Ms Emma Fane was not a Privileged Relation within the definition.

160. Linguistically I consider that Mr Horton's submission is not only perfectly tenable, but is to be preferred to Mr Burton's:

160.1. The definition extends and extends only to all the persons mentioned after the words "means and includes". It does not include the individual member himself (in this case the Claimant).

160.2. The first group of persons are specified by reference to their relationships to the individual member (or deceased or former member). On the other hand the second group of persons are not defined by reference to the individual member (or deceased or former member), but by reference to "the above persons".

160.3. There is therefore a distinction between the persons to whom the relationships specified in respect of the first group of persons refer and the persons to whom the relationships specified in respect of the second group of persons refer.

160.4. The "above persons" to whom the relationships specified in respect of the second group of persons refer could be just the persons specified in the first group of persons or could, as Mr Burton submitted, refer also to the aggregate of the individual member (or deceased or former member) and the first group of persons. However,

160.5. I consider that the more natural reading of the reference is to the other persons within the definition, rather than to the persons in regard to whom the definition is made:

160.5.1. If one asks: "who are the Privileged Relations on an individual member?" the answer would be: "those persons specified in the definition", that is to say the first group of persons and the second group of persons, so that the reference to "the above persons" in the definition of the second group of persons would most naturally refer to the first group of persons.

160.5.2. The categories of person in respect of which the relationships are specified in respect of the first and second groups of persons overlap, but are different. Thus, the first group of persons includes any parent

of a husband or wife or civil partner and the parents of a widower or widow or surviving civil partner. It also includes lineal descendants and ascendants and the brothers and sisters of the member and their lineal descendants. The second group of persons does not. The second group of persons includes former spouses and civil partners, the first group of persons does not. Two things follow from that:

160.5.2.1. Firstly, if "any of the above persons" includes the individual member, then where the categories overlap there would be a duplication of references to the persons within the overlapping categories. That might be put down to poor or over-cautious drafting, but duplication would be avoided if the "other persons" referred to in the second group of persons was a reference to the first group of persons.

160.5.2.2. Secondly, it would be poor drafting if former wives of a member were intended to be included in the definition, but were not included in the first group of persons which deals with direct relationships with the member (or deceased or former member).

161. Looking at the Articles as a whole, Mr Burton submitted that they were badly drafted; that the overall object of clause 49.12 was clearly to include a very wide range of relations and that it would make no sense to exclude former spouses of a member, particularly when (i) the spouses of members were included and (ii) the former spouses of persons other than of the member himself were included, whilst if Mr Horton's interpretation was correct the former spouse of a member was excluded.

162. Mr Horton submitted that it could make some commercial sense to exclude former wives of a member because a divorce might be acrimonious and it would not be in the Company's and the other shareholders' interests to have an angry former spouse as a shareholder of what had been a Company in which their spouse had been a shareholder and, possibly, remained such and possibly was a director. As regards the inclusion of former spouses of the first group of persons, but not of a member the explanation could be that the animosity arising from a divorce was more likely to be aimed at the member and the Company than it would be in the case of a former spouse of a person in the first group of persons who would, *ex hypothesi*, have been at least one relationship removed from the member and hence from the Company. Another, and in my view better, explanation could be that given that the clause is concerned with transfers of shares legally and/or beneficially owned by a member, if a divorce from the member did not cause a spouse of the member to cease to be a "Privileged Relation", a member's shares might get transferred to their former spouse by an order of the divorce court when neither the member nor the other members wished for that to happen. Both Mr Burton's and Mr Horton's submissions mentioned in this paragraph have some force but I prefer Mr Horton's because it gains strong support from Article 49.6.

163. Article 49.6 provides:

"Where Ordinary Shares have been transferred under Article 49.2 to a husband or wife or civil partner of the particular individual member or former individual member referred to in Article 49.1.2 or any parent of such husband or wife or civil partner (whether directly or indirectly by a series of transactions under Article 49) and such husband or wife or civil partner ceases to be married to, or in civil partnership with (as the case may be), the relevant individual, other than by reason of death of such

individual, then it shall be the duty of the member which is the former husband or wife or civil partner or parent of any such person to notify the Directors in writing that such event has occurred and such member shall (unless the relevant shares are transferred to a Permitted Transferee of the particular individual member or former individual member referred to in Article 49.2) be bound to give a Transfer Notice in relation to the Ordinary Shares held by such member."

164. The fact that under Article 49.6 a divorce triggers an obligation to serve a Transfer Notice in respect of share which a member had previously transferred quite properly to their spouse under Article 49.2, is an indication of an intention that a divorced (former) spouse of a member was regarded in the Articles as a person who the other members might wish to be able to cause not to have an interest in shares in the Company and hence that a transfer to a former spouse at a time when they were already divorced from the member should also trigger the need to serve a Transfer Notice.

165. My preference for Mr Horton's submissions on the point by reason of the support they get from Article 49.6 means that in my judgment Ms Emma Fane ceased to be a "Privileged Relation" when she became a "former spouse" of the Claimant.

166. It follows from my decision that Ms Emma Fane ceased to be a "Privileged Relation" when she became a "former spouse" of the Claimant, that, subject to the point that Ms Emma Fane is not a party to the Claim or the Counterclaim, the 1st, 2nd and 3rd Defendants will be successful on the first head of relief sought under the Counterclaim.

167. Under the second head of relief sought in the Counterclaim, the 1st, 2nd and 3rd Defendants seek a declaration that the transfer by the Claimant of a 50% beneficial interest in the Claimant's shares to Ms Emma Fane and the Deed are "invalid". The Claimant and Mr Burton criticise the use of the word "invalid". In paragraph 18.3 of the Reply and Defence to Counterclaim the Claimant alleges that he is "unable to divine what the Defendants mean by the use of the word "invalid"". A common meaning of the word "invalid" is "have no legal force". I consider that there is no reason for it not to be given that meaning in its contexts in the Counterclaim and if it has that meaning that fits well with the thrust of the Defendants' case in relation to the Deed and its effect. In particular with those paragraphs where the 1st, 2nd and 3rd Defendants seek an order that the Claimant serve a Transfer Notice under Article 50.1. Such a Transfer Notice is required to be served by a member who "wishes to transfer" shares. The present, not the past tense is used. If the Deed had been effective to transfer or dispose of a 50% beneficial interest in the shares to Ms Emma Fane, it would be too late to serve a Transfer Notice because the interest would already have been transferred or disposed of. Accordingly, I treat the Defendants' use of the word "invalid" in the Counterclaim as meaning "ineffective" or "of no legal effect".

168. By clause 1b of the Deed the Claimant confirmed, represented and warranted to Ms Emma Fane that he "acknowledged she has a beneficial interest in 50% of the Shares as to both capital, income and all associated rights attached to the Shares." Prima facie it would follow from this that at some stage, either by the Deed or by some other document or transaction the Claimant had transferred a beneficial interest in 50% of the Shares to Ms Emma Fane.

169. For the purposes of the Articles, Article 48.1 provides that "a reference to the transfer of or transferring shares shall include any transfer, assignment, disposition or proposed or purported transfer, assignment or disposition" of (48.1.1) "any share or shares of the Company"; or (48.1.2) any interest of any kind in any share or shares of the Company".

170. The transfer or disposition by the Claimant of a 50% beneficial interest in his shares in favour of Ms Emma Fane would be a transfer or disposition of an interest in the shares within the meaning of Articles 48.1, 48.1.1 and 48.1.2, and in the Articles would, unless the context otherwise required, be a "transfer". Further, if (i) such a transfer or disposition was in breach of Article 50.1 because the Claimant had not served a Transfer Notice in respect of it before it was made, and (ii) the effect of Article 50.1 was that in such circumstances what would otherwise have been the transfer or disposition was ineffective to vest a 50% beneficial interest in the share in Ms Emma Fane, then what would otherwise have been the transfer or disposition would have been a purported transfer and still would have been within the definition of transfer in Articles 48.1 and 48.1.2, unless the purported transfer or disposition was itself made conditional on the requirements of the Articles first being satisfied.

171. In the PoC and in the Reply and Defence to Counterclaim, the Claimant proceeds on the footing that the Deed or something preceding it effected a transfer of a 50% beneficial interest in the shares to Ms Emma Fane. Thus:

171.1. In paragraph 26 of the PoC it is pleaded that Ms Emma Fane was within the class of "Permitted Transferees" and in paragraph 26.2 it is pleaded that "the disposition of the Claimant's interest in his shares effected by a declaration of trust in favour of Ms Fane and as recorded by the Deed is therefore a "permitted transfer" within the meaning of clause 49.2.1 of the Articles.

171.2. Paragraph 18 of the Reply and Defence to Counterclaim alleges that as a matter of interpretation of Article 49.1.2 Ms Emma Fane was a "Permitted Transferee", an interpretation which I have rejected. Paragraph 18.2 contains a plea that "no transfer notice was required in respect of a disposition to her."

171.3. Neither the PoC nor the Reply and Defence to Counterclaim address the questions:

171.3.1. (1) of whether, on the footing that Ms Emma Fane was not a Permitted Transferee, Article 50.1 would have been engaged and would have required the Claimant to serve a Transfer Notice "before transferring or agreeing to transfer" the shares. Or,

171.3.2. (2) of whether, if Article 50.1 had been engaged in that way, a purported transfer of a 50% beneficial interest to Ms Emma Fane without a Transfer Notice having been served would nevertheless have effected a transfer of a 50% beneficial interest to Ms Emma Fane.

172. In the Defence the Defendants allege that there was no transfer of the 50% beneficial interest to Ms Emma Fane. Thus:

172.1. Paragraph 21.2 of the Defence alleges that the "purported transfer" of the 50% beneficial interest was "pursuant to the Deed".

172.2. Paragraph 21.5 and clause (2) of the Prayer for Relief in the Counterclaim allege and claim that the transfer was "invalid".

173. Mr Burton submitted that if, by reason of Ms Emma Fane not having been a Privileged Relation, the Deed had been ineffective to transfer a beneficial interest to Ms

Emma Fane, then the Claimant had not wished to transfer or dispose of his share so as to trigger the obligation under Article 50.1 to serve a Transfer Notice. In other words, the Claimant's wish to transfer a beneficial interest to Ms Emma Fane was conditional on Ms Emma Fane being a Privileged Relation.

174. In his statement the Claimant says that he has "never wished to transfer 50% of [his] shares other than pursuant to a permitted transfer". As a matter of fact, I find that difficult to square with clause 1b of the Deed. Clause 1b contains no indication of conditionality. Indeed, I find it so difficult to square with clause 1b of the Deed, that in my judgment the Defendants have a better than real prospect of establishing that the Claimant did wish to transfer a beneficial interest in 50% of the Shares to Ms Emma Fane, either by the Deed or before the execution of the Deed. That difficulty is made even greater by the terms of clause 3 of the Deed by which it is agreed that the Claimant shall not do, or permit to be done, any act or thing that would or might depreciate, jeopardise or otherwise prejudice "the value of the beneficial interest held by the Beneficial Owner ...". The phrase used is "held by the Beneficial Owner", not "to be held by the Beneficial Owner", thereby indicating strongly that the transfer or disposition of the 50% beneficial interest was something which the parties to the Deed considered had already happened or was happening simultaneously with the execution of the Deed.

175. Mr Burton submitted that the only potentially dispositive part of the Deed was its clause 6, under which Ms Emma Fane had, subject to satisfaction of certain conditions precedent, the right to call for a transfer of 50% of the Shares which right, submitted Mr Burton, had not been exercised and could not yet be exercised because the conditions precedent had not been satisfied. If that submission is correct as to the factual allegations as to non-exercise of the clause 6 right, I would agree with Mr Burton that the clause 6 right had not yet been exercised. However, that does not prevent a 50% beneficial interest in the Shares from having been vested or from having purportedly been vested in Ms Emma Fane by some other means.

176. Clause 6 of the Deed is concerned with a transfer of the legal title to the shares into the joint names of the Claimant and Ms Emma Fane. The Deed does not expressly include the extended meaning of "transfer" which is given to that word in Article 49.1.2. In particular it does not contain an equivalent of Article 48.1.2 which includes within the definition "any interest of any kind in any share or shares of the Company".

177. I do not have all the potentially relevant background to the execution of the Deed which might be expected to be relevant to its interpretation; but it appears to me that the terms of the Deed indicate so strongly that there was or was intended to be a transfer of a 50% beneficial interest in the shares to Ms Emma Fane, that there is at least a real prospect that there would be insufficient background material to interpret the Deed in a different way or to imply a term that "transfer" in clause 6 of the Deed had the extended meaning given to the word in Article 49.1.2, or otherwise to cause clause 6 to extend otherwise than to a transfer of the legal title to the shares pursuant to a share transfer. Clause 1b of the Deed and, indeed, the description adopted in the Deed for Ms Emma Fane as "the Beneficial Owner" indicate that the Deed's parties considered that there was or had been a transfer of the beneficial interest to Ms Emma Fane. The terms of clause 6 of the Deed are concerned with whose names the shares are registered in. It creates an obligation in the Claimant (defined in the Deed as "the Registered Owner") to transfer the

shares into the joint names of himself and Ms Emma Fane. Prima facie that concerns the legal title.

178. The phraseology used in and in respect of clause 1b of the Deed of: "The Registered Owner confirms, represents and warrants to the Beneficial Owner that: he acknowledges that ... she has a beneficial interest in 50% of the Shares as to both capital, income and all associated rights attached to the Shares" is more apt to describe an existing situation, i.e. one in which Ms Emma Fane is already the beneficial owner of 50% of the shares, than one in which she is to become such an owner by the operation of the Deed. There is no indication that the acknowledgement in clause 1b that Ms Emma Fane's beneficial interest in 50% of the shares is any way conditional. The conditionality only applies to the obligations under clause 6 as to the vesting of legal title to the shares.

179. I have already decided that as a result of her divorce from the Claimant, Ms Emma Fane ceased to be a "Privileged Relation". The divorce occurred before the Deed was executed.

180. If, as I consider to be the case, there is a real prospect that the Claimant did purport unconditionally to have transferred or disposed of a beneficial interest in 50% of the Shares to Ms Emma Fane, the very fact of such an unconditional purported transfer or disposition indicates that there was a wish in the Claimant to effect it, with the consequence that there would be a real prospect of it being established that Claimant came under an obligation under Article 50 to serve a Transfer Notice in respect of that purported transfer or disposition.

181. The Claimant has not served a Transfer Notice in respect of the transfer to Ms Emma Fane. The Defendants allege that, assuming there was an obligation to have served such a notice, the consequences of that failure are (i) that the transfer of the 50% beneficial interest is invalid; (ii) the Deed is invalid and (iii) the Claimant is obliged to serve a Transfer Notice in respect of the transfer or the intention to make the transfer.

182. The requirement to serve a Transfer Notice under Article 50 is that the member serve a Transfer Notice "before transferring or agreeing to transfer" the shares which he wishes to transfer. Both counsel proceeded before me on the footing that if, as a consequence of the execution of the Deed, Article 50.1 required a Transfer Notice to be served, then the failure to serve a Transfer Notice would have meant that the purported assignment or disposal in favour of Ms Emma Fane did not pass any proprietary interest to Ms Emma Fane. Indeed that is the Defendants' pleaded case. It formed the foundation of Mr Burton's argument in relation to the Deed and clause 6 of the Deed.

183. I was not referred to cases where the effect or non-effect of a purported assignment or disposal of a beneficial interest in breach of the articles of association of a company were considered. In particular I was not referred to any authority on the question whether a transfer of a beneficial interest in shares which the Articles provided should not be effected before a Transfer Notice was served is (i) analogous to the assignment of leases in breach of covenant where the assignment is effective, but is a breach of the terms of the lease giving rise to a right in the landlord to forfeit; or (ii) is analogous to an assignment of the benefit of a contract in breach of a term of the contract providing that the benefit of the contract is unassignable except with the consent of the other party, when that

provision makes a purported assignment of the benefit of the contract ineffective as between the putative assignor and the putative assignee on the one hand and the other original party to the contract on the other; albeit that the assignment may still have some effect as between the putative assignor and the putative assignee. The rationale for the first line of cases is that what is being assigned is an interest in property rather than a mere contractual interest. An ordinary share in a company is frequently treated as an item of property which gives rise to both contractual and statutory rights. Thus, an assignment of an interest in a share may be closer to the assignment of lease line of cases than to the purely contractual line of cases. On the other hand, pre-emption rights in respect of the disposition of shares are commonplace in the articles of companies and in the case of pre-emption rights in respect of legal title to shares, a failure to have complied with the requirements for a transfer will generally result in the company being obliged not to register the transfer. With both Mr Burton and Mr Horton having proceeded on the basis that if Article 50 required service of a Transfer Notice, the effect of Article 50.1 was that if a Transfer Notice had not been served the purported transfer of the 50% beneficial interest would have been ineffective, at least as between the Claimant, the other members and the Company, I consider that it would be wrong for me to attempt to decide that point either differently or at all without hearing proper argument on the point.

184. In those circumstances I proceed on the footing that there is at least a real prospect that the effect of Article 50.1 was to make the purported transfer of the 50% beneficial interest ineffective. Consequently, I consider that, subject to the point that Ms Emma Fane is not a party to the Claim or the Counterclaim, there is a real prospect of success for the counterclaimed relief that the transfer of the 50% beneficial interest was ineffective (i.e. Prayer (2) of the Counterclaim).

185. If the purported transfer or disposition of the 50% beneficial interest by the Deed was ineffective, the 1st, 2nd and 3rd Defendants would come to have no interest in the validity of the Deed or its effect or possible effect as between the Claimant and Ms Emma Fane. And there would be no real prospect of justice requiring that they be granted a declaration as to its effectiveness.

186. In the alternative that the purported transfer or disposition of the 50% beneficial interest by the Deed was the 1st, 2nd and 3rd Defendants was effective, the Deed would be effective and the Counterclaim for a declaration that it was ineffective would fail.

187. Thus, whether or not the Deed was effective to transfer or dispose of the 50% beneficial interest, the 1st, 2nd and 3rd Defendants have no real prospect of obtaining the declaration sought by them as to the invalidity of the Deed. Nor is there any other compelling reason why that issue should be tried as between the Claimant and 1st, 2nd and 3rd Defendants, and I will give summary judgment against the 1st, 2nd and 3rd Defendants on it.

188. Under the third head of relief sought in the Counterclaim, the 1st, 2nd and 3rd Defendants seek an order that the Claimant do serve a Transfer Notice in respect of 50% of the Claimant's shares pursuant to Article 50.1. Is there no real prospect of such an order being made?

189. Article 50.1 imposes an obligation to serve a Transfer Notice when any member "wishes to transfer" shares. In my judgment as a matter of language that requires there to be a present subjective wish in the member to transfer shares in order for the obligation to exist. Where a member once had the relevant wish, but has ceased to have it, the obligation will have ceased to exist, albeit that if no Transfer Notice had been served during the period when the member had the wish, that would have been a breach of the terms of Article 50.l.

190. I held above that the Defendants have a better than real prospect of establishing that the Claimant did wish to transfer a beneficial interest in 50% of the Shares to Ms Emma Fane, either by the Deed or before the execution of the Deed.

191. Whatever the Claimant's wish in relation to a disposition of the 50% beneficial interest might have been at or before the execution of the Deed, by the time of the hearing before me, there was a good prospect of the Claimant establishing that subjectively he no longer had a wish to transfer or dispose of a 50% beneficial interest to Ms Emma Fane either because he considered that he had already done so on the footing that Ms Emma Fane was a Privileged Relation or, if he had not already done so, because he would not wish to continue his breach of Article 50.1, so that any wish to transfer or dispose would, at most, be a wish to do so conditionally on its being possible for him to do so without becoming obliged to serve a Transfer Notice. In this context the Claimant's statement that he has never wished to transfer 50% of his shares other than pursuant to a permitted transfer could, unlike in the context where I have considered it above, have weight because the present context arises on the hypothesis that there has not been a transfer or disposition of the 50% beneficial interest, so the statement by the Claimant as to his wishes would not be inconsistent with clause 1b of the Deed.

192. Even if that prospect (i.e. the prospect the Claimant establishing that subjectively he no longer had a wish to transfer or dispose of a 50% beneficial interest to Ms Emma Fane) was so good as to oust the reality of there being a prospect of the Claimant still having a subjective wish to transfer or dispose of the 50% beneficial interest, that would not be the end of the matter because if and for so long as the Claimant remained under an obligation to transfer or dispose of the 50% beneficial interest to Ms Emma Fane which was not conditional on compliance with Articles 49 and 50, or under the obligation to effect a transfer when requested by Ms Emma Fane under clause 6 of the Deed, those obligations would be inconsistent with the Claimant's subjective intention. In my judgment those inconsistencies mean that despite his probably having an actual subjective wish not now to transfer or dispose of the 50% beneficial interest or the clause 6 legal interest, there is a real prospect that his obligations under the Deed prevent him from being able to rely upon that subjective wish, with the consequence that there is a real prospect that, subject to the point as to Ms Emma Fane not being a party, the 1st, 2nd and 3rd Defendants will be successful in obtaining the relief sought under the third head of their Counterclaim.

193. Ms Emma Fane is clearly very interested in whether or not the transfer to her of a 50% beneficial interest in the shares was effective; in whether the Deed was invalid in whole or in part and in whether a Transfer Notice should be ordered to be served in respect of the shares in which she may have a beneficial interest.

194. Although a declaration in these proceedings as currently constituted as to the effect of the Deed would not be binding on Ms Emma Fane and although the law is more flexible than it used to be as to the circumstances in which a declaration may be made, in my judgment it remains the case that as a matter of practice the court should be slow to make declarations concerning the rights of third parties, even if the declaration is not binding on them. The modern approach is that that practice is related to the principle that the court must be satisfied that all sides of the argument will be fully and properly put; as to which see the passage from Marcus Smith J's judgment in *Bank of New York Mellon, London Branch v Essar Steel India Ltd* [2018] EWHC 3177at para.21(5) set out by me above which reflects the words used by Aikens LJ in his dissenting judgment in *Rolls-Royce Plc v Unite the Union* [2009] EWCA Civ 387, [2010] 1 WLR 318 at para.121:

> "(6) However, the court must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected are either before it or will have their arguments put before the court."

195. I am not satisfied that all the arguments in favour of the Deed or some other transaction being effective to give Ms Emma Fane a beneficial interest in the shares or whether the Deed was invalid in whole or in part or whether a Transfer Notice should be ordered to be served in respect of the shares in which she may have a beneficial interest., have been put before the court. In particular I am not satisfied that all the arguments have been put to me in respect of the possibility of a purported transfer of a beneficial interest in breach of the Articles might nevertheless be an effective transfer of that beneficial interest.

196. I am not dealing with an application by the Defendants for summary judgment on the Counterclaim, but with an application by the Claimant for reverse summary judgment on the Counterclaim. In that context I consider that the lack of Ms Emma Fane as a party is not something which prevents the 1st, 2nd and 3rd Defendants from having a real prospect of success on the Counterclaim. The fact that she is not a party is something which can be remedied either by joining her or perhaps by giving her notice of the Counterclaim.

197. Accordingly, the fact that Ms Emma Fane is not a party does not dissuade me from refusing to dismiss the Counterclaim and, except for that part of the second head of the Counterclaim which seeks a declaration that the Deed is invalid, I will not dismiss the first, second or third heads of relief sought in the Counterclaim.

198. Under the fourth head of relief sought in the Counterclaim, the 1st, 2nd and 3rd Defendants seek damages and interest. On the footing that Ms Emma Fane was not a Privileged Relation, and that there is at least a real prospect of establishing that in breach of Article 50.1 no Transfer Notice has been served when one ought to have been, there must also be real prospect that damages and interest would be awarded for such breach, so I will not grant the Claimant reverse summary judgment in respect of the fourth head of relief sought in the Counterclaim.

199. Paragraph 4 of the Draft Order seeks an order that Mr Rajani shall be appointed as a director of the Company with immediate effect and an order that the Defendants shall take the necessary steps to register Mr Rajani as a director of the Company with Companies House "forthwith".

200. Both the Articles and the SHA contain provisions dealing with the appointment of directors.

201. Under Article 20.1.3 a person can be appointed as a director by a "Principal Shareholder" who holds shares at or above the "General Threshold".

202. Under the clause 4.1(a) of the SHA a Principal Shareholder, while holding at least 5% of the issued ordinary share capital may appoint of remove one "Nominated Director".

203. The allegations in the PoC that the Claimant was and remains a Principal Shareholder holding more than 9% of the total issued ordinary shares in the Company are admitted in the Defence.

204. Under clause 4.1(b) of the SHA notice of the proposed appointment of any "replacement Nominated Director" is required to be given to all Principal Shareholders "with details including the name, occupation, regulatory or other recognised status and such other details as any Principal Shareholder shall reasonably request" and any Principal Shareholder has 10 Business Day days after the giving of the notice to make a written objection, which shall include the reasons for the objection.

205. At one stage of the hearing the submissions in relation to the appointment of Mr Ranjani explored, at my instigation, what the position was if Mr Ranjani was not a "replacement Nominated Director", so that clause 4.1(b) of the SHA would not be engaged in respect of his proposed appointment. However, the pleadings make it clear that the parties were proceeding on the basis that clause 4.1(b) was engaged. That they were correct to do so is apparent from paragraphs 22.3 and 22.7 of the Reply and Defence to Counterclaim where it is alleged, above a statement of truth, that a Mr Orrell had previously been nominated by the Claimant to and had attended meetings of the Board of Directors.

206. The Articles do not contain an equivalent of clause 4.1(b) of the SHA. However, as set out above, under clause 3.3 of the SHA, in the event of any inconsistency between the provisions of the SHA and the Articles, the provisions of the SHA should prevail. Accordingly, it was necessary for the Claimant to serve a notice under clause 4.1(b) of the SHA.

207. The allegation in paragraph 40 of the PoC that a notice dated 16 January 2023 was given in which the Claimant "sought the appointment of Mr Pankaj Rajani" is admitted in the Defence.

208. The Defendants allege in paragraph 36.1 of their Defence that by their solicitors' (Shoosmiths') letter dated 24 January 2023 they "made it clear that the Defendants did not consent to the appointment of Mr Rajani". The Claimant denies that.

209. When Shoosmiths' 24 January 2023 letter is looked at it does not directly object to the appointment of Mr Rajani or give reasons for objecting.

210. In the letter of 24 January 2023 Shoosmiths challenge that ability of the Claimant to have nominated Mr Rajani, but they do not state why the appointment of Mr Rajani is

objected to. The points taken in the 24 January 2023 letter do not concern the qualities of or alleged conflicts in Mr Rajani. They comprise arguments as to the status of the Claimant to give the notice having regard to the terms of the Deed. By reason of the Defendants' admission that the Claimant was and remains a Principal Shareholder, if those arguments were ever objections of the kind contemplated in Clause 4.1(b) of the SHA, they must now fall away.

211. The 24 January 2023 letter states that the Claimants' solicitors have failed to address the points raised in Shoosmiths' letters of 14 January 2022 and 3 November 2021.

212. Shoosmiths' letter dated 14 January 2022 argues that pursuant to clause 1b of the Deed the Claimant had transferred the beneficial interest in 50% of his shares to Ms Emma Fane and all the rights associated with those shares, which included the rights attaching to the shares under the SHA. The letter does not otherwise contain any objection to the appointment of Mr Rajani as a director.

213. Shoosmiths' letter dated 3 November 2021 contains arguments as to the effect of the Deed, but does not otherwise contain any objection to the appointment of Mr Rajani or any reasons for any such objection.

214. In paragraph 36.2 of the Defence the Defendants rely upon a letter from the Company dated 8 January 2021 and an email from the 1st Defendant dated 14 March 2021 as having made it clear to the Claimant that Mr Rajani was objected to, with reasons being given.

215. In paragraph 32.3.2.1 of the Reply and Defence to Counterclaim it is stated that the Claimant cannot identify any letter from the Company dated 8 January 2021 in which Mr Rajani's appointment is objected to, though the existence of a letter dated 12 January 2021 is referred to in which, it is alleged in the Reply and Defence to Counterclaim, the reason given for the failure to concur in the appointment of Mr Rajani in that letter was the Claimant's alleged breach of Articles occasioned by the Deed.

216. A copy of the email dated 14 March 2021 is in the Hearing Bundle. The email states, amongst other things:

216.1. "Pankaj Rajani of Plutus Estates is insisting that he be appointed to the company's Board of Directors as your nominated director. For the reasons explained below, we do not consider him to be a suitable nomination." And,

216.2. "In June 2016, so less than a year after execution of the SHA, you and Emma Fane entered into a facility agreement with Plutus Estates (the "Facility Agreement"). Mr Rajani is Plutus Estates' director. He is also the director and principal shareholder of Macalvins Limited, who were the Wellesley Group auditors until June 2014 ..."

216.3. "It is now also apparent that you have attempted to appoint Mr Rajani as a Nominated Director to obscure the arrangement between you and Plutus Estates. Mr Rajani is essentially seeking to exercise undeclared rights over shares granted to him by you. Mr Rajani is plainly not suitable for such appointment under such circumstances."

217. It is reasonably clear from those passages that in March 2021 the 1st Defendant objected to the appointment of Mr Rajani and why he objected to the appointment.

However, the email dated 14 March 2021 substantially pre-dated the admitted notice dated 16 January 2023. Clause 4.1(b) required the written objection to the appointment to be made "within 10 business days of the giving of" the notice of the proposed appointment. Giving a notice of objection before that period had started would prima facie not be the giving of a written objection in accordance with the terms of clause 4.1(b). That prima facie position is supported by the consideration that decisions as to whether to object and the reasons given for objection might well change over time, which an interpretation of clause 4.1(b) which included objections which were made before the notice of proposed appointment would not allow for. In my judgment the Defendants do not have a real prospect of establishing that a timeous written objection was given in accordance with the requirements of clause 4.1(b).

218. The Defendants rely on a further defence to the making of the orders sought by the Claimant in respect of the appointment of Mr Rajani.

219. The Defendants allege that in breach of Article 50 the Claimant failed to serve a Transfer Notice in respect of 114,836 of the shares held by him. 114,836 shares is 50% of the Claimant's holding. I have already held that there is at least a real prospect of establishing that in breach of Article 50.1 no Transfer Notice has been served in respect the shares in which the 50% beneficial interest referred to in the Deed subsisted.

220. The Defendants allege that if a Transfer Notice had been served the 114,836 shares would have been purchased by the 1st, 2nd and/or 3rd Defendants. That allegation is not admitted in the Reply and Defence to Counterclaim; but it is supported by the statement of Mr Warren who says that had the required Transfer Notice been served, the shares would have been purchased by the other Principal Shareholders. I cannot determine the issue of whether that allegation will or will not be made good. It is an issue at least partly of fact which cannot properly be determined summarily under CPR 24. It is not inherently so unlikely that the Defendants do not have a real prospect of success on it.

221. The Defendants allege that the consequences of the 1st, 2nd and/or 3rd Defendants acquiring 114,826 shares from the Claimant would have been (i) that the Claimant's holding would have been reduced to less than 5% of the issued share capital of the Company and (ii) that the Claimant would have ceased to have the right to appoint a director pursuant to clause 4.1(a). Those consequences (though not the hypotheses on which they are based) are admitted by the Claimant in the Reply and Defence to Counterclaim. I have held that the Defendants have a real prospect of success insofar as establishing those hypotheses is concerned. It follows that they also have a real prospect of establishing that if the Claimant had not, in breach or Article 50 failed to serve a Transfer Notice, the 1st, 2nd and/or 3rd Defendants would have acquired 50% of the Claimant's shares and have thereby deprived him of the right to nominate a director under clause 4.1 of the SHA. The same would follow in respect of the right under Article 20.1.3.

222. The Defendants then allege that it would be inequitable to permit the Claimant to benefit from that breach by obtaining an order for specific performance of an obligation which they would not have been under had the Claimant not breached the Articles. This allegation appears to me to be one which has at least a real prospect of success. In my judgment it would be unfair and inequitable to order specific performance of the

obligation to appoint a nominated director, at least not without considerable further investigation of the facts. I will not make such an order of the Application.

223. Paragraphs 5 and 6 of the Draft Order deal with costs. It would be premature for me to deal with costs in this judgment. If not agreed, they will have to await further argument.

224. Paragraph 7 of the Draft Order seeks a declaration that the Plutus Charge is a "permitted transfer" pursuant to Article 49.

225. As set out above, paragraph 19 of the Defence admits that if, which was not admitted, the Charge was executed and contained the terms set out in paragraph 9 of the PoC and a genuine loan was made by Plutus to the Claimant, then it was a "permitted transfer" within the meaning of Article 49.2.7 and would not have contravened clause 17.6 of the SHA.

226. Following the provision by the Claimant of evidence, it was accepted by the Defendants that the Charge was executed and contained the terms set out in paragraph 9 of the PoC and that a genuine loan was made by Plutus to the Claimant.

227. It follows that the Charge is admitted to be a "Permitted Transfer".

228. The Defendants do not oppose the making of the declaration sought in paragraph 7 of the Draft Order. Conversely the Claimant in paragraph 17.6 of the Reply and Defence to Counterclaim pleaded that on the basis of the Defendants' admission, it was admitted that there was no longer a need for the declaratory relief sought in paragraph 25 of the PoC, which includes a claim for a declaration that the Charge is a permitted Transfer. By the time of the Application and Mr Burton's skeleton argument, the Claimant was again asking for the declaration.

229. The precise nature of the Defendants' acceptance that the Charge was executed and contained the terms set out in paragraph 9 of the PoC and that a genuine loan was made by Plutus to the Claimant may not be clear in the future. In the circumstances I consider that no harm would be done in making the declaration and that justice would be done to the parties by my so ordering. I will make that declaration, but without prejudice as to any argument as to costs.

230. Paragraph 8 of the Draft Order seeks a declaration that unless and until Plutus gives notice of any intention to enforce the terms of the Plutus Charge, the Claimant is not required to serve a Transfer Notice pursuant to Article 49.5.

231. The Order sought under paragraph 8 of the Draft Order reflects the plea in paragraph 25.2 of the PoC that the Claimant seeks a declaration that unless and until Plutus gives notice of any intention to enforce the terms of the Plutus Charge, the Claimant is not required to serve a Transfer Notice pursuant to Article 49.5. That was not admitted by the Defence. In paragraph 17.6 of the Reply and Defence to Counterclaim the Claimant pleaded, as mentioned above, that on the basis of the Defendant's admission, it was admitted that there was no longer a need for the declaratory relief sought in paragraph 25 of the PoC.

232. Nevertheless, before me Mr Burton asked for the making of the declaration and Mr Horton opposed it.

233. Mr Burton' s case on this was simply that the Charge was a Permitted Transfer under Article 49.2.7 and that there had not yet been a release of the Charge or any proposed exercise of the power of sale under the Charge, with the result that the Claimant was not yet required to serve a Transfer Notice under Article 49.5.

234. Mr Horton's case on this was that:

234.1. The words of the declaration proposed in paragraph 8 of the Draft Order did not reflect the terms of Article 49.5.

234.2. The reference in Article 49.5 to the "holder" having to give notice might refer to the holder of the Charge rather than to the holder of the shares, and the court should clarify what the position was in that regard.

235. I agree with Mr Burton that there has not yet been an event which triggers the obligation to serve a Transfer Notice under Article 49.5. However, Article 49.5 specifies two potential triggers in that regard: (i) the release of the Charge, and (ii) any proposed exercise of the power of sale pursuant to the Charge. The proposed declaration in paragraph 8 of the Draft Order only covers the former, not the latter. Therefore, I am not willing to make an order in the form of paragraph 8.

236. A charge will not involve an assignment of the shares charged, but it will create an interest in the shares. The creation of such an interest would be a "transfer" within the extended definition of "transfer" in Article 1.1. The member would remain the registered holder of the shares.

237. I consider and hold that as a matter of interpretation of the Articles "holder" in Article 49.5 means the registered holder of the shares, not the holder of the Charge. "Holder" is defined in Article 1.1 "in relation to shares" as meaning, unless the context otherwise requires, the person whose name is entered in the register of members as the holder of the shares or, in the case of a share in respect of which a share warrant has been issued (and not cancelled), the person in possession of the warrant. Article 49.5 and the obligations imposed by it are concerned with shares and the context does not require any meaning to be given to "holder" other than the defined meaning in Article 1.1. On the contrary, in my judgment the context indicates that "holder" means the registered holder of the shares. First because it is the "holder" whom the Article requires to give the Transfer Notice and (i) on a release of a Charge, the chargee would have no interest in giving a notice, while the member would and (ii) Transfer Notices under Article 50 are Notices which are given by a member. Further, the overall scheme of the Transfer Notice provisions in the Articles is that it puts obligations on the member, not on third parties.

238. In his reply submissions Mr Burton asked that I amend the declaration sought under paragraph 8 of the Draft Order to refer to a release or proposed exercise of the powers of sale in place of the reference to giving notice of an intention to enforce the Charge. Even with those amendments, I would not be willing to make the declaration. That is because although the courts can and do make declarations in respect of the consequences of possible future sets of circumstances, the court will need to be satisfied that the future

circumstances are clearly defined. In my judgment a "proposed exercise of a power of sale" is something which will become clear at some stage prior to a sale, but the precise time at which it does so is likely to be unclear. Further, the duty to notify the Directors and to give a Transfer Notice under Article 49.5 in the event of a release or proposed exercise of the power of sale is subject to an exception if the Relevant Shares are then transferred to the member from whom they were transferred pursuant to the Charge or a Permitted Transferee thereof other than a Permitted Transferee pursuant to Article 49, any such transfer being deemed to be authorised under Article 49. If the declaration sought was to be amended to include that exception, the declaration would be doing not more than repeating the terms of Article 49.5 in circumstances where it was not known precisely what transaction might take place in the future which would or might trigger the clause 49.5 obligations. Those uncertainties and result mean that in my judgment it would be inappropriate to make a declaration in that amended form.

239. Paragraph 9 of the Draft Order seeks a declaration that the Plutus Charge did not and does not contravene the provisions of clause 17.6 of the SHA. That reflects the plea in paragraph 25.3 of the PoC. As I have just stated in relation to the relief claimed under paragraph 7 of the Draft Order:

239.1. Paragraph 19 of the Defence admits that if, which was not admitted, the Charge was executed and contained the terms set out in paragraph 9 of the PoC and a genuine loan was made by Plutus to the Claimant, then it was a "permitted transfer" within the meaning of Article 49.2.7 and would not have contravened clause 17.6 of the SHA.

239.2. Following the provision by the Claimant of evidence, it was accepted by the Defendants that the Charge was executed and contained the terms set out in paragraph 9 of the PoC and that a genuine loan was made by Plutus to the Claimant.

240. Clause 17.6 provides:

"Except as provided in this clause 17 (or under or pursuant to the Charge Agreements) no person may assign, hold on trust or otherwise transfer its rights or benefits under this Agreement without the written consent of all other Parties or mortgage or otherwise charge its Shares unless the terms of the Articles apply on any crystallisation of such mortgage or charge and provided always that all terms of the Articles and this Agreement affecting such Shares continue to apply."

241. Mr Horton argued that it was unclear whether Article 17.6 was intended to apply to any charge or mortgage, or only to those types of charge or mortgage that start as uncrystallised, i.e. a floating charge that becomes a fixed charge. I agree that the meaning and effect of the part of clause 17.6 which deals with the crystallisation of a mortgage or charge is opaque. However, if that second part of clause 17.6 is restricted to floating charges, then clearly it would not be engaged by the Charge because the Charge is not a floating charge.

242. It is strange that the second part of clause 17.6 appears at all in clause 17 of the SHA which is otherwise concerned only with rights under the SHA. Be that as it may, subject to any extraordinary admissible extrinsic evidence relevant to the interpretation of clause 17.6, my view on the terms of the document would be that the creation of the Charge did not contravene the provisions of clause 17.6 of the SHA. However, by reason of the conditional admission in paragraph 19 of the Defence and the acceptance that the Charge

was executed and contained the terms set out in paragraph 9 of the PoC and that a genuine loan was made by Plutus to the Claimant, I do not have to and do not rule on whether that view is correct. The admitted interpretation is at least sufficiently well arguable for me to accept and give effect to the admission.

243. Mr Horton argued that because the interpretation of clause 17.6 might affect a third party and in particular because it might affect Plutus, it should not be dealt with summarily. I consider that the possible impact on third parties of a declaration as sought in paragraph 9 of the Draft Order would be zero or insignificant. As regards Plutus, the declaration sought is in Plutus's favour, therefore there would be no prejudice to Plutus. Further, unlike the position in relation to the possibility of a purported transfer of a beneficial interest in breach of the Articles nevertheless being an effective transfer of that beneficial interest, I am satisfied that all the arguments have been put to me in respect of the issue of whether or not the Charge contravened the provisions of Article 17.6, so the possible effects of the declaration on third parties is not something which in this instance has any significant influence against my making the declaration sought.

244. As with the order sought under paragraph 7 of the Draft Order, because the precise nature of the Defendants' acceptance that the Charge was executed and contained the terms set out in paragraph 9 of the PoC and that a genuine loan was made by Plutus to the Claimant may not be clear in the future, I consider that no harm would be done in making the declaration and that justice would be done to the parties by my declaring that the Charge did not and does not contravene Article 17.6 of the SHA, and I will make that declaration as sought.

245. Paragraph 10 of the of the Draft Order seeks a declaration that the transfer of 50% of the beneficial interest in the Claimant's shares to Ms Emma Fane recorded in the Deed, was a Permitted Transfer pursuant to Article 49. I have determined this issue above in relation to the Counterclaim. The transfer or purported transfer of the 50% beneficial interest was not a Permitted Transfer within Article 49 and I will not make the declaration sought in paragraph 10 of the Draft Order.

246. Paragraph 11 of the Draft Order seeks a declaration that neither "the Fane Transfer" nor the Deed contravene the provisions of clause 17.6 of the SHA. The "Fame Transfer" is defined in paragraph 10 of the Draft Order as the "transfer of 50% of the beneficial interest in the Claimant's shares to Mrs Emma Fane which was recorded" in the Deed.

247. By reason of the use of the words "recorded in" in paragraph 10 of the Draft Order, I read the reference to a "transfer" in those paragraphs as meaning an actual transfer, assignment or declaration of trust, and as not including a purported, but ineffective transfer, assignment or declaration of trust within the extended meaning given to "transfer" in the Articles. On the footing of the parties' approach that any effect of the Deed in relation to the Shares or in relation to a past transaction in relation to the Shares for the purported benefit of Ms Emma Fane was ineffective, paragraph 11 of the Draft Order would contain a false hypothesis that there was an effective transfer, assignment or declaration of trust. On that ground and because I am not satisfied that in relation the possibility of a purported transfer of a beneficial interest in breach of the Articles nevertheless being an effective transfer of that beneficial interest all the arguments have been put to me, I am unwilling to make a declaration in the terms of paragraph 11 of the Draft Order as to the effect of the Fane Transfer, as defined.

248. Paragraph 21.6 of the Defence admits that the Deed does not contravene clause 17.6 of the SHA because it does not purport to assign, declare a trust of and/or otherwise transfer the Claimant's rights under the SHA.

249. On the basis of the Defendants' admission and my view, as explained below, that the Deed probably did not contravene clause 17.6 of the SHA, I would, subject to the possible interest of Ms Emma Fane in the issue, be willing to make a declaration as sought in paragraph 11 of the Draft Order in respect of the Deed, but not in respect of the Fane Transfer, as defined.

250. The prohibition in clause 17.6 of the SHA is against the assignment or holding on trust or otherwise transferring rights or benefits under the SHA without the written consent of all other parties.

251. What was assigned or recorded as having been assigned in clause 1b of the Deed was a beneficial interest in 50% of the Shares "as to both capital, income and all associated rights attached to the Shares". It is only if those "associated rights" included rights under the SHA, that the transfer or purported transfer of the 50% beneficial interest or the Deed would contravene clause 17.6 of the Deed. That point was argued by the Defendants' former solicitors in correspondence, but not before me. I consider that it is probably correct that the "associated rights" did not include rights under the SHA.

252. Ms Emma Fane clearly has an interest in whether or not the Deed gave or purported to give her rights under the SHA. If the Deed did give or purport to assign or declare rights in the SHA for her benefit, that assignment or declaration of trust would be void under clause 17.7 of the Deed. Nevertheless, it might be in Ms Emma Fane's interest to argue that the Deed has that effect, so as to found a claim for breach of contract or warranty against the Claimant.

253. A declaration in these proceedings as currently constituted as to whether the deed contravened clause 17.6 of the SHA would not be binding on Ms Emma Fane, especially if I made the declaration on the basis of the Defendants' admission.

254. As I have said above, the law is more flexible than it used to be as to the circumstances in which a declaration may be made, although in my judgment it remains the case that as a matter of practice the court should be slow to make declarations concerning the rights of third parties, even if the declaration is not binding on them.

255. Having regard to the contention as to "associated rights" having been made by the Defendants' former solicitors in correspondence, and notwithstanding that Ms Emma Fane is not a party it appears to me that justice requires that I should make a declaration that is effective as between the parties that the Deed does not contravene the provisions of clause 17.6 of the SHA and I will do so.

256. Paragraph 12 of the Draft Order seeks a declaration that the Claimant "is, and has been at all material times, a "*Principal Shareholder*" with full rights, within the meaning of the Shareholders' Agreement and the Articles."

257. In the PoC the Claimant claimed a declaration that the Claimant continues to be a "Principal Shareholder" under the SHA and the Articles. In the Defence the Defendants admitted that the Claimant continued to be a Principal Shareholder under the SHA and/or under the Articles and that he was entitled the declaratory relief sought to that effect.

258. Before me Mr Horton for the Defendants did not oppose the making of the declaration sought in paragraph 12 of the Draft Order. That declaration goes further than the declaration sought in the PoC because of the addition of the phrase "with full rights".

259. I have already held that the Claimant is the holder of the shares for the purposes of the Articles. There is no express definition of "holder" in the SHA, but I consider there is little or no reason to depart from the usual meaning that, as per the definition in the Articles, it means the registered shareholder.

260. I would therefore not have any difficulty in making a declaration that the Claimant was the Principal Shareholder within the meaning of the SHA and the Articles in accordance with the Defendants' acceptance in their Defence that the Claimant was entitled to that relief.

261. Despite Mr Horton's not opposing the making of a declaration in the form of paragraph 12 of the Draft Order, I have been troubled by the inclusion of the phrase "with full rights", not only for the technical reason that with those words the declaration goes further than that sought in the PoC.

262. It was clear from both Mr Burton's and Mr Horton's submissions that they were both concerned with the phrase "with full rights" in the context of a Principal Shareholder's rights under the Articles and the SHA to appoint a director. I was not taken to any other parts of the Articles or the SHA under which a Principal Shareholder has "rights", but there are some.

263. Looking only at the right of a Principal Shareholder to appoint a director under clause 4.1 of the SHA, that right is qualified by clause 4.1(b) in the case of the appointment replacement Nominated Directors. I have already held that in the case of the possible appointment of Mr Rajani, there is a real prospect that the Claimant's qualified right to appoint Mr Rajani under clause 4.1(b) is itself curtailed by a potential refusal by the Court to order the appointment of Mr Rajani. Accordingly, there is a real prospect that the Claimant's rights as a Principal Shareholder are less than "full", and I will not make a declaration that he has "full rights".

264. I am willing to make a declaration that, in accordance with the admission in paragraph 23.2 of the Defence and my interpretation of the word "holder" in the Articles and the SHA that the Claimant continues to hold more than 9% of the total issued Ordinary Shares in the Company. Although there is the admission in the Defence, I consider that the potential for confusion and difficulty arising primarily out of the differences between the meaning of "share transfer" or "transfer" on the one hand and the extended meaning given to "transfer" in Article 1.1, means that to reduce further confusion and difficulty and justice to the parties requires that I should make such a declaration. With that amendment, paragraph 12 of the Draft Order will read:

"The Claimant continues to hold more than 9% of the total issued Ordinary Shares in the Company, and has been at all material times and continues to be, a "*Principal Shareholder*" within the meaning of the Shareholders' Agreement and the Articles."

265. In summary my conclusions in respect of the relief sought on the Application are as follows:

265.1. Paragraph 1 of the Draft Order ("allowing" of Application) – no order.

265.2. Paragraph 2 of the Draft Order (order as to information under clause 11.2 of the SHA):

265.2.1. Order in respect of clause 11.2(a) for the provision of monthly Group management accounts as per the Draft Order, but with the form of the order changed so as to make it clear that it only covers the period down to the last date prior to the date of the order when the information should have been provided. Further, if, within 28 days after this Judgment is handed down, the Company has provided the Claimant with the audited consolidated Group accounts for the year ended 31 December 2023 as required by clause 11.2(c) of the SHA, the order as to the monthly management accounts will apply to the period commencing 1 January 2024. If not, this part of the order will apply from 1 January 2023.

265.2.2. No order in respect of clause 11.2(b) for the provision of quarterly consolidated Group accounts.

265.2.3. Order as sought in respect of clause 11.2(c) for the provision of Group Accounts for the financial year ended 31 December 2023.

265.2.4. No order in respect of clause 11.2(d) for the provision of Annual Budgets and Business Plans.

265.2.5. No order in respect of clause 11.2(e) for the provision of details of indebtedness.

265.2.6. No order in respect of clause 11.2(f) for the provision of peer to peer cash reports.

265.2.7. No order in respect of clause 11.2(g) for the provision of daily loans reports.

265.2.8. No order in respect of clause 11.2(h) for the provision of weekly cash flow reports.

265.2.9. No order in respect of clause 11.2(i) for the provision of emails to all directors.

265.2.10. No order in respect of clause 11.2(j) for the provision of minutes of Committees.

265.2.11. Order as sought in respect of clause 11.2(k) for the provision of reports detailing credit card expenditure, but only in respect of the period from the end of November 2020 to the last date prior to the date of the order when a report should have been provided.

265.3. Paragraph 3 of the Draft Order (dismissal of Counterclaim) – Order for the dismissal of the counterclaim for a declaration as to the invalidity of the Deed, but otherwise no order in respect of the Counterclaim.

265.4. Paragraph 4 of the Draft Order (appointment of Mr Ranjani) – No order.

265.5. Paragraphs 5 and 6 of the Draft Order (costs orders) – No order at this stage - to be dealt with at the Consequentials Hearing.

265.6. Paragraph 7 of the Draft Order (declaration that the Charge is a "Permitted Transfer") – Declaration as sought.

265.7. Paragraph 8 of the Draft Order (declaration as to future obligation to serve a Transfer Notice relating to the Charge) – No declaration.

265.8. Paragraph 9 of the Draft Order (declaration that Charge did not contravene clause 17.6 of the SHA) – Declaration as sought.

265.9. Paragraph 10 of the Draft Order (declaration that transfer to Ms Emma Fane was a Permitted Transfer) – No declaration.

265.10. Paragraph 11 of the Draft Order (declaration that neither the Fane Transfer nor the Deed contravene clause 17.6 of the SHA) – Declaration that Deed does not contravene clause 17.6 of the SHA, but no such declaration in respect of the Fane Transfer.

265.11. Paragraph 12 of the Draft Order (declaration that the Claimant is and has been at all material times a Principal Shareholder with full rights) – Declaration as sought, but without the words "with full rights".

266. All the above relief is without prejudice to the incidence of the costs of the Application. Unless the incidence of the costs of the Application and the quantum of any costs which are to be summarily assessed can be agreed, I direct that there should be a virtual hearing ("the Consequentials Hearing") by Microsoft Teams before me to determine those issues and any other consequential matters. Unless the parties agree otherwise, the time estimate for that hearing will be 1 ½ hours plus 1 hour's pre-reading.

267. Under CPR 24.6 when the court determines a summary judgment application it may, among other things, give further directions about the management of the case. In the context of a judgment for admissions on part of a claim, CPR 14.4(3) provides that the court shall give appropriate directions for determination of any outstanding issues. In the event the substance of the contentious parts of the Application have concerned summary judgment under CPR 24. In those circumstances, unless the further directions are agreed, I do not intend to give any further directions at the Consequentials Hearing other than directions as to a possible stay for ADR and the listing of a Case and Costs Management Hearing.

Deputy Master Henderson
20th February 2025