Neutral Citation Number: [2021] EWHC 1744 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (CHD)

Claim No. PT-2019-000964

BETWEEN:

(1) MICHAEL STANDING
(2) AXIS FOOTBALL INVESTMENTS LTD

Claimants

-and-
LEE POWER

Defendant

and

Claim No. PT – 2021 - 000482

BETWEEN:

AXIS FOOTBALL INVESTMENTS LIMITED

Claimant

- and -

(1) SWINTON REDS 20 LIMITED
(2) LEE POWER

Defendants

Before:

NICHOLAS THOMPSELL

(Sitting as a Deputy Judge of the Chancery Division)

Hearing date: 15 June 2021

Mr Colin West QC appeared on behalf of the Claimants instructed by **Hanover Bond Law**.

Ms Hannah Thornley appeared on behalf of the Defendants instructed by **Terrells Solicitors LLP**.

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.

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COVID-19 Protocol: This judgment is handed down remotely by circulation to the parties' representatives by email, release to BAILII. The date and time for hand-down is deemed to be 10:30am on 25 June 2021.

A. INTRODUCTION

1. This hearing, which was held remotely via Microsoft Teams, has dealt with matters concerning three related disputes:

   (a) a dispute between Mr Michael Standing and Mr Lee Power as to the basis on which Mr Power is holding shares in Swinton Reds 20 Limited ("**SR20**"), the top company in the chain of companies holding interests in Swindon Town Football Club (the "**Club**"), and more specifically whether he holds part of this shareholding on trust for Mr Standing;

   (b) a dispute between Axis Football Investments Ltd ("**Axis**") and Mr Power as to whether Mr Power is precluded from bringing about any sale of interests in the Club, or any of the chain of companies holding the Club otherwise than through selling his shares in SR20 in compliance with the pre-emption procedure for transfer of shares set out in the articles of association of SR20 (the "**Articles**"); and

   (c) a dispute between Axis and SR20 and Mr Power relating to the effect of notices served under the processes in the Articles to be followed on a transfer of shares.

2. The first two of these disputes are long-running actions proceeding under Part 7 of the Civil Procedure Rules ("**CPR**") and this is but one of a number of interlocutory hearings relating to them. These two actions have been the subject of a formal joinder of action so that they are considered together.

3. The third of these disputes, although part and parcel of the ongoing commercial differences between Mr Standing and Axis on the one hand and Mr Power on the other hand, is a new dispute, having been put on foot by means of a Part 8 Claim Form issued on 28 May 2021.

4. Ahead of this hearing, I had the benefit of being able to consider skeleton arguments by Ms Hannah Thornley for Mr Power and SR20, and of Mr Colin West QC on behalf of Mr Standing and Axis. Ms Thornley and Mr West have represented their clients at this hearing and I am grateful, as ever, for their thoughtful and learned arguments.

5. There have been various matters that the court has dealt with in this hearing and they may be summarised as follows:

   (a) **The Pre-Emption Claim:** By the Part 8 Claim Form, Axis has applied for declaratory and/or injunctive relief in relation to a purported acceptance of an offer notice (as defined in the Articles) served on it following the service of a transfer notice (as defined in the Articles) by Mr Power.

   (b) **The Amendment Application:** By an Application made in June, the Claimants have applied to amend their Particulars of Claim.

   (c) **The Restriction Issue:** Whether the provisions in a settlement agreement between Axis and (1) Mr Power, (2) SR20, and (3) Seebeck 87 Limited ("**Seebeck**") scheduled to a Tomlin order made by Master Kaye on 18 November 2020 (the "**Settlement Agreement**") prevent a sale of the Club; and, if they do, whether there is a fetter on the Claimants' discretion to refuse consent to a sale of the Club and whether the Court should insist on their enforcement.

   (d) **The Quick Sale Application:** Prior to the last hearing the Claimants sought an order under CPR rule 25.1(1)(c)(v) for the sale of shares by Mr Power to Axis, by means of an application dated 11 May 2021 and a later clarificatory note dated 16 May 2021.

   (e) **The Expedited Timetable:** The timetable for trial on the first two actions mentioned above, now that this is to be held on an expedited basis.

6. The court in addition had been requested to consider whether injunction orders made by Morgan J on 31 March 2021 (the "**March injunction**"), and an earlier injunction also ordered by Morgan J in November 2019, (the "**2019 injunction**"), each as subsequently confirmed and extended on various occasions should be continued or further amended.

7. These matters are considered below.

B. THE PRE-EMPTION CLAIM

Background

8. The basic facts underlying the Pre-emption Claim are not in dispute.

   (a) On 17 May 2021, Mr Power gave notice (the "**Transfer Notice**") to SR20 of his intention to sell all 85 of his shares in SR20 at a price of £2,500 per share pursuant to the pre-emption rights in article 23 of the Articles.

   (b) On 25 May 2021, SR20 sent to an offer notice offering to sell **13** shares (representing 15% of 85 shares) at a price of £2,500 per share (the "**Offer Notice**"), pursuant to the Articles.

   (c) On 28 May 2021, Axis served a notice of acceptance (the "**Notice of Acceptance**") purporting to accept a purchase of 85 shares on the bases that:

      (i) the Offer Notice must be construed or rectified to be consistent with the Articles, which require all of the shares to be offered to Axis; or

      (ii) alternatively, on the basis that Axis had a right under Article 23.8 of the Articles to take up additional shares in excess of its offered proportion, and was exercising that right.

9. On 28 May 2021, Axis issued and filed the Part 8 Claim Form supported by a witness statement of Edward William Parladorio dated 28 May 2021. This was the same day as Axis's Notice of Acceptance and only three days after the Offer Notice itself. These documents were sent on that day by registered and first-class post to SR20 and email to Mr Power and to their solicitors. However, the Claim Form was only formally served on 3 June 2021 owing to a delay in its being sealed by the court.

10. By the Claim Form, Axis has sought declaratory and/or injunctive relief that: (1) the Notice of Acceptance was valid in relation to all of 85 shares owned by Mr Power; or (2) SR20 is obliged to issue an Offer Notice to Axis in respect of all 85 shares. Axis sought appropriate declaratory or injunctive relief accordingly.

11. Axis applied to the court for directions for this matter to be listed to be heard at the hearing that had already been scheduled for 15 June 2021 to deal with the other matters which were due to be heard on that date. Mr Power, via his counsel, Ms Thornley, resisted this on the basis that Mr Power and SR 20 needed more time to compile evidence and consider the matters under question.

12. I considered this matter on paper and exchanged emails with Counsel about this. Although I considered that there was urgency to consider this application, and that this application needed to be considered before the other important matters to be dealt with at this hearing could be properly considered, I initially hesitated to order that this be heard at the requested date of 15th June. I hesitated because under CPR rule 8.3, the Defendants had 14 days to file their acknowledgement of service. Although they would have been aware of the claim and the issues involved for at least this period, the sealed version of the claim was not received back from the court until Tuesday, 1 June 2021 and so they would not have had the formal service for the full 14 days. Whilst this would be within the court's power, I was reluctant to give them less time to serve their acknowledgement than would be the normal expectation under CPR rule 8.3. I explored the possibility of a slightly later hearing to deal with everything and found that this would not be practical for two or three weeks as a result of counsels' other commitments.

13. Having considered the further representations of both counsel on paper I decided that I would hear this matter at this hearing on the 15th June. In coming to that decision I took account of various factors which included the following:

    (a) SR20 and Mr Power had in fact signed an Acknowledgement of Service of the application on 10 June 2021, so it was clear that they did not need the full 14 days to do this.

    (b) Within the form of Acknowledgement, the Defendants had been given an opportunity to object to the Part 8 process being applied and they did not take that opportunity by ticking the box to register any such objection.

    (c) Under CPR rule 8.5, a defendant who wishes to rely on written evidence must file it with his acknowledgement of service and the Defendants in this case had not filed any such written evidence.

(d) It seemed to me that the question in issue related principally to a question of construction of the Articles and did not require any witness evidence. Whilst Ms Thornley had suggested that she thought the matter was unsuitable for Part 8 as there would be a need for evidence, she was unable to point to any particular evidence that I thought would be pertinent to the question.

(e) It seemed to me that there was urgency in regularising the position of SR20 and of the Club. The court had seen evidence about the unsatisfactory financial position of the Club and there was no doubt that the continuing uncertainty was bad for it. I did not see any benefit in delaying the resolution of this limited question for any longer than was necessary.

Should I deal with this Claim at this hearing?

14. Ms Thornley, in her skeleton argument and in oral argument before me at this hearing has repeated her objection to my determining this matter under Part 8 and on such an expedited basis.

15. Although the proper time for this objection to be made was in the Acknowledgement, I have been willing to consider these arguments and to be persuaded that this matter should not be resolved at this hearing if there is any danger of this not being a fair process. I have listened carefully to the arguments that Ms Thornley has made in support of her request that the Pre-Emption Claim should be adjourned.

16. Mr Power complains that the Part 8 Claim Form has been brought at a very late stage before the hearing. This seems a somewhat unfair criticism as the claim was brought at the very first moment that it could be.

17. A further complaint is that Axis wrote to the court unilaterally to ask for directions. This, Mr Power says, forced him to take advice and respond unreasonably quickly and that Axis did not seek consent to a directions order as would ordinarily be required for a judge to deal with a matter on paper.

18. To the extent that it was irregular to do this, any irregularity is cured if the court gives an opportunity for the Defendants to make their case at this oral hearing as to why this matter should be adjourned. Accordingly, I have taken the time at this hearing to give this issue a full airing and, in particular, to consider Ms Thornley's arguments that the court should not consider those as a Part 8 matter and that it would violate Mr Power's right to a fair trial if Mr Power is not given more time to put in evidence.

19. Ms Thornley has argued that Axis has not followed the correct procedure and the Part 8 claim is ill formulated. She has referred me to the decision in *Cathay Pacific Airlines Limited v Lufthansa Technik AG* [2019] EWHC 484 (Ch), where John Kimbell QC (sitting as a Deputy Judge of the High Court) set out the steps that should generally be taken by a party contemplating commencing proceedings under Part 8 (at paragraph 42 of that judgement). These steps include:

    (a) providing a draft of the precise issue or question which the Claimant is proposing to ask the Court to decide, which ought to be supplied to the defendant for comment; and

    (b) setting out any agreed facts relevant to the issue or question ought to be identified.

20. It should be added, however, that the learned Deputy Judge went on to say that:

> *"There will no doubt be exceptional cases (e.g. urgency or an uncontactable defendant) where these steps will not be practical."*

21. In my judgement, this is one of those cases, because of the desirability of dealing with this matter alongside the other matters to be considered at this hearing and the urgency of resolving the apparently precarious financial position of the Club. I do not think the absence of taking the steps recommended is of itself reason enough to prevent Part 8 proceedings going ahead.

22. Ms Thornley has also referred to the need for the question to be resolved by the Part 8 proceedings to be precisely framed, again taking me to the decision in *Cathay Pacific,* referring me to the paragraph 32 where the Judge said:

> *"In some cases, the court will permit the parties to use CPR Part 8 as a means of obtaining a quick decision on one or more issues of law or construction in a broader litigation – see e.g. Myers v Kestrel Acquisitions Limited [2015] EWHC 916 (Ch) .* ***In such cases it is imperative that there be an agreed statement of facts and a precisely framed question****." (emphasis, hers)*

and to Jefford J's decision in *Merit Holdings Limited v Michael J Lonsdale Limited* [2017] EWHC 2450 (TCC)):

> *"21. ... Part 8.2 provides that the Part 8 Claim Form must state 'the question which the claimant wants the court to decide; or the remedy which the claimant is seeking and the legal basis for the claim to that remedy.' It is therefore, an express requirement of the use of the Part 8 procedure that the question for the court is one what is unlikely to involve a substantial dispute of fact and it is, it seems to me, to be implied in the rules that the question should be framed with some degree of precision and/or be capable of a precise answer."*

23. Ms Thornley says that Axis has not precisely identified the question of construction that they seek the Court to determine. The Part 8 Claim Form states that "*[b]y these Part 8 proceedings Axis asks the Court to determine (1) that the Notice of Acceptance was a valid Notice of Acceptance in relation to all 85 of Mr Power's shares; alternatively (2) that SR20 is obliged to issue an Offer Notice to Axis in respect of all 85 such shares, and not only 13 of them. Axis seeks appropriate declaratory and/or injunctive relief accordingly*". She argues that this is not the question that the Court must determine, but rather a statement of the relief that Axis seeks.

24. Whilst I fully accept that there is a need for the matter in dispute to be clearly identified within the Claim Form, I consider that there is no lack of clarity in this case. The matter in issue is obvious from the description of the details of the claim. It is whether the validity of the Acceptance Notice is affected by the fact that it purported to accept an offer for 85 shares when only 13 shares had been offered (but, in the argument of the Claimant, 85 shares should have been offered). If in these proceedings any party had raised any other matter that may be in dispute, there might be some doubt about this, but, I see no merit in the argument that it is not clear what are the issues raised by the Claim Form. If there were any doubt about the issue at hand, that doubt would be resolved by the witness statement of Mr Parladorio that accompanied the Claim Form, but I do not

think that it is necessary to rely on that for the Defendants to have been able to understand the basis of the claim.

25. Ms Thornley also complains that the Part 8 Claim Form was not properly served by Hanover Bond Law, since it did not include the Notes for the Defendant. Mr West, for Axis, points out that the CPR do not require this for the Claim Form to be validly served and I agree that this matter does not go to the validity of the Claim Form.

26. However this was irregular, and this irregularity is one of the reasons why I have thought it appropriate to spend a considerable amount of time at this hearing dealing with Ms Thornley's procedural arguments, despite the fact that her clients' Acknowledgement of Service did not raise any objection to the Part 8 procedure. It is possible that had these notes been included, the Defendants would not have completed in the Form of Acknowledgement in the way that they did, (although I consider this unlikely since the matter was being dealt with by solicitors with access to counsel who were each fully up to date with the facts and should have understood the Part 8 procedure). However, because the court has fully considered (and as I will explain, dismissed) these arguments I do not see that any harm has been caused to the Defendants by that omission.

27. The third argument raised is that on behalf of the Defendants is that the Pre-Emption Claim is more suitable to the Part 7 procedure because there are necessarily going to be issues of fact, as well as law.

28. This point is made principally by reference to the issue that the Court is, in addition to determining a point of *construction*, invited to grant relief involving rectification and that this will require witness evidence to resolve.

29. In many circumstances rectification might require witness evidence as to the intention of parties, since it will be founded on common continuing intention. However, the same considerations do not apply in this case. This case is concerned with the proposed

rectification of a notice that was purported to have been served in accordance with the Articles on the grounds that it did not conform to the requirements in the Articles.

30. The only potential question of intent involved is whether Mr Power intended to initiate the pre-emption procedure by serving the Transfer Notice. This is clear on the face of the Transfer Notice and the court does not need to, and should not, go behind this to consider his state of mind. The fact that he wanted AC Sports Wiltshire LLC ("**AC Sports**") to be the buyer was also clear on the face of the Transfer Notice but was irrelevant to the effect of the Notice. It was clear that he was submitting to the pre-emption procedure. This could have resulted in a sale to AC Sports, but only if Axis had not taken up its pre-emption rights. By serving the Transfer Notice Mr Power was taking the risk that Axis might take up its pre-emption rights. I must take it from his subsequent reaction to the Acceptance Notice that he had misunderstood the extent of the pre-emption rights (as I find them to be as explained further below) but his beliefs about how the pre-emption procedure worked are not relevant to the construction that should be put on his Transfer Notice or its effectiveness.

31. The effect of that notice was to constitute the company SR20 as his agent to sell the shares, but in acting as such agent, the company does not have any wide discretion and its intentions are not relevant. It is required to act in accordance with the provisions set out in the Articles. If its intentions are relevant at all, SR20 must, for the purpose of any rectification claim relating to its Offer Notice, be presumed to intend to comply with the Articles, and there is no need to obtain any evidence on this.

32. I think, therefore, the court is able to order rectification without any need for further evidence and so I do not see a need to adduce evidence as being an objection to the application of the Part 8 procedure.

33. As to the more general point whether the Defendants need more time to consider this matter and to gather evidence, the court needs to balance this consideration against the other realities of this litigation.

34. The issue that is at the heart of this is purely a question of legal construction. The Defendants have been legally represented by solicitors and able counsel throughout. Counsel has been able to produce a detailed skeleton argument running to some 25 pages. As a result, it is difficult to see what would be achieved by giving them more time.

35. Against this, the court needs to consider the interests of all parties, what will be best to preserve the asset, and the desirability of determining this key matter before it can make a sensible decision about the other matters that are in question.

36. The court was informed that on 7 June 2021, SR20 issued a notice of meeting of the directors of SR20 on Monday 14 June 2021 to consider the motion that the directors give approval for the Transfer Notice to be revoked in accordance with Article 23.7(c) and I have heard at this hearing that that approval was given. Whilst, this is not relevant to the question raised by the Part 8 claim as it has been put, these moves show the need for the court, if it is going to do justice, to act swiftly before the circumstances change.

37. Having given full consideration to all the arguments that have been most ably raised by Ms Thornley, I remain of the view that it is appropriate to consider the Pre-emption Claim as a Part 8 claim at this hearing, having regard to the overriding objective set out in CPR rule 1. If Axis succeeds in relation to the Part 8 claim, then the court's finding on this matter is likely to serve to resolve much else in the disputes between the parties (unless there is some other matter that has not yet been raised which prevents a valid Acceptance Notice giving rise to a contract for Mr Power to sell the shares to Axis). It would be a waste of the court's time and of costs if this opportunity were not to be explored.

The Pre-emption Claim itself

38. The Pre-emption Claim arises under the articles of association of SR20 and it is worthwhile setting out the salient elements of the relevant article, in articles 23.7 and 23.8 in full:

"23.7 (Save where a transfer is made pursuant to Article 23.3, any person (the "proposing transferor") proposing to transfer any shares (the "sale shares") shall give notice in writing (the "transfer notice") to the Company that he wishes to transfer the sale shares and specifying the price per share which in his opinion constitutes the fair value of the sale shares.

(b) The transfer notice shall constitute the Company the agent of the proposing transferor for the sale of all (but not some of) the sale shares to any member or members willing to purchase the sale shares (the "purchasing member") at the price specified in the transfer notice or at the fair value certified in accordance with Article 23.9 (whichever shall be the lower).

(c) A transfer notice shall not be revocable except with the approval of the directors.

23.8(a) The sale shares shall be offered to the members (other than the proposing transferor) as nearly as may be in proportion to the number of shares held by them respectively. Such offer shall be made by notice in writing (the "offer notice") within 7 days after the receipt by the Company of the transfer notice. The offer notice shall state the price per share specified in the transfer notice and shall limit the time in which the offer may be accepted, not being less than 21 days nor more than 42 days after the date of the offer notice, provided that if a certificate of fair value is requested under Article 23.9 the offer shall remain open for acceptance for a period of 14 days after the date on which notice of the fair value certified in accordance with that Article shall have been given by the Company to the members or until the expiry of the period specified in the offer notice (whichever is the later).

(b) For the purposes of this Article 23.8 an offer shall be deemed to be accepted on the day on which the acceptance is received by the Company.

(c) The offer notice shall further invite each member to state in his reply the number of additional sale shares (if any) in excess of his proportion which he wishes to purchase and if all the members do not accept the offer in respect of their respective proportions in full the sale shares not so accepted shall be used to satisfy the claims for additional sale shares as nearly as may be in proportion to the number of shares already held by them respectively, provided that no member shall be obliged to take more sale shares than he shall have applied for. If any sale shares shall not be capable without fractions of being offered to the members in proportion to their existing holdings, the same shall be offered to the members, or some of them, in such proportions or in such manner as may be determined by lots drawn, and the lots shall be drawn in such manner as the directors may think fit."

39. Article 23.9 then describes the procedure allowing any member to ask the company to arrange for the fair value of the shares to be determined by the auditor. This article is not said by any party to be engaged and so I will pass over it.

40. Article 23.10 onwards then deal with the consequences if purchasing members found for sale shares or not in the following terms:

> *23. 10 If purchasing members shall be found for all the sale shares within the appropriate period specified in Article 23.8, the Company shall not later than 7 days after the expiry of such appropriate period give notice in writing (the "sale notice") to the proposing transferor specifying the purchasing members and the proposing transferor shall be bound upon payment of the price due in respect of all the sale shares to transfer the sale shares to the purchasing members.*
>
> *23. 11 If in any case the proposing transferor after having become bound to transfer the sale shares makes default in transferring any sale shares the Company may receive the purchase money on his behalf, and may authorise some person to execute a transfer of the sale shares in favour of the purchasing members. The receipt of the Company for the purchase money shall be a good discharge to the purchasing members. The Company shall pay the purchase money into a separate bank account.*
>
> *23. 12 If the Company shall not give a sale notice to the proposing transferor within the time specified in Article 23.10, he shall, during the period of 30 days following the expiry of the time so specified, be at liberty to transfer all or any of the sale shares to any person or persons.*

41. As I have mentioned, the Transfer Notice was served on SR20 on 17 May 2001. The document described itself as a "*Transfer Notice pursuant to Article 23*" and stated that Mr Power gave "*notice to Swinton Reds 20 Ltd that I propose to sell my total shareholding of eighty-five (85) fully paid-up shares in the company to AC Sports Wiltshire LLC or their nominees*". The price was stated to be £2,500 per share and the figure was stated "*to take into account the outstanding liabilities of the associated companies, which control Swindon Town Football Club*". Mr Power stated that in his opinion that figure constituted the fair value of the shares. The notice was signed by Mr Power's solicitors on his behalf.

42. I have little doubt that when Mr Power served this notice, he was doing so on the understanding that the effect of this would be that he could be compelled to sell 13 of the shares offered to Axis, but he thought that having done this he would be free to sell the remainder of the shares, as he wished to AC Sports. If that was his belief, that was a mistaken belief, as I will explain. However, that belief does not have any bearing on the effectiveness of the Transfer Notice. Mr Power had decided that he wanted to sell the

shares. As a person proposing to transfer shares, had become within the words of article 26.7 a "*proposing transferor*". This was enough to start the pre-emption process running. No reason has been put to me why this Transfer Notice was not fully effective as a Transfer Notice under the Articles and I accept it as such.

43. Following the procedure set out in the Articles, the Transfer Notice was followed by an Offer Notice.

44. The Offer Notice was dated 25 May 2021. It described itself as an "*Offer Notice pursuant to Article 23*" and was addressed to Axis in the following terms:

> *1. We attach a copy of the Transfer Notice received on behalf of Lee Michael Power. The price per share is £2500 each for the eighty five (85) fully paid up shares held by Lee Michael Power. One hundred shares (100) have been issued by the company and you hold the balance of the fifteen shares (15).*
>
> *2. Under Article 23.8(a) of the Articles the sale shares shall be offered to you "as nearly as may be in proportion to the number of shares held by you." You hold fifteen shares (15). Therefore you are offered 85 x 15% of the sale share i.e. 12.75 shares say 13 shares at the price of £2,500 per share totalling £32,500.*
>
> *3. You have not less than 21 days or more than 42 days in which the offer may be accepted.*
>
> *4. If the certificate of Fair Value is requested under Article 23.9 the offer shall remain open for acceptance for a period of 14 days after the date on which notice of the fair value certified in accordance with that Article shall be given by the Company to the members or until the expiry of the period specified in the offer notice (whichever is the later).*

45. It was signed by Terrells LLP as solicitors for Lee Michael Power, Director and Shareholder.

46. On 28th May, Axis, acting through its solicitors, Hanover Bond Law served a Notice of Acceptance in the following terms:

> *Notice of Acceptance (pursuant to Article 23.8)*
>
> *We refer to the transfer notice dated 17 May 2021 delivered in accordance with Article 23 of the Company's articles of association to the Company under the terms of which Lee Michael Power has given notice to the Company of his desire to sell*

85 ordinary shares of £1 each in the capital of the Company (Shares), at a price of £2,500 per share.

We acknowledge receipt of the Offer Notice dated 25th May 2021 in relation to shares in the Company. Under Article 23.8(a) this Offer Notice had to offer all 85 such shares to Axis and should therefore be read as if it referred to all 85 such shares (or rectified so to read). Alternatively, if such a Notice could validly be served in relation to only 13 such shares (which is denied), Axis hereby exercises its option under Article 23.8(c) to acquire further shares over and above those offered to it, up to the total number of shares comprised in the transfer notice. As Axis is the only other shareholder apart from the proposed transferor, it is entitled to and hereby does exercise unilaterally the option to purchase all of the shares comprised in the transfer notice.

On the basis -set out above, we hereby accept the offer to purchase all the Shares registered in the name of Lee Power at the offered price of £2,500 per share, making a total of £212,500.

Please confirm in due course that a sale notice has been issued to Mr Power under Article 23.10 specifying Axis as the purchasing member in relation to all 85 shares. We will thereupon take the necessary steps concerning the payment of the price in accordance with the Articles.

47. This Notice of Acceptance therefore has on its face rehearsed the principal arguments that Axis has asked the court to confirm. These, in summary, are that:

    (a) the procedures under the Articles required for the Offer Notice to offer all the shares that were subject to the Transfer Notice and not just a percentage of them equal to the percentage of shares that Axis held;

    (b) Axis was entitled to read this Transfer Notice as if it referred to all 85 shares or is rectified to read to all 85 shares; and

    (c) in any case the effect of the Offer Notice was to activate an option that Axis had under article 23.8 (c) of the Articles to acquire further shares up to the number of shares comprised in the Transfer Notice.

48. Each of these propositions need to be considered.

Question one: How many shares should have been offered?

49. The first question is whether the Articles fall to be interpreted:

(a) in the way that SR20 interpreted them in the Offer Notice (i.e. that the shares to be offered to any shareholder comprised only the percentage of the shares to be sold under the Transfer Notice equal to that shareholder's percentage of all of the shares in issue), or

(b) in the way that Axis interprets the Articles – so that all of the shares need to be offered to the non-selling shareholders, divided among them proportionately to the non-selling shareholders' respective shareholdings in the company.

50. This question turns on the interpretation of article 23.8(a). This provides that:

> *"The sale shares shall be offered to the members (other than the proposing transferor) as nearly as may be in proportion to the number of shares held by them respectively."*

51. This provision, taken by itself, can be considered ambiguous since the word "them" in the final phrase "*held by them respectively*" could refer either:

(a) to "*the members*", meaning all of the members (interpretation 1), or

(b) to the members other than the proposing transferor (interpretation 2).

52. This possible ambiguity is created, or at least aggravated, by the brackets around the words "*other than the proposing transferor*" which seem to serve to separate that phrase from the word "*members*" preceding it.

53. However, taken in its context it is clear that the only sensible interpretation is interpretation 2: the word "them" must refer to the members other than the proposing transferor. The other interpretation would render the provisions entirely useless, since it is the clear intention of these provisions that the transferring shareholder can be forced to sell to the other shareholders only if purchasing members can be found for all the sale shares. This is clear from article 23.10. If article 23.8(a) were to be construed in the manner contended for by Mr Power, then there would be no point whatsoever in these provisions since they could never lead to the other shareholders being able to take up pre-

emption rights (except perhaps through the operation of article 23.8(c) as discussed further below).

54. Given two competing interpretations, one of which reflects the normal and expected manner in which man or woman of business would contract and the other of which produces a nonsense, the former must be preferred. It is my determination that the article must be read according to interpretation 2. I therefore agree that Axis is correct that it should have been offered all 85 shares that were the subject of the Transfer Notice.

55. Ms Thornley has referred me to *Greenhalgh v Mallard* [1943] 2 All ER 234, CA; and *Smith & Fawcett* [1942] Ch 304, CA, at paragraph 306 for the proposition that the right to freely transfer shares can only be restricted by sufficiently clear words.

56. I find it difficult to extract such a boldly stated conclusion from these two cases. The first of these cases involved the court dismissing a contention that a restriction on selling shares to non-shareholders should be extended in its interpretation to restrict a sale of shares to an existing shareholder. The second was primarily concerned with the matters that directors should take into account when exercising a power to refuse to register a share transfer. Whilst that case did include a statement that a "*shareholder's right to transfer its shares is not to be cut down by uncertain language or doubtful implications*", it is taking these authorities too far to suggest that whenever an ambiguity can be argued for in drafting, however untenable the other interpretation may be, the court must simply ignore a provision which clearly was intended to have a sensible commercial effect of the type normally adopted by shareholders of small private companies.

Question two: Was Axis entitled to read this Offer Notice as if it referred to all 85 shares or as rectified to read to all 85 shares?

57. I have no doubt that Axis was entitled to receive an Offer Notice that referred to 85 shares but does this mean that it is entitled to treat the Offer Notice that it did receive, offering it 13 shares, as if it had been for the correct number of shares?

58. The argument that it can, has been made by Mr West in two ways. First, that Axis was entitled to construe the Offer Notice to say what it should have said. Secondly, that the court should rectify the Offer Notice to say what it should have said.

59. In relation to the first proposition, Mr West took me to the discussion in *Chartbrook Ltd and another v Persimmon Homes Ltd and another* [2009] UKHL 38. In that case, the court considered the breadth of the principle that mistakes may be corrected by construction. Mr West drew my attention to Lord Hoffmann's dictum that:

> *"…. There is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant"*

60. I consider that there is an arguable case, based on the consideration that the Offer Notice clearly referenced article 23.8, and therefore evidenced an intention to provide the offer that that article required, that the parties and the court can and should construe the Offer Notice as saying what article 23.8 required it to say.

61. However, I am cautious about basing a decision on that argument. As well as referencing article 23.8, the Offer Notice set out in detail the way in which SR20 had interpreted the article and its detailed calculation. Unlike *Chartbrook*, the problem here was not that something had gone wrong with the language to create a nonsensical result: the problem was that the result produced by clearly expressed language relating to the calculation is contrary to the true interpretation of article 23.8. Whilst I would not go as far as dismissing Mr West's argument on this point, I am reluctant to base a decision on this ground and I do not think that I need to do so in this case given what I am going to go on to say.

62. In relation to the second argument based on the availability of rectification - I do consider that this would be an appropriate case for rectification of the Offer Notice. The Offer Notice is essentially a document to implement a procedure that is supposed to operate automatically without the company exercising anything or anything much by way of discretion. As a result, there is no need to consider the intent of the parties in order to reach a determination that the document should be rectified. This is a case where there was a concluded antecedent contract (the Articles) with which an instrument (the Offer Notice) did not conform. The parties' intention can be, and should be assumed to be to comply with the provisions of the Articles (as correctly interpreted) and the court should be ready to correct the Offer Notice to say what it was required to say under the agreement (the Articles) that it was purporting to implement. If the parties will not agree to rectify it, the court will do so. In this case, the court should give an order to rectify the Offer Notice so that it offers 85 shares rather than 13 shares.

63. The court has heard from Ms Thornley that there has been a purported withdrawal of the Transfer Notice. The court has not seen any evidence about that and the existence or effect of any such withdrawal is outside the scope of the matters that the court is considering under the Part 8 claim. However, the potential existence of this as an issue means that I should consider the extent to which the court's order for rectification is considered to take effect retrospectively.

64. In relation to this matter, Mr West referred me to Chapter 16 of Snell's Equity which at paragraph 16.027 states as follows:

> *"Where rectification is ordered no new document need be executed; a copy of the order of the court may be indorsed on the instrument rectified which will then operate accordingly. The decree has retrospective force. The effect is not that the instrument continues to exist, though with a parol variation, but that "it is to be read as if it had been originally drawn in its rectified form" and will include any implied easements and other rights which its new form imports. Thus, existing transactions which only the rectified instrument would have authorised become retrospectively valid. But until rectification has been decreed the instrument is binding as it stands;*

"so long as it remains uncorrected, it is no defence to say, that it does not truly ascertain the real contract of the parties"."

65. I have found that the Offer Notice should be rectified to refer to an offer of 85 rather than 13 shares. Following the principles set out in paragraph above, this has retrospective effect and it follows that (absent any other issues that may be raised that the court is not aware of) that the Acceptance Notice should be regarded as a valid Acceptance Notice having the effect that a valid Acceptance Notice should have under article 23.8.

Question three: Was the effect of the Offer Notice to activate an option that Axis had under article 23.8 (c) of the Articles to acquire further shares up to the number of shares comprised in the Transfer Notice?

66. In view of my determination in relation to rectification, it is less important to determine this third question, but I will deal with it for completeness.

67. Axis claims that its Acceptance Notice included a valid exercise of the rights that it has under article 23.8(c) of SR 20's articles. This, as I have mentioned, states that "*The offer notice shall further invite each member to state in his reply the number of additional sale shares (if any) in excess of his proportion which he wishes to purchase and if all the members do not accept the offer in respect of their respective proportions in full the sale shares not so accepted shall be used to satisfy the claims for additional sale shares as nearly as may be in proportion to the number of shares already held by them respectively*"…

68. The Offer Notice that was sent did not include any such invitation. This was clearly wrong. The Offer Notice should be rectified to include such an invitation, although nothing would turn on this if it is to be rectified anyway so that the offer was an offer of 85 shares.

69. However, even if the Offer Notice is not rectified on this point, I consider that Mr West's argument was a good one that the words in article 23.8(c), create independently an option for a member to bid for more of the sale shares than are offered to that member and that that option exists whether or not the Company remembers to inform the shareholder about the existence of that option.

70. There are two ways in which this conclusion can be reached. First, the words "*the offer notice shall further invite*…" can be taken as meaning any Offer Notice has the effect of creating such an invitation.

71. Secondly, the offer that was made by the Offer Notice, by referring to the article 23 procedure must be deemed as including as an implied term, or a term incorporated by reference, that as well as offering the shares offered in the Offer Notice mentioned, the recipient of the Offer Notice was entitled to request taking up any other shares not taken up by any other shareholder in accordance with article 23.8(c).

72. Accordingly, I consider that Axis was entitled, as it purported to do, to exercise its rights under article 23.8(c) and to respond to the Offer Notice with notice of its wish to purchase all of the sale shares (given that there was no other shareholder that it was competing with to acquire the sale shares offered).

73. This interpretation commends itself because it avoids a nonsensical position whereby the shareholder can be denied its rights by means of a company's inadvertent or deliberate failure to inform the shareholder about its rights. I do not see how the company could deny this right – it should be estopped from relying on its own misfeasance from doing so. Further this interpretation provides business efficacy should there be a position where some shareholders were informed about the rights and others were not, which otherwise would be impossible for the company to navigate.

74. In summary then, I have found that the Offer Notice should be read in its rectified form offering 85 shares and including the invitation to take up any other shares under article

23.8(c). I have also found that in any case Axis was entitled, if it needed to, to take up the article 23.8(c) invitation.

75. Either of these grounds answers the objection made by Ms Thornley that under the basic principles relating to the formation of a contract there must be correspondence between an acceptance and an offer. As the offer must be regarded as being rectified to become an offer for 85 shares, and also should be deemed to include the 23.8(c) right, there was no lack of correspondence between the offer and the acceptance. Accordingly, the Acceptance Notice should be considered a valid acceptance notice capable of creating a binding contract for the transfer of the shares.

76. This is as far as I said, when giving directions for this hearing, that I would go on this occasion under the Part 8 process. I have dealt with the main relief requested in the Part 8 Claim Form by providing a declaration that the Notice of Acceptance was a valid Notice of Acceptance in relation to all 85 of the sale shares comprised in Mr Power's Transfer Notice.

77. Whilst I will note that under article 23.8(b) an offer "*is deemed to be accepted on the day on which the acceptance is received by the Company*", I will not go further and determine any other matter (should any such matter be raised) such as whether it was open to Mr Power to withdraw his Transfer Notice after a valid Notice of Acceptance had been served, or indeed whether it was proper for the board of SR20 to approve such a withdrawal, or open to the board to do so or whether such actions could amount to unfair prejudice or a breach by directors of their duties. To the extent that any of these issues may still arise after what I have found today, they should be properly scoped out by an appropriate claim or application.

78. I will, however, address the argument made by Ms Thornley based on the decision of the Supreme Court in *Braganza v BP Shipping Ltd and another* [2015] 1 WLR 1661, UKSC that in exercising the discretion conferred upon it by Article 23.8, Axis is subject to the implied term not to act arbitrarily, capriciously or irrationally, and that it breached

that implied term by accepting the offer, rather than allowing a sale to go forward in favour of AC Sports. This argument was put forward on the basis that Axis should have stepped aside because AC Sports was offering a better deal for creditors.

79. I see no merit whatsoever in this argument. A shareholder that is taking up its pre-emption rights is generally entitled to do so by reference to that shareholder's own interests. A shareholder generally is not, in its capacity as shareholder, obliged to do something which might be better for another party. I find it difficult to conceive of circumstances where a decision a party makes whether to take up a pre-emption right could be regarded as arbitrary, capricious or irrational if that decision reflected the shareholder's own wishes, except perhaps if the shareholder did not have the means to make the payment required for the shares or otherwise knew it would not be able to perform the contract. Certainly, I do not see the circumstances here as being arbitrary, capricious or irrational.

80. As regards the suggestion that Axis should have recognised AC Sports as offering a better deal for SR20 or its creditors, it is difficult to see how Axis could have taken account of the possibility that AC Sports might have offered terms that were better for SR20 or its creditors. Pre-emption rights operate solely by looking at the price paid for the shares and make no allowance for any other terms that a party might offer. Axis could not have known on what other terms the shares would be sold if it did not take up the pre-emption rights - there would have been no obligation for the sale to be on the terms which Axis was aware AC Sports had previously offered, and indeed Mr Power, if the pre-emption rights were not taken up, would have been free to sell to whoever he wanted to.

81. There was also a suggestion that Axis should have stepped aside as a result of the potential for difficulties under the rules of the English Football League in its becoming the majority shareholder. As regards this suggestion, the court has heard no persuasive argument to suggest that Axis will not be approved as a suitable owner of a football club. Axis is already a part-owner of SR20 and Mr Morfuni, its ultimate beneficial owner, has been accepted as being fit to act as a director of a football club. It such circumstances it was not arbitrary, capricious or irrational for Axis to assume that this would not be a

problem and to refuse to deny itself its pre-emption entitlement merely on the grounds that no application had yet been made for it to be approved as an owner.

82. That then disposes of the matter between Axis, SR20 and Mr Power, in relation to Claim No. PT – 2021 – 000482. I will reserve the question of costs to a further hearing.

C. THE AMENDMENT CLAIM

83. On 4 June 2021, the Claimants submitted an application notice (the "**June Application**"), seeking permission to amend their Particulars of Claim. This included also an application for summary judgment in the Claimants' favour on the averments set out at paragraphs 67 to 81 of the Amended Particulars of Claim (which relate to the Restriction Issue); and for an order that the Defendant effect a sale or transfer of the shares in SR20 (or 50% of those shares) to the Second Claimant and for the Second Claimant to assume immediate management control of the Companies (i.e. the Quick Sale Application).

84. Ms Thornley has helpfully reminded me of the matters that are taken into account when considering an application to amend as recently set out by Lambert J in *Lucien Pearce v East and North Hertfordshire NHS Trust* [2020] EWHC 1504, QB. The court under CPR rule 17.3 has a broad discretionary power to grant permission to amend and should use this discretion in accordance with the overriding objective.

85. Mr Power had not until at this hearing been clear about the elements of the amendments to which he objected, if any. It now appears that he has no objections to the amendments as such, but he wants to have the usual leave to amend his Points of Defence and to make a counterclaim. The Claimants have no objection to this.

86. Accordingly, I will order that the Particulars of Claim are amended as per the mark-up provided to the court.

87. I would normally have acceded to Mr Power's original request that he be given 28 days to amend his Points of Defence and to make a counterclaim, but in view of the timetable to trial (which has been set for 6 September 2021), both counsel have agreed that it would be appropriate to shorten this a little to allow more time for the later steps later in the proceedings and so I will order 21 days for this.

88. Mr Power has, however, objected to the other elements in the June Application that the Restriction Issue be heard on a summary basis, and of course objects to the Quick Sale Application, and I have considered these objections separately.

D. THE RESTRICTION ISSUE

Should the court hear the Restriction Issue on a summary basis?

89. At the last hearing on 17 May 2021, it seemed to me that the Restriction Issue was a contained issue of interpretation, and was one that was suitable to be dealt with on summary basis, but I should not deal with it at that hearing on a summary basis without receiving a properly framed application in accordance with Practice Direction 24 asking for this.

90. The court now has an application asking for summary judgment on this point in the form of the June Application.

91. Ms Thornley set out various objections that Mr Power has to the form of the June Application. She suggests in particular the Claimants have failed to comply with para 2(3) of Practice Direction 24, which requires that the application notice or the evidence contained or referred to in it or served with it:

    (a) to identify concisely any point of law or provision in a document on which the applicant relies, and/or

    (b) to state that it is made because the applicant believes that on the evidence the respondent has no real prospect of succeeding on the claim or issue or (as the case

may be) of successfully defending the claim or issue to which the application relates,

and in either case state that the applicant knows of no other reason why the disposal of the claim or issue should await trial.

92. The relevant section of the Application is as follows

> *"[t]here be summary judgment in the Claimants' favour on the averments set out at paragraphs 67-81 of the Amended Particulars of Claim" and "[s]o far as concerns paragraph 2, the Claimants case has been set out in submissions for the earlier interim hearings in this matter and will be further set out in the Claimants' skeleton argument."*

93. I do not accept that this is an inadequate way of identifying the point of law relied upon. The paragraphs referred to in the Amended Particulars of Claim clearly set out the Claimants' case on this matter. Accordingly, I do not think there has been any failure to comply with the Practice Direction in this regard.

94. Mr Power also argues that the matter should not be heard on a summary basis at this hearing because the application:

(a) should have stated, but did not state, that it was made under Practice Direction 24;

(b) should have included, but did not include, a statement that it is an application for summary judgment made under CPR Part 24; and

(c) did not draw the attention of the respondent to CPR rule 24.5(1), which places requirements on the respondent to the application to serve any evidence on which the respondent intends to rely within a certain period.

95. In this regard Ms Thornley has referred me to the judgement of Floyd LJ in *Price v Flitcraft Ltd* [2020] EWCA Civ 850, [86], which emphasised the importance of these procedural matters.

> "*these procedural safeguards in the rule and practice direction are not "formal requirements" or "formalities" if by that it is intended to detract from their critical importance for ensuring a fair hearing of the application. The requirement to state in the application notice (or in the evidence contained or referred to in it) that it is made because the applicant believes that on the evidence the respondent has no real prospect of successfully defending the claim is an important one. It prevents a claimant making an application and claiming the case to be straightforward when, in truth, he knows otherwise.*"

96. Whilst I would in no way disagree with the points made by Floyd LJ, the court can act with common sense in judging whether there is any harm arising from proceeding when the procedure has not been perfectly followed.

97. In this case, the application for summary judgment will not have come as a surprise since it was trailed at the May hearing when I suggested that this contained issue might be suitable to be heard by way of summary judgment and Mr West, on behalf of the Claimants indicated that he would make such an application. Whilst the June Application does not specifically refer to Part 24, it is clear on its face that it was seeking summary judgment.

98. The failure to provide the Defendant with the warning that it would need to supply any relevant witness evidence within a particular period could be a reason for not proceeding with hearing this matter on a summary basis at this hearing. Accordingly, I have been willing to be persuaded that if Mr Power does or might need to adduce any witness evidence that would be relevant to the matter in question, I would not determine this matter at this hearing. However, this seemed unlikely to me, and having allowed a discussion of the Restriction Issue and the points that Mr Power would want to raise about this, I do not see that there is any witness evidence that would be relevant to the issue. Therefore, I do not see that there has been any harm to Mr Power in his not being warned about the timescales for providing witness evidence.

99. Mr West on behalf of the Claimants, referred in his skeleton argument to the legal test for summary judgment set out in the judgment of Lewison J (as he then was) in *EasyAir v Opal Telecom* [2009] EWHC 339 (Ch). In particular I note this passage from that case:

> *"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 but that it is not uncommon for an application under Part 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 ."*

100. I consider that this is one of those cases where having a determination on a short matter of construction is greatly desirable for the type of reasons mentioned by Lewison J. Having regard to the overriding objective, I see much merit in the court giving an early determination on the Restriction Issue, so as to avoid the parties continuing with the litigation in reliance on this issue where their position might be hopeless on it.

Determination of the Restriction Issue

101. The relevant matter on which summary judgment is sought relates to the effect of Clause 7 of the Share Sale Agreement by which Axis acquired its existing shareholding in SR 20 from Mr Power. Mr Power agreed when settling certain the proceedings against him by Axis concerning Axis's 15% shareholding in SR20, to continue to abide by the Share Sale Agreement.

102. Clause 7 states:

> "*The Seller shall ensure (so far as is possible in the exercise of his rights and powers) the [sic.] Swinton Reds, Seebeck 87 and Swindon Town shall not without the prior written consent of all Shareholders... sell or otherwise dispose of the whole or any part of undertaking, property, assets, or any interest therein or contract to do so whether or not for valuable consideration...*"

103. Mr West argues on behalf of Axis that this clause should be read in the context of the pre-emption rights in the Articles. The Articles set out a procedure, which has been discussed at length above, allowing Mr Power if he wants to sell his shares in the top company SR20. This clause 7 serves to buttress that provision by preventing it being subverted through a sale of the Club or of shares in one of the intermediate holding companies so as to hollow out SR20. Mr West says that the effect of this is that Mr Power is prevented arranging a disposal of the Club, by any means whatever, without the prior written consent of Axis, except, in the case of a sale of shares at the top level made in accordance with the pre-emption rights, where this consent must be deemed already to have been given.

104. At a previous hearing on 19 April 2021 and again at the hearing on 17 May 2021, Mr Power suggested through his counsel that the bar on him disposing of the Club or his interest in it without Axis's consent might not be unqualified. In particular, he submitted that a refusal of consent on Axis's part might not be contractually effective if it was unreasonable. The example given was if Axis refused to consent to a sale to a third-party

buyer which was on better terms than Axis itself was prepared to offer to purchase the Club.

105. We did not at the hearing explore this argument in this context in any depth, but it appears that this is the argument based on *Braganza* that I discussed above in the context of the use of the pre-emption rights. I have given my views on that argument in that context and I think that it applies similarly in relation to the clause 7 restriction as I agree that this is best seen in the context of the pre-emption rights in the Articles and as buttressing those rights.

106. It had also suggested that Mr Power's obligation under Clause 7 only required him to take reasonable steps to obtain Axis's consent, but that if Axis persisted in refusing consent, Mr Power could proceed with the disposal anyway.

107. As we explored each side's position, it appears that each side agreed that the clause does apply to create binding obligations, and there was largely a common understanding of how it operates. In particular, it is agreed that the clause applies only to restrict sales of shares or assets by SR20 and its subsidiaries and it does not apply to any sale of shares that Mr Power holds in SR 20. In relation to any sale of shares in SR 20 by Mr Power these instead are governed by the Articles including the pre-emption rights discussed above. By consenting to be bound by the Articles, Axis must be taken to agree to any sale by Mr Power of those shares made in accordance with the Articles.

108. Ms Thornley did not specifically seek at the hearing to advance the *Braganza* argument in this context but did seek to advance the second point that Mr Power's obligation under Clause 7 only required him to take reasonable steps to obtain Axis's consent, but that if Axis persisted in refusing consent, Mr Power could proceed with the disposal anyway.

109. I found it difficult to follow this logic but I think that this interpretation was based on relying on the phrase in Clause 7 "*(so far as is possible in the exercise of his rights and powers)"* as providing leeway to suggest that this phrase would allow Mr Power to

arrange a sale if he tried hard to obtain the consent but failed to do so. This would be on the basis that, as his failure to obtain the consent arose from the fact that he did not have sufficient rights and powers to force the consent, he could be excused from his failure to obtain the consent.

110. This is another argument where I see no merit. The interpretation is a strained reading that one cannot get to on the plain words of the clause and is totally lacking in any business rationale.

111. Clauses of this type are common in commercial contracts, where a shareholder or director agrees to procure that something is not done by a company. As shareholders and directors do not have absolute control over everything that goes on within a company (and the more so in the case of things that go on within a subsidiary of a company) it is commonplace for them to qualify their obligations so that they are not in breach if they do everything within their power to avoid the prohibited thing. This is a form of "best endeavours" or "all reasonable endeavours" obligation. It would destroy the commercial efficacy of all of these kinds of "best endeavours" clauses if this sort of qualification to an obligation could be read so that a best endeavours obligation not to do something without consent could be read as an obligation to apply best endeavours to obtain the consent. I have no hesitation in dismissing this interpretation.

E. THE QUICK SALE APPLICATION

112. At the last hearing of this matter in May, I noted that, given the position of the parties to this action and the freezing effect of the injunctions, that unless something changed, there appeared to be three possible futures for the Club:

(a) the Club carries on and somehow finances itself until the substantive hearing when all else is determined;

(b) Mr Power pursues a sale of his shares in SR20 following the pre-emption procedure and this results either in a sale to Axis or a sale to AC Sports or another third party; or

(c) the Club runs out of money, fails to pay its debts and is put by external creditors into some kind of insolvency proceedings.

113. I expressed the hope that outcome (c) would be recognised by all as being so unacceptable that common-sense would prevail, but noted that it was is possible that it would not, given the lack of trust that there seems to be between the Defendant and the Claimants.

114. In view of the risk that the Defendant would for his own reasons not act in a way under option (a) or (b) that would save the Club, the Claimants had proposed that I go further and order the sale of the club to Axis or take other steps to put control of the Club into the hands of Axis or on temporary basis. I was urged to use the court's powers in CPR rule 25.1(1)(c)(v) to resolve the impasse.

115. CPR rule 25.1(1)(c)(v) provides that

> "*[t]he court may grant the following interim remedies— ... an order— ...for the sale of relevant property which is of a perishable nature or which for any other good reason it is desirable to sell quickly*".

116. At that point, it was unclear whether Mr Power would want to continue funding the Club until the substantive claims are settled or whether he might consider a sale and of the pre-emption rights. This application was adjourned while he considered his position and directions were given for him to state his intentions by 28 May 2021.

117. In the event, Mr Power did not do this, but instead serve the Transfer Notice, which may be taken as an indication that he wished to sell. Since then, however, the court understands that he has sought to withdraw the Transfer Notice, and he has indicated (but not stated clearly) in a later witness statement that he wishes to continue funding the Club at least until the conclusion of the trial, which is now set down for early September.

118. The Claimants have renewed the Quick Sale Application and Mr West has pressed this point at this latest hearing. He has drawn the court's attention to the financial information previously submitted by Mr Power at the hearing in April, which showed the finances of the group headed by SR20 to be in a parlous state and to an earlier witness statement by Mr Power where he stated that he was unable to continue supporting the Club. He points out that Mr Power has not been clear about his intentions regarding the Club and has not produced any evidence about his ability to continue supporting the Club for the foreseeable future to contradict his earlier evidence.

119. It may be thought that having found that the Acceptance Notice was valid, that the Court does not need to make any further order as a sale should proceed under the pre-emption provisions in the Articles, and that remains my expectation. However, Mr West has asked the court to anticipate that Mr Power will not accept this and will create further delay, during which the Club's finances (and sporting prospects) will continue to decline. He turns around the argument with the question why should Mr Power not be made to sell his shares when he is clearly willing to sell them, but merely wishes to choose who should be the buyer?

120. I agree with Mr West that the evidential position as to Mr Power's intentions and means remain unsatisfactory. Ms Thornley has invited the court to rely on the fact that Mr Power has supported the Club up to now, but that is not by itself a reason to assume that he is able to bear the considerable expenses of the Club which the court heard in April are likely to require payment in the next few months, particularly in circumstances where his previous evidence, and some public statements, raise questions about this.

121. The finances of the Club may also be worsened if a potential boycott of season tickets that is being arranged by what appears to be a substantial section of the fan-base gains traction.

122. Countering this, Ms Thornley has advanced the argument that the fact that the trial is now listed for September this year, (when previously it was listed for the second part of

next year) substantially changes Mr Power's attitude to his willingness to continue funding. Mr West points out, however, that it is difficult to see the logic for this because even if Mr Power wins against Mr Standing in September he will still be unable to sell his shares to AC Sports and will still face a choice between continuing to fund the Club or selling his shares under the pre-emption rights.

123. More broadly, Ms Thornley asks the court to accept that he loves the Club and would not allow its demise. Mr Power has managed to arrange for the Club to be funded for a considerable time and there is no reason to believe he will not be able to do so. These protestations are reassuring but the court does not have a sound basis for relying on them when it considers the previous financial evidence that Mr Power had adduced for the April hearing, and his request then to be allowed to put the Club into administration if the court would not agree to his preferred application to sale to AC Sports.

124. Mr Power strongly resists this application and in her skeleton argument and in oral argument Ms Thornley has emphasised the Draconian nature of the remedy CPR rule 25.1(1)(c)(v) and has raised various arguments as to its applicability and appropriateness in the current circumstances.

125. There was no time to explore these arguments and the case law during our one-day hearing and I do not propose on this occasion to run through these arguments, but certainly I accept the broad thrust of the proposition that the court needs to be very careful about using this power, and I am loathe to make an order in a position where I do not have up-to-date financial information as to the financial position and prospects of SR20 and the Club, and as to Mr Power's commitment and ability to support it and also when it seems that the matter should be resolved anyway by the Transfer Notice that has been served.

126. Nevertheless, on the financial evidence that the court has seen there seems to be a real possibility that SR20 and the Club may not be adequately funded to continue trading unless Mr Power is prepared to do this. I am not, therefore, able either to dismiss this

application outright, or to grant it, and reluctantly I can only suggest an adjournment while further information is sought, and I will make an order for Mr Power to produce suitable financial information to show the prospective resources and expenditure of SR20 and the Club and to confirm his willingness and means to support this.

F. TIMETABLE TO TRIAL

127. With regard to the proposed timetable for the trial that is now listed for 6 September 2021, amendments will need to be made to the arrangements that were determined at the case management conference that was held on 2 February 2021 and to the order made by Master Pester that envisaged witness statements being served on 1 October 2021 ahead of a trial window between 1 December 2021 and 31 March 2022.

128. I have requested that the parties discuss and attempt to agree a timetable for the outstanding steps to the trial of this matter now listed to commence on 6 September 2021 and I will make an order accordingly. Those matters include disclosure, witness statements and any necessary forensic expert accountancy evidence.

129. Progress on these points should be reviewed at an adjourned hearing, which shall also consider, to the extent necessary, any permission for expert evidence and any consequential amendments to costs budgets which may be required and such other matters as may be included in an order which I will settle.

G. THE INJUNCTIONS

130. Two injunctions remain in force:

    (a) The injunction originally obtained by Mr Standing on 22 November 2019, prohibiting Mr Power from selling or otherwise dealing with or disposing of his shares in Swinton Reds. At an *inter partes* hearing at the return date, on 6 December 2019, the injunction was extended to continue until trial or further order. In May 2020, Mr Power made an application for fortification of Mr Standing's undertaking which was dismissed. This injunction was amended at the May

Hearing to allow Mr Power to sell the shares he is holding in SR20 in accordance with the pre-emption rights, or to sell to Axis according to private agreement (the **"Amended 2019 Injunction**").

(b) On 31 March 2021, Mr Standing obtained an injunction (the "**2021 Injunction**") prohibiting Mr Power from: (a) taking steps to put SR20 and its subsidiaries into administration; and (b) from using the resources of STFC to pay the debts of STFC, other than short-term debts, without the permission of the Court or the express written permission of Mr Standing. The 2021 Injunction also required Mr Power to notify Mr Standing of all invoices of other demands falling due between service of the injunction and 14 April 2021, and other information reasonably necessary for Mr Standing to perform his undertaking to meet the working capital requirements of STFC. At the May Hearing, the 2021 Injunction was continued.

131. These injunctions remain in force and for the avoidance of doubt shall remain in force until any further order of the court. The financial implications of these injunctions as they relate to the provision of financial support to SR20 should be reviewed at an adjourned hearing.