Judgments

Cunningham v Resourceful Land Ltd and others

[2018] EWHC 1185 (Ch)

Chancery Division

Insolvency and Companies Court Judge Briggs (Chief Registrar)

2 May 2018

Company – Share register – Rectification

Judgment

Dov Ohrenstein (instructed by Burgate Litigation Services) for the Claimant

Clara Johnson (instructed through Direct Access) for the Second to fourth Defendant

Tina Kyriakides (instructed by TK Law Solicitors) for the Sixth Defendant

APPROVED JUDGMENT

I DIRECT THAT PURSUANT TO CPR PD 39A PARA 6.1 NO OFFICIAL SHORTHAND NOTE SHALL BE TAKEN OF THIS JUDGMENT AND THAT COPIES OF THIS VERSION AS HANDED DOWN MAY BE TREATED AS AUTHENTIC.

JUDGE BRIGGS:

Introduction

1. A drag-along mechanism in a shareholder agreement was triggered by a syndicate holding shares (the "Syndicate Shareholders") in Resourceful Land Limited ("RLL") obliging the Claimant, Angus Cunningham, to sell his shareholding to Wortside 123 Limited ("Wortside"). He makes a claim to rectify the register at Companies House striking out the name Wortside and replacing it with his name as holder of 270 shares.

The basis for rectification is that the sale of shares to Wortside was made in breach of the drag along provisions.

Background

2. Mr Kenny and Mr Nicholas Stubbs had an interest in developing an anaerobic digestion plant. Mr Nicholas Stubbs, an architect by profession, explained that he had a passion for greenhouse reduction technologies as he believed that it is the best technology available, and within realistic reach, to make a worthwhile contribution to reducing the effects of climate change. Similarly, Mr Kenny, a chartered engineer, had a long-standing interest in AD.

3. A company known as Hinton Organics Limited owned land at Queen Charlton Quarry, Keynsham Bristol (the “Quarry”). Mr Cunningham was the director of Hinton Organics Limited. Mr Jonathan Stubbs became interested in the idea of an anaerobic digestion plant (AD Plant) and was prepared to help fund a project. To this end a company known as Resourceful Earth Limited (“REL”) was incorporated on 16 August 2012. The idea behind the incorporation of REL was that it would run the business of the AD plant. Mr Kenny, Nicholas and Jonathan Stubbs were appointed directors and were equal shareholders. Mr Cunningham was also appointed a director and was a shareholder along with his girlfriend Joanne Downes. RLL was incorporated on 6 December 2012 for the purpose of holding the land upon which REL would operate. RLL had an issued share capital of £6.00 divided into 600 ordinary shares of £0.01 each. The shares were allotted to Mr Kenny and Nicholas and Jonathan Stubbs, each receiving 100 shares (together these shareholders became known as the “Syndicate Shareholders”), Mr Cunningham received 270 and Mr Ring 30 shares.

4. On 3 April 2013 a shareholder agreement (the “Shareholder Agreement”) was entered into in respect of RLL and its shareholders. On the same day RLL purchased the Quarry from Hinton Organics Limited for the sum of £240,000. Hinton Organics Limited had at that time accumulated creditors. This company was struck off the register on 4 March 2014. The purchase of the Quarry was financed by equal payments of £80,000 paid by Nicholas and Jonathan Stubbs and Mr Kenny. Mr Cunningham did not make a financial contribution. These sums are said in the Shareholder Agreement to represent loans to RLL.

5. The Shareholder Agreement recites that “the shareholders have agreed to enter into this agreement for the purpose of regulating arrangements between themselves as shareholders and arrangements between them, as shareholders, and the Company”. By clause 3 the Syndicate Shareholders are given an “overriding power to commit the Company to do any act or thing or refrain from doing any act or thing which would otherwise be in the power of the Board to resolve that the Company should do or refrain from doing.” Although the Syndicate Shareholders together held 50% of the issued share capital clause 3 provided them with ultimate control. As with many closed companies there is a restriction on share transfers and a pre-emption right for the other shareholders to acquire the selling party's shares at a fair value. A fair value is to be determined by a formulation set out in the Shareholder Agreement. Third party determination would be available if the parties did not agree on the value. A tag along provision is included so that if at any time one or more of the shareholders proposed to sell 50% or more of the shares in issue to an outside party, the other shareholders may be permitted to sell all their shares to the proposed buyer. By contrast the parties agreed a drag along clause so that if the Syndicate Shareholders:

> “wish to transfer all their interest in Ordinary shares (Callers' Shares) to a bona fide arm's length purchaser (Third Party Purchaser) the [Syndicate Shareholders] have the option (Drag along Option) to require all other Shareholders (together the Called Shareholders) to sell and transfer all their Shares upon the same terms to the Third-Party Purchaser or as the Third-Party Purchaser shall direct in accordance with this clause 8.”

6. Clause 8.6 provided that if the Called Shareholders fail to execute the transfers then upon the Company receiving the purchase monies or any other consideration payable for the shares the Syndicate Shareholders may execute the transfers on their behalf. An objective reading of the Shareholder Agreement leads to the conclusion that the Syndicate Shareholders through clauses 3 and 8 would have control of RLL's direction and ultimate sale or transfer.

7. Nicholas Stubbs explains what happened once RLL had been incorporated and the Quarry purchased. There has been no challenge to his version of events in relation to the period April 2013 to September 2016:

> "Once the Land had been purchased, Jono [Jonathan Stubbs] and I set about looking for project finance in order to fund the development of the AD plant. We came to realise that virtually all of the supposed 'green' funds only really understood and were only interested in much less complex schemes, like photovoltaic solar panels. Frank [Kenny] introduced Privilege Project Finance Limited ("Privilege") as being familiar with funding farmers with a similar investment risk to AD and who were now increasing their AD portfolio. On 3 March 2016, Privilege and REL entered into a written loan agreement pursuant to which Privilege agreed to advance a loan of £8 million to REL ("the Loan Agreement"). With the associated charges and rolled up interest, the total lending was £9.6 million. The security for the Loan Agreement was an all monies Debenture over REL's assets and a first legal charge over a lease that was to be granted by RLL to REL. On 16 May 2016, RLL granted to REL a lease of part of the Land for a term of 25 years at an initial rent of £100,000 per annum to commence on 16 November 2017 ("the Lease"). By March 2017, it was clear to the directors of REL that there was a need for further funding.
>
> Without it, the construction of the AD plant could not complete. We had identified the need for a further £2.3 million at that stage. On 16 March 2017, there was a meeting between Phil Gerard, Gerry Keegan and Charlotte Horner of Privilege and Jono and I for REL. The need for further funding was explained and at that time, Privilege appeared to be onboard with the request. They took the position that they wanted to keep working with us, solve the problem and see the project through to the end. However, they wanted equity as a condition of any further lending. By this point, the loan draws down was approximately £6.5 million. REL was still putting in requests for funds from Privilege and they were still being paid. On 7 April 2017, I met Gerry on site to review the state of the AD plant and cost the overruns. Gerry was encouraging that the south field could generate revenue to offset the additional debt. He indicated to me at the meeting that Privilege would be seeking a 20% equity stake in REL. On 13 July 2017 there was a further meeting held on site, attended by Jono and Frank and Gerry (I was on leave). As a result of some analysis from the main contractor, Water & Waste Services Limited (a company of which Frank was director and shareholder), the estimated sum required to completion was £2.3 million. However, I am told by Frank and Jono that Gerry recommended that we re-examine the amount of additional loan requested to ensure it included everything, including contingency, such that the new figure would not be exceeded.
>
> As such, the loan request increased to £2.9 million. By this time, Privilege was seeking a 30% equity stake in REL. Gerry met the shareholders in REL on 25 July 2017 to discuss Privilege's offer, with Mr Bruce Roxburgh (REL's solicitor) in attendance. Privilege also sought Angus's [Cunningham] resignation as director of REL. Gerry and Bruce retired and, after a long discussion, we all agreed that it would be wise to accept Privilege's offer but for Adrian [Ring] and I to meet with Privilege and see if the 30% equity could be reduced. Adrian and I met Phil Gerrard, Gerry and Andrew Vernau on 8 August 2017. At the meeting, Privilege agreed to accept 24.9%, but with an additional 3% fee on the additional debt which would cease on refinance.

> By August 2017, the funds had run out. REL had exhausted the loan from Privilege and had no means of paying its creditors. Jono and I used our own funds to pay staff wages, as we both took the view that it was simply a question of timing. We were fairly confident at this stage that Privilege would agree to provide the additional funding that was required. On 15 August 2017, Steve Bailey and David Wilder of Privilege visited the site to review the construction costs with Frank and the business case with Jono. At the very end of August, Mr Bernard Kumeta met me on site and indicated that, following the site visit on 15 August 2017 and having thoroughly reviewed the business case internally, Privilege had a significant concern about the level of indebtedness we were seeking."

8. Ms Kiddle, who gave evidence, is a solicitor, business consultant and Chartered Waste Manager. She is a director of TK Law, a law firm specialising in environmental issues. She was instructed by Privilege on 5 September 2017 to advise the lender on its options. Instructed for one day, she had familiarised herself with the history of the land, planning, consents, permits, and reached a preliminary view of the likely environmental risks. She was aware that the indebtedness of REL had risen to approximately £8,000,000. She attended the meeting between Privilege and the REL directors and shareholders on 6 September 2017. The perceived environmental risks included inert waste tipped onto the Quarry by Churngold Recycling Limited, who had, according to the evidence, form of tipping hazardous waste including asbestos; disposal of waste from a Bristol transport company and abandonment of a large amount of waste wood which had the potential for leeching nitrates into the soil.

9. Ms Kiddle's evidence is that it became clear to her at the meeting on 6 September 2017, that the directors and shareholders were divided, the Syndicate Shareholders on one side and all other shareholders on the other. Her attendance note of the meeting gives an insight into her initial thoughts about options for Privilege. They included diluting the equity of the shareholders in RLL by 80% and giving them no voting rights.

10. Perhaps it came as little surprise that on 7 September Mr Kenny called her to report that Mr Cunningham had attended the Quarry and told the employees and contractors of REL that the Syndicate Shareholders had been sacked as directors. She called Mr Cunningham. His version of the conversation is that Ms Kiddle had advised him that the Syndicate Shareholders had so badly managed REL that she could seek a prosecution carrying a custodial sentence, "so they will do exactly as they are told".

11. Ms Kiddle accepts that there was a telephone conversation but strenuously denied that she had informed Mr Cunningham of any investigation into or potential for a prosecution, and denied she had informed Mr Cunningham that she believed or Privilege believed that the Syndicate Shareholders had mismanaged REL. Ms Kiddle says that Mr Cunningham was seeking to blame the Syndicate Shareholders for the failure to progress the AD plant and Mr Cunningham had told her that Mr Ring, a solicitor, would be seeking to take action for them "to hand over their shares or their houses". Mr Cunningham informed Ms Kiddle that he and Mr Ring would "come up with an equity offer" for Privilege. Acting, as she was, for Privilege, Ms Kiddle immediately phoned Privilege to inform it of the differences between the Syndicate Shareholders and others and raised the alarm that the differences between them carried extra risks for Privilege.

12. Solicitors acting for REL, Roxburgh Milkins Limited ("RM") were instructed by the Syndicate Shareholders to respond to an offer put forward by Privilege if further funding was to be advanced. The Syndicate Shareholders, Mr Cunningham and Mr Ring in the meantime knew of the financial difficulties REL was facing and by extension RLL. This led Ms Kiddle to suggest to RM that advice be sought from an insolvency practitioner. Mr Boughey was subsequently instructed.

13. Mr Ring and Mr Cunningham sought and obtained private meetings with Ms Kiddle and had a number of telephone conversations with her. Ms Kiddle explains in her evidence that the common theme of the

meetings and telephone calls was Mr Cunningham's claim that Syndicate Shareholders had mismanaged REL. He expressed an intention to oust them from the management of REL. In the meantime, Ms Kiddle discovered that REL was in likely breach of the Privilege loan agreement as monies lent had not been used solely for the purpose of REL and the development of the AD plant. RLL has also benefited. Mr Ring telephoned Ms Kiddle towards the end of September 2017 when he knew that REL was in a critical financial position. He told her that he and Mr Cunningham wanted 80% of the REL shares and referred to REL going into administration after a meeting with Mr Boughey. Mr Ring informed her that his intention was to buy the assets from the administrator free of the security held by Privilege. How realistic the threat, perhaps is not important, but Ms Kiddle became very concerned. This one event was the catalyst for the sale of RLL to a subsidiary of Privilege.

14. Initially Privilege was prepared to provide further funding if the assets of the AD plant were transferred into a new company in which Privilege would appoint directors and hold 80% of the equity. REL would have the remaining 20%. The 25-year lease granted by RLL to REL would be assigned to the new company. As at the date of the Privilege offer no payments had been made under the lease by REL. REL was due to start paying rent in November but it is accepted by all parties to this litigation that REL had no available cashflow to make the lease payments. A failure to pay the rent would permit RLL to forfeit the lease of land on which the AD plant was under construction and prevent its development and operation. Privilege, aware of this position, did not offer to step-in and pay the rent on behalf of REL. There were two possibilities, according to Ms Kiddle. First the AD plant would have to be moved from site. The evidence of Ms Kiddle was that the AD plant was capable of location transfer. The second option was a holistic approach which would involve funding for a reorganisation of both REL and RLL.

15. The e-mail with the offer produced by Ms Kiddle was not just sent to the Syndicate Shareholders. All shareholders received the offer. Mr Ring and Mr Cunningham and the other minority shareholders chose not to respond except to inform Ms Kiddle of their intention to purchase the assets of REL from administrators if appointed. By contrast the Syndicate Shareholders responded quickly accepting the offer made subject to finalising issues such as a new shareholder agreement in respect of the proposed newly formed company.

16. The unchallenged evidence on these issues leads me to conclude that all shareholders were aware of the offer made by Privilege, Mr Ring and Mr Cunningham were seeking to take advantage of the position, making (whether empty or not) threats to oust the Syndicate Shareholders as directors and purchase the AD plant from the administrators in an attempt to destroy Privilege's security.

17. By 27 September 2017 employees were leaving the site as REL was not able to meet its wage commitments. Privilege was informed. The administration of REL was imminent. Privilege had become more nervous about its security position and the exposure to losses. It instructed Ms Kiddle to look at a complete restructure and set up a new company with a view to obtaining all the shares of RLL and thereby obtaining complete control over the Quarry. Another new company would be set up to purchase the assets from the administrators when appointed.

18. A meeting was arranged at the house of Nicholas Stubbs. It took place on 29 September 2017 and was attended by Jonathan Stubbs, Mr Kenny and Ms Kiddle. Privilege's position had hardened further. Ms Kiddle proposed that a new company would be incorporated by Privilege and the Shareholders in RLL would do a “share for share” swap with the new company. This new company would be the sole shareholder in RLL but the current shareholders in RLL would retain an economic interest in the AD development (albeit a minor and indirect one). Ms Kiddle proposed that if all the shareholders were not to agree then the Drag Along provisions in the Shareholders Agreement could be triggered. In her witness statement Ms Kiddle says that the Syndicate Shareholders informed her that the purpose for the drag along provisions in the RLL Shareholder Agreement was to prevent Mr Cunningham and Mr Ring from fettering the investor's control of the company and that their shareholding in RLL was no longer worth any money. In the witness box Mr

Nicholas Stubbs said, “there was no difference between 10% of nothing and 100% of nothing”.

19. Ms Kiddle said that as far as Privilege was concerned the directors' loans made by the Syndicate Shareholders, as expressed in the Shareholder Agreement, could remain in RLL. The term used by Nicholas Stubbs to describe this is that Privilege would “honour” the loans. I am satisfied that all this meant was that after the reorganisation RLL would continue to have an obligation to repay the loans in accordance with the Shareholder Agreement.

20. After discussing contamination of the land at the Quarry, potential breaches of environmental permits and the perceived nominal value of the RLL shares, Nicholas and Jonathan Stubbs and Mr Kenny agreed in principle that the proposal put forward by Privilege would provide the best outcome for all.

21. On 2 October 2017 Wortside Limited was incorporated with an issued share capital of 5,400 ordinary shares of £0.01 each. A sale and purchase agreement (SPA) was entered into between Wortside and the Syndicate Shareholders. The Syndicate Shareholders called a board meeting for 6 October 2017 and, exercising their rights under the Shareholder Agreement, served a notice on the Mr Cunningham and Mr Ring pursuant to clause 8 imposing the drag-along.

22. Mr Grove learned of the meeting. His evidence is that on the morning of, and prior to the board meeting on 6 October 2017 he arranged to meet with Mr Cunningham and Mr Ring. He wished to “confirm my interest in the opportunity, and with a view to meeting with all the shareholders and directors of RLL, and to make an offer of at least £315,000 for 50% stake in the company…...I was told that the Syndicate Shareholders wanted to get out and my offer would have repaid them completely.”

23. Mr Cunningham does not mention the meeting with Mr Grove in his written evidence. He does say that he told the board that “I had an independent bona fide purchaser who would step in and buy the Syndicate Shareholders' shares.” Mr Ring does not produce any evidence at all and does not come to court to be tested. The minutes of the meeting state that Mr Ring accepted that there was no other binding offer for the RLL shares available. There is no suggestion that the minutes are inaccurate.

24. Mr Cunningham's evidence is that Mr Ring protested against the transfer of shares to Wortside in consideration for shares in that company. He maintains that RLL “owned valuable land assets”. The minutes record that the Syndicate Shareholders responded to Mr Ring's concerns informing him that Privilege and its subsidiary Wortside were arm's length and unconnected. As regards the value of the shares it is recorded that Mr Ring and Mr Cunningham were informed that any value in the land was offset by the potential liabilities arising from the stored waste wood, outstanding liabilities arising from a contract with Bristol & Avon and potential enforcement action by Bristol City Council. There is no evidence that Mr Ring responded. A vote was taken and the board of directors, save for Mr Ring, approved the terms of the SPA. On 19 October 2017 REL entered administration and Mr Boughey was appointed administrator. The statement of affairs as at 20 November 2017 provides an estimated deficiency of £7,217,214.

25. Post completion events support the view that the land at the Quarry was not free from liabilities. Asbestos sheeting was found, and laboratory testing verified positive chrysotile white asbestos. Nicholas Stubbs's evidence is that the likely costs for site restoration is in the region of £1m, although he accepts that after further analysis that figure may alter. By contrast Mr Grove estimated that the contamination clearance would cost as little as £5,000.

The Claim

26. The claim was issued on 16 November 2017 under Part 8 of the CPR, and an order made to expedite the trial at the first directions hearing. The trial progressed in a very unsatisfactory way due to the procedure adopted. The claim set out in the claim form merely asserts the relief sought. The grounds for the claim is contained in one witness statement of Mr Cunningham. The witness statement is reasonably vague permitting Mr Ohrenstein of counsel some elasticity as to how the claim was put at trial. This led to the Defendants often having to second guess the Claimant's case against them. The allegations transformed into subgroups, but it was argued that they were maintainable as they could be hung on a particular sentence in the witness statement or word used by Mr Cunningham. The rectification claim was consequently expanded upon and added to through the delivery of the Claimant's skeleton argument and changed during the course of the trial, even during closing. The Defendants took issue with how the case was being prosecuted. The manner in which the arguments were advanced in cross-examination made it difficult for the Court to follow. Questions were put on a hypothetical basis such as if Privilege decided to pay the rent on behalf of REL the land owned by RLL would be valuable.

27. There was cross-examination on the basis that there had been collusion between Privilege and the Syndicate Shareholders. Mr Cunningham says that the transfer was not for proper value as Wortside did not have any other assets and was worthless at the time. The 100% shareholders of RLL exchanged ownership for only 10% of the shares in Wortside which was not only a dilution but dilution into a company that may have no prospects. To bolster this allegation Mr Cunningham says that the Syndicate Shareholders failed to consider any alternative proposals for the purchase of their shares and relies upon the offer made by Mr Grove.

28. Mr Cunningham states in his witness statement “I believe that the Syndicate Shareholders need to be and were provided with some form of incentive (such as an assurance in relation to their position) to agree to the transaction proceeding (regardless of whether there was a formal collateral agreement in place or not). Such an assurance would prevent the transaction being bona fide (just as it would prevent it being at arms' length). However, I wish to emphasise that even if there was no such incentive (or if I am unable to prove the existence of such an incentive), the transaction was in any event neither bona fide nor at arms's length.” He adds that the same matters are relied upon to claim that the “Syndicate Shareholders conduct in relation to the transfer was a breach of their contractual obligations under the Shareholders' Agreement, and in particular their duty of good faith under clause 11.3.”

29. At the end of the first day of trial and after Mr Cunningham admitted that he would have been in no position to purchase the shares, Mr Ohrenstein announced that the allegation of collusion raised in his skeleton argument was not being pursued.

Determination of an issue prior to closing

30. Another allegation pursued was that the Shareholder Agreement only provided for a sale that would result in the shareholders receiving cash for the shares. The allegation took the Defendants by surprise and I disallowed the new argument to be run. I found that to take the issue so late in the day would contravene the principles of fairness and contravene the overriding objective of the Civil Procedure Rules 1998.

31. Nevertheless, in the alternative, if I was wrong to reach such a conclusion, I considered the argument, and made a ruling to enable the parties to focus on the substantive issues during closing. Mr Ohrenstein cited a number of authorities for the proposition that “sale” could only mean that cash was exchanged in whole or in part. The authorities cited to advance the case concerned the Sale of Goods Act 1979 and one related to the Law of Property Act 1925. They were good examples of construing an Act of Parliament where

the Court uses a purposive approach and interprets the provision to achieve, where possible the objective of the legislature. Ms Kyriakides and Mrs Johnson correctly referred to the rules concerning the interpretation of contracts, the five principles set out by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 through to the more recent *Arnold v Britton* [2015] AC 36 where Lord Neuberger said

> "When interpreting a written contract, the court must identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", focussing on the meaning of relevant words in their documentary, factual and commercial context"

32. Employing the contractual interpretation principles explained by the Supreme Court I found little difficulty in finding that the provisions of clauses 4-7 were different to the drag along provision contained in clause 8. Focussing on the meaning of the relevant words in the factual commercial context of the Shareholder Agreement, expressly providing control of RLL's direction through clause 3, and the ability to transfer or sell the shares of RLL through clause 8, the use of the words "or any other consideration" following "the purchase monies" permitted the Syndicate Shareholders to transfer the shares in return for a shareholding in a different company. The language is permissive. The likely consideration for the sale of shares in RLL was not known at the time the Shareholder Agreement was entered into ; it could have taken many different forms. The words "any other consideration" are deliberately wide to allow for a circumstance unforeseen in April 2013. The syntax permits a non-cash transfer.

The law

33. Section 125 of the CA 2006 provides the court with the power to rectify the register

> "(1) If—
>
> (a) the name of any person is, without sufficient cause, entered in or omitted from a company's register of members, or
>
> (b) default is made, or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member,
>
> the person aggrieved, or any member of the company, or the company, may apply to the court for rectification of the register.
>
> (2) The court may either refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved.
>
> (3) On such an application the court may decide any question relating to the title of a person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for rectification of the register.

> (4) In the case of a company required by this Act to send a list of its members to the registrar of companies, the court, when making an order for rectification of the register, shall by its order direct notice of the rectification to be given to the registrar."

34. The power under s.125(1)(a) applies in all cases "if without sufficient cause a name stands on the register": see *Re Imperial Chemical Industries Ltd* [1936] 2 All ER 463 at [469].

35. Mr Ohrenstein submits that the term "bona fide" means "good faith". In his skeleton argument he argues that the "transaction" was not in good faith as it arose as a condition of further funding, the Syndicate Shareholders received a collateral benefit, it happened in great haste and was intended to take advantage of RLL. Miss Kyriakides argues that the term means "good faith" which is to be translated as "honestly" and cites *R v Holl* 7 Q.B.D. 575 and Stroud's judicial dictionary of words and phrases. Mrs Johnson argues that the term "bona fide" is defined in Black's Law Dictionary as "1. Made in good faith; without fraud or deceit. 2. Sincere; genuine". Jowitt's adopts the following definition "In good faith, honestly (*R v Holl* (1881) 7 Q.B.D 575), without fraud, collusion or participation in wrong-doing. The expression characterises to the mental as opposed to the physical aspect of an individual act, and can be used to describe a belief, claim, intention, interest, mistake, objection, or indeed, a person's conduct overall".

36. In my judgment the language used in clause 8.1 refers to the position of the purchaser and not the transaction. The purchaser is required to be bona fide and at arm's length.

In *Midland Bank Trust Co Ltd v Green* [1981] AC 513 Lord Wilberforce explained:

> "My Lords, the character in the law known as the bona fide (good faith) purchaser for value without notice was the creation of equity. In order to affect a purchaser for value of a legal estate with some equity or equitable interest, equity fastened upon his conscience and the composite expression was used to epitomise the circumstances in which equity would or rather would not do so. I think that it would generally be true to say that the words "in good faith" related to the existence of notice. Equity, in other words, required not only absence of notice, but genuine and honest absence of notice. As the law developed, this requirement became crystallised in the doctrine of constructive notice which assumed a statutory form in the Conveyancing Act 1882, section 3. But, and so far, I would be willing to accompany the respondents, it would be a mistake to suppose that the requirement of good faith extended only to the matter of notice, or that when notice came to be regulated by statute, the requirement of good faith became obsolete. Equity still retained its interest in and power over the purchaser's conscience. The classic judgment of James L.J. in Pilcher v. Rawlins (1872) L.R. 7 Ch.App. 259, 269 is clear authority that it did: good faith there is stated as a separate test which may have to be passed even though absence of notice is proved. And there are references in cases subsequent to 1882 which confirm the proposition that honesty or bona fides remained something which might be inquired into…"

37. As regards the term "arm's length" Miss Kyriakides and Mrs Johnson argue that the term is well defined by Black's Law Dictionary, (10 th ed)

> "1. A transaction between two unrelated and unaffiliated parties 2. A transaction between two parties, however closely related they may be, conducted as if the parties were strangers, so that no conflict of interest arises".

38. Counsel for the Defendants both cite *Mansworth v Jelly* [2002] EWHC 442 where Mr Justice Lightman considered the words “bargain at arm's length”:

> “The formula of words connotes more than a transaction: it connotes a transaction between two parties with separate and distinct interests who have each agreed term (actually or inferentially) with a mind solely to his own respective interests”.

39. Mr Ohrenstein does not demur.

The witnesses

40. I heard witness evidence from Mr Cunningham, Mr Grove, Nicholas and Jonathan Stubbs and Ms Kiddle. Mr Cunningham accepted that there was a considerable amount of waste on the Quarry land, that RLL was a breach of planning and consents. He accepted that RLL had no money to rectify the breaches and admitted that he had not invested any of his own money into the company. Mrs Johnson:

> Q. you never suggested to the syndicate shareholders that there was alternative funding for RLL
>
> A. no, and I did not offer to invest.

41. He was asked whether or not he disputed the minutes of the meeting held on 6 October 2017:

> Q the minutes have not been disputed by you
>
> A. I have not read them recently

42. It became clear with the cross-examination of Ms Kyriakides that Mr Cunningham did not know what the waste was on site, or how it could be properly managed. He was unsure as to how the relationship between REL and RLL worked in practice and who should have the benefit of work undertaken on the land leased to REL. Although Mr Cunningham may have tried his best to recall the events of September and October 2017, his memory was reconstructing events to advance his case:

> Q. Privilege is an independent bona fide purchaser and stepped into save a failing business?
>
> A no. what I believe to this day is that Privilege forced their hand and forced the Syndicate Shareholders to sell to Wortside.
>
> Q. How do you support that?
>
> A. we had Dave Grove – I spoke, and he said he would pay off their loans, the £315,000. At the board meeting I brought this up, I put forward the offer on behalf of Mr Grove. If they had taken the £315,000, which would have paid off their debt, they would have walked away absolutely

clear.

Q. You had discussed terms?

A. The terms were to be discussed with Mr Grove when he came to site- the offer was £315,000 in exchange for 50% of the shares- their shares.

Q. not a firm offer is it? Not binding was it?

A. I don't agree.

Q. see the board meeting at page 65- Mr Ring said there was no binding offer

A. I see, but I still disagree. There was an offer to come up to site and do a deal?

Q. That is not the same thing as a binding offer is it?

A. no answer

Q. when did you first contact Mr Grove

A. when the drag along offer came - but I received an e-mail from Adrian (Ring)

Q. Mr Grove did not make an offer to my clients

A No

43. He was asked by Ms Kyriakides about the allegation made in his witness statement, that Ms Kiddle had informed him that Privilege were “looking at possible liability for criminal offences” against the Syndicate Shareholders.

Q. para 20(2) of your witness statement. Please read it.

A that is what she told me.

Q you manufactured this to suggest collusion

A no

Q you have no evidence of this

A I do not have any evidence of this, but that is my belief.

Q. There is no written record of such an allegation, no minute recording it and nothing was mentioned in the meeting of 6 October to suggest that a criminal prosecution was being considered?

A. No, I did not bring it up.

44. The answers to and manner in which Mr Cunningham answered questions put by Mrs Johnson and Ms Kyriakides about the liabilities of RLL, its future funding, potential purchasers and his allegations concerning a private criminal prosecution were unsatisfactory. He was not prepared to change his mind when faced with documentary evidence that contradicted his position and his demeanour became uncomfortable when he was pressed for detail. I find, on that there was no conversation between him and Ms Kiddle where she informed him of a likely prosecution and on the key issues Mr Cunningham's evidence was unsubstantiated and unreliable.

45. The evidence relied upon by Mr Cunningham for a market for the RLL shares, and in particular 50% of the RLL shares came from Mr Grove. Mr Grove appeared relaxed and confident in the witness box. The main cross examination was conducted by Mrs Johnson. She employed a gentle probing technique that proved devastatingly effective.

Q Before you made your offer to Mr Cunningham did you make any enquiries about planning? Permits? Did you know about these?

A no not that I am aware- in theory the planners should play ball. I pay others to do it.

Q can you establish special circumstances to change the planning?

A oh yeah

Q would you say that you are a willing and able purchaser for the sum of £315,000?

A I may have not had the money, but it would come from investors.

Q You haven't got the money yourself?

A I probably haven't got the money

Q how much money would you say you have available?

A. I am not sure- I imagine about £180,000

Q You would be depending on others?

A I would bring in GDTC

Q but it's not trading is it?

A well whoever I go to see will invest in me

Q how would your offer work for the Syndicate Shareholders?

A. I said I would go in and start my offer at £315,000 and they could walk away from the company and that money would come from the dividends. The loans would be honoured by the dividends- I may have given a little bit more.

Q I see, is it right when you spoke with Cunningham you would have paid whatever the loans are?

A I gave the figure to Adrian, I said what are they owed? He said 315. I said I would give them 315 but will not go more than 500 that is it. I don't think Mr Cunningham was a party to the conversation.

46. And later

Q had you seen the company accounts, company's books, planning inquiries? Solicitors? Environmental expert?

A No

Q Did you know about all the Churngold waste material?

A Angus said it is REL's anyway

Q there is no real basis to say it would cost £5,000 only to clear the site as you state in your witness statement?

A No real basis – no.

47. The cross-examination continued in this vein until there was very little left of Mr Grove's evidence that stood. He accepted in the further cross-examination by Ms Kyriakides that he was not interested in the AD

plant at all and was more interested in a new process of taking oil from rubber tyres. With a mandate to return the Quarry land back to agricultural use it was clear that he had carried out no analysis. I was left with the impression that Mr Grove was a stooge for Mr Cunningham, knew little about the Quarry, little or nothing about RLL and failed to come up to proof. He was a most unreliable witness.

48. Nicholas and Jonathan Stubbs were cross examined by Mr Ohrenstein. I have no doubt that they were both reliable and honest witnesses. Jonathan Stubbs explained the dilemma faced by the Syndicate Shareholders, surrendering control to Privilege and reducing their prospects of a return on their investment. He said that he has worked hard on saving RLL and REL but they had reached the end of the line. When making his decision he was mindful of the lack of cards RLL had to play and the hardening position of Privilege. He said when making the decision to transfer the shares to Wortside and accept Privilege's offer, that he put the interests of RLL first, followed by the shareholders and then his own position. I found him entirely credible. Nicholas Stubbs was an alert witness, highly engaged in the ambitions of RLL and REL to complete an AD plant, and passionate about environmental issues. He explained some of the strains upon him to reach the right decision and maintain a chance for the AD plant to complete and succeed. He said he had put thousands of hours into the project and many hours seeking finance and funding. He was firm in his view that Privilege as a specialist lender presented not only the best but at the time, the only prospect for RLL. His knowledge of planning, finance and prospects is demonstrated by the following answers to questions put by Mr Ohrenstein:

> Q did know someone was interested in the shares. Mr Grove?
>
> A yes
>
> Q you failed to consider it?

A if there was a proposition that had credibility it would have been worth considering, one difficulty for the claimant in this case is that he has a very different view of the value of the land. He thinks its brownfield site. There is no such thing as a brown site in planning terms. In fact, the land is green belt. What is more, is that all consents are time limited and all the consents had expired with the requirement to return the land to agriculture- Mr Grove's suggestions of rubber to oil on the site would have been inappropriate within the green belt. The only viable consent is AD consent because the benefits outweigh the harm. Mr Grove is not interested in AD. It was not reasonable for us to spend time considering something that would not work – you have to bear in mind timing issues- we had no detailed knowledge of this offer- all prior experience of offers is subject to planning and permits. Mr Grove had done no due diligence. He would have had to employ one and they would have concluded the same and no other planning other than AD would have been available or very likely and therefore these costs could only be offset by continuing with the AD therefore there was no likely prospect of a third party coming in with a better offer and the only way of doing this was AD and Privilege was offering to continue with AD which was the only reasonable and extant offer on the table at the time that we believed would be supported.

49. Later in cross examination Nicholas Stubbs was asked about side benefits he received in an attempt to demonstrate that the transaction was not bona fide or at arm's length:

> Q your loan position put you at a benefit more than the others?
>
> A As I see it the loans stay in RLL and does not change anything. The loans were all agreed by the shareholders in the Shareholder Agreement.

Q That the loan would be repaid was an inducement and therefore you were acting in bad faith?

A we took into account all the material facts- there was no inducement.

Q side deal meant that the Privilege deal was not at arm's length?

A I read the documentation prepared with legal advice and Mr Ring is a solicitor and advised Mr Cunningham.

Q one of the motivations that you were led to believe was that funding would be given to REL?

A Yes that is correct- I am a shareholder in REL but REL is in administration

50. Nicholas Stubbs presented his evidence with care. I find that he gave credible and reliable evidence. As is apparent, some of the questions put were misconceived as they were aimed at ascertaining the state of the transaction rather than the mental state of the purchaser, but nevertheless Nicholas tried his best to answer whatever he was asked.

51. Lastly, I heard from Ms Kiddle, solicitor acting for Privilege. Her evidence was that Mr Cunningham was seeking to blackmail Privilege by threatening to obtain the AD plant free from its security. This led to Privilege hardening its position and making an offer that had little room for negotiation. She said in response to a question put by Mr Ohrenstein “your client has not denied he tried to blackmail”. She explained that administrators were appointed over REL in October 2017 and no party has sought to purchase or negotiate for the assets of REL. This demonstrates a lack of market. She “categorically” denied that she had told Mr Cunningham that Privilege were looking at criminal prosecutions, stating that she would have had no idea about such things in any event as she had only been instructed two days before the meeting on 7 September.

52. Mr Ohrenstein put to Ms Kiddle that one of the hall marks of an arm's length transaction is that the parties are advised to take independent advice. She responded that that is exactly what she had done. She explained that Privilege planned to complete the AD plant and how expensive the exercise was becoming with the litigation now on foot. She said “at the moment it is paying £40,000 per month for security and there is the loss of interest, but there is the alternative to removing the assets from the land. Privilege was looking after its own position as financer “PPFL wishes to not be a land owner it is a lender and does not want to be an asset holder. ” She was then asked

Q There was a side interest to Privilege?

The advantage to my client was to avoid litigation and prevent blackmail. The process of litigation is what we wanted to avoid.

Q did you put pressure on the syndicate to rush things through?

A no

Q if they had asked for more time

A I would have taken instructions

53. The evidence of Ms Kiddle was straightforward and reliable.

Privilege - bona fide

54. The burden of proof rests with Mr Cunningham to demonstrate on the balance of probabilities that Privilege was not acting bona fide. Mr Ohrenstein conceded that there was no collusion between the Syndicate Shareholders and Privilege. I accept the evidence of the Defendants and in particular Ms Kiddle that there was no side deal or special inducement for the Syndicate Shareholders. All shareholders of RLL were treated the same insofar as they all received the same proportionate shareholding in Wortside through RLL. The initial money paid to RLL by the Syndicate Shareholders in order to purchase the Quarry was to be treated as soft loans. The terms of the loans are set out in the Shareholder Agreement. Nothing has changed. There is no other evidence that Privilege provided the Syndicate Shareholders with a sweetener. There is no evidence to support the contention that Privilege intended or did take advantage of the RLL shareholders. I accept Ms Kiddle's evidence that Privilege was seeking to protect its position as a major lender and had no desire to be a land or AD plant owner. It took a pragmatic approach to an undesirable situation not of its own making.

55. It is true that the shares of RLL were not exposed to a market. Mr Cunningham has produced no credible evidence that a market existed for the RLL shares. Mr Grove gave evidence to support the argument that others would be interested in acquiring the RLL shares and produce a better outcome for the shareholders and the company, but his evidence was unsustainable. He could not make the offer himself and required outside funders. He had not approached outside funders, he failed to take into account the planning constraints, breaches of conditions, permits and health and safety. He was not interested in the AD plant and had undertaken no investigations as to the debts and liabilities of RLL. He had not made any inquiries of the secured lender, Privilege. Mr Grove was forced to accept that his offer was not binding and that it would have been subject to a number of contingencies, enquires and conditions. The offer only related to the Syndicate Shareholders and not the whole shareholding in any event. I find that Mr Grove's evidence did not support the position advanced by Mr Cunningham.

56. In his skeleton argument Mr Ohrenstien submitted that the Syndicate Shareholders failed to offer their shares to Mr Cunningham “who was known to be interested in acquiring the shares.”. There was no obligation under the Shareholder Agreement to offer their shares to Mr Cunningham, but the argument fails on the evidence. Mr Cunningham admitted that he was not in a position to buy the shares or otherwise invest and offered no other evidence of a backer or financer. There was no alternative offer for the Syndicate Shareholders to consider.

57. One of the major difficulties in terms of a value that could be put on RLL is that it had liabilities, and no income producing assets other than the Quarry which, to use a colloquialism, was flawed (it produced no income). No experts were called but, doing the best I can, taking into account that RLL was in breach of planning and other consents, was under a mandate to return the land to agricultural use and had the benefit of a lease where the tenant was non-performing, insolvent and about to go into administration, it is hard to see how anything other than a nominal value could be attributed to the company.

58. As far as alternative funding is concerned and time pressures, Mr Cunningham had known since at least the e-mail sent by Ms Kiddle on 8 September 2017, that RLL had reached a critical position. He knew that administrators were highly likely to be appointed in respect of REL. He knew that REL had reached its funding limit and required more funds. He accepted that he knew about the land contamination but disagreed about the cost of rectification. He failed to take any positive action during this time. He failed to respond to the e-mail. I accept the evidence of Nicholas Stubbs that time had become of the essence. It was running out due to the funding ceiling and I accept that Mr Stubbs knew from past experience of raising funds for the AD plant, that a new funder would either be impossible or at least very difficult to obtain at short notice.

59. I do not accept the submission that the transaction was done in such haste that none of the parties had an opportunity to consider the terms being put by Privilege. Mr Ring was a solicitor and advising Mr Cunningham. I accept the evidence of Ms Kiddle that she had not put time pressure on the Syndicate Shareholders, but she was very wary of Mr Cunningham's threats. She worked in the best interests of Privilege, seeking to secure the site and safeguard its considerable investment. The writing had been on the wall and the Syndicate Shareholders at least had been active in pursuing options. Mr Cunningham in the meantime decided to turn inward and blame the Syndicate Shareholders for any perceived failures. Mr Ring has not come to court to support the position of Mr Cunningham. This is a factor I take into account.

60. If it was maintained in closing that no fair vale was obtained as required by clause 6 of the Shareholder Agreement, the submission is misconceived. I have mentioned above the difference between clauses 6 and 8 requiring a very different exercise when shares are to be transferred or sold. The term “fair value” does not appear in clause 8. In any event there is no evidence to support the assertion that the shares in RLL were transferred at an undervalue.

61. In summary I accept the submission of Mrs Johnson that there is no evidence of bad faith practised by Privilege: *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535. It follows that I accept the submission of Ms Kyriakides that there is no evidence to satisfy the Court that Privilege was anything other than a bona fide purchaser within the meaning of the Shareholder Agreement.

Privilege- Arm's length

62. The argument is that the wholly owned subsidiary of Privilege, Wortside, is not an arm's length purchaser as RLL obtained a shareholding in Wortside. I agree with Ms Kyriakides that clause 8 of the Shareholder Agreement provided for an arm's length purchaser at the time of sale, not at the time of, and consequent upon, the completion of the purchase.

63. The mischief behind clause 8 is a conflict of interest. An arm's length purchase is more likely to be in the interests of all shareholders and assist to secure transparency. I am satisfied that Wortside is a subsidiary of Privilege, with directors appointed by Privilege, and was acting with a mind solely concerned with its own interests. I am satisfied on the evidence that there was no prior connection with the Syndicate Shareholders other than a commercial relationship between Privilege and REL. Wortside obtained an interest in RLL as a result of the transaction. Until completion Wortside had no interest in or connection with RLL.

64. I have already found, as a matter of fact, that Privilege was acting entirely in its own interests purchasing the shares in RLL through the personality of a subsidiary. I have found that Privilege's commercial objective was to gain control of the land at the Quarry in order to protect its investment, which was in serious jeopardy as a result of the imminent administration of REL; and as a result of the threats being made by Mr

Cunningham. There is nothing in this point.

Syndicate Shareholders- good faith

65. I deal with this in brief. Although Mr Orhenstein mentions the breach in his skeleton argument it was not pursued with great vigour at trial or in closing. It is said that if the Court finds that the shares in RLL were not sold for market value, the sale was motivated by an improper collateral purpose, and the interests of Privilege were put ahead of Mr Cunningham and Mr Ring, it follows that there was a breach of good faith. The evidence produced by Mr Cunningham to support alternative values and a market did not stand scrutiny. There is no evidence before the Court that the value of the shares in RLL was, at the material time, any different from the consideration received. There was no evidence before the Court that there was a possible funder to step in and pay the lease payments REL was obliged to meet. There is no value in a lease with an insolvent non-performing tenant. There is no evidence from Mr Cunningham that there was a market for another tenant. The tenancy had been made up between two connected companies for a specific purpose. There was no evidence the position could be repeated. The evidence of Ms Kiddle is that no party has approached the administrator seeking to buy any of the REL assets. On the other hand, the evidence supports a degree of land contamination which must be rectified. The costs of rectification are uncertain, but Mr Grove admitted that there was no basis to assume they would be as low as £5,000. The highest figure put to the court is £1m. I do not need to decide the sum, but it is safe to find that there is a liability and RLL had no income producing assets or available funds to meet the liability. On top of the environmental liability there was no planning permission for any other use other than agriculture. There were breaches of consents and issues concerning health and safety. I have little difficulty in finding that RLL had very few options, and the Syndicate Shareholders took what was available in difficult circumstances.

66. The evidence does not support an open market; it does not support a collateral purpose, improper or otherwise; and there is no evidence that the Syndicate Shareholders put Privilege's interests ahead of their own, Mr Cunningham or Mr Ring. There is also another difficulty with the argument. It was not explained how, if there had been a breach of good faith as imposed by clause 11 of the Shareholder Agreement, by the Syndicate Shareholders, a breach of the clause could lead to rectification of the register. The claim fails.

Conclusion

67. There are no grounds for rectification as the name of Wortside has cause to be entered in RLL's register of members. Wortside, was a bona fide arm's length purchaser of RLL.

68. Order accordingly.