

THE HIGH COURT

[2022] IEHC 416

[2021/29 COS]

IN THE MATTER OF BELLVUE PORT SERVICES (WATERFORD) LIMITED

AND

IN THE MATTER OF SECTION 173 OF THE COMPANIES ACT 2014

BETWEEN

TOUGHER OIL DISTRIBUTORS

APPLICANT

AND

AMBER PETROLEUM UNLIMITED COMPANY AND FITZGERALD OTTO 2019

UNLIMITED COMPANY

RESPONDENTS

JUDGMENT of Ms. Justice Butler delivered on the 1st day of July, 2022

Introduction

1. This judgment deals with the applicant’s application under s. 173 of the Companies Act 2014 for rectification of the register of members of Bellevue Port Services (Waterford) Ltd (“the company”) by entering the name of the applicant as the owner of 50 ordinary shares in the company (“the disputed shares”). Additional relief is sought directed at setting aside decisions made by the directors of the company reflected in correspondence issued by the solicitors for the respondents on 8th and 12th February 2021. Although I will refer to this correspondence in due course, it does not seem to me that the additional

relief adds anything to the claim overall. If the applicant succeeds in establishing an entitlement to the rectification of the register in the manner sought, the contents of the correspondence will become largely irrelevant.

2. The applicant is opposed by the respondents both substantively and also on a number of procedural grounds. The respondents contend that the application is improperly constituted because the company is not named as a respondent. The respondents also assert that the first respondent (Amber) should not have been included as a respondent because it is no longer the holder of the disputed shares. It is contended that the relief sought is not suitable for summary disposition on affidavit. In order to understand the substantive dispute between the parties, it will be necessary to look at the history of interactions between them in some detail.

3. In brief, the respondents claim that Amber accepted an offer to purchase the applicant's shares which, under the terms of a shareholders' agreement entered into between those two parties, was deemed to have been made on the applicant entering into examinership in November 2012. The respondents claim that a sum of €50 was paid for the shares and that the cheque and a completed stock transfer form were sent to the examiner in January 2013. Through inadvertence and because at that time the shares had no value, the stock transfer form was not registered until 2021. Nonetheless, the respondents contend that Amber has been the beneficial owner of the shares since 2013. Amber has since transferred its entire shareholding in the company to Otto, the second respondent.

4. The applicant disputes the respondents' claim on two main grounds. Firstly, the applicant contends that the conduct of Amber since 2013 is not consistent with the claim it now makes to have purchased the shares. Instead, for a number of reasons, its conduct is more consistent with a belief that the applicant remained the owner of the shares. Secondly, the applicant argues that the purported purchase of its shares in the company in 2013 did not comply with the terms of the shareholders' agreement on foot of which

the purchase allegedly took place. Consequently, the applicant asserts that the purchase relied on by the respondents was of no legal effect.

5. In looking at these issues, I propose to set out a chronological history of the company and of the interactions between the parties as regards the company. In the context of this chronology, it will be necessary to examine the relevant provisions of the shareholders' agreement under which the purported transaction took place. I will consider the procedural issues raised by the respondents and then, if appropriate, I will determine the substantive issue as regards the ownership of the disputed shares.

History of Interactions Between the Parties

6. The company was incorporated on 11th December 2006. As its name suggests, it was intended to be the vehicle for a joint venture between the applicant and Amber for the development of an oil terminal/storage depot for the transport of oil through the port of Waterford. The incorporation of the company was accompanied by the applicant and Amber entering into a shareholders' agreement on 22nd December 2006. Under the shareholders' agreement, the total issued share capital of the company was 100 shares and each of the applicant and Amber held 50 shares. Under a subsequent amendment to the shareholders' agreement provision was made for the conversion of a shareholder's shares from ordinary to preference shares in the event that the shareholder was unable to discharge their financial obligations under the agreement.

7. The joint venture progressed and, in April 2007, the company acquired for the sum of €6,500,000 approximately 36 acres of land at Waterfront Port for the intended development. The purchase price and associated costs were funded primarily by a bank loan. As the company was not trading and had no income, each of the shareholders advanced funds to the company to enable it to discharge its obligations under the loan. Clearly, the timing was not auspicious and, shortly after the purchase of the site, the country suffered an economic crash and went into recession. Although the agreement was that funding was to be

advanced by both shareholders, by 2011, the applicant was unable to meet its obligations and stopped making monthly repayments. Amber continued making payments until the loan was repaid in full in 2021.

8. The difficulties experienced by the applicant were not limited to making repayments on this loan. In his affidavit, Mr. Fitzgerald, formerly a director of Amber and currently a director of Otto, states that, in June 2011, he was advised by a former director of the applicant (Mr. Tougher) that the applicant's assets had come under the control of NAMA and other banks. Ultimately, an examiner was appointed to the applicant in October 2012, which appointment was confirmed by court order in November 2012. The respondents claim that the appointment of the examiner triggered a provision in the shareholders' agreement under which the applicant was deemed to have offered shares in the company for purchase by Amber and that Amber accepted that offer. I will return in a moment to the relevant terms of the shareholders' agreement and the steps taken by the parties. At this point, it is relevant to note that Mr. John O'Regan, a director of the applicant and the deponent of its affidavits in this application, acquired an interest in the applicant following the conclusion of the examinership (which ended on 19th February 2013). Mr. O'Regan avers that "*that asset*" – which I have taken to mean the applicant's shares in the company which, in turn, owned the property at Waterford Port – formed part of the reason for his investment in the applicant. The court has no information as to when the former principal of the applicant divested himself of his shareholding in the applicant or ceased to be a director of the applicant. The respondents complain that the applicant has not put any material from the examinership before the court and, consequently, that the court cannot draw any conclusions as to the outcome of the examinership including as to Mr. O'Regan's investment in the applicant.

The Shareholders' Agreement

9. The terms of the shareholders' agreement entered into between the applicant and Amber are significant. This agreement was intended to govern the relationship between the shareholders in circumstances where both would be required to make significant and continuing investment in the company before the purpose of the joint venture could be achieved. The object of the company is described at clause 3 of the agreement as being the development of an oil terminal/ depot for the transport of oil through the port of Waterford. Under clause 8, the applicant agreed to provide security for the purchase of the site equivalent in value to the security already provided by Amber in default of which the applicant's shares would be converted from ordinary shares to redeemable preference shares without attendant voting rights. The shareholders were thereafter entitled but not obliged to provide funding to the company. At the time of the agreement, under clause 5 the directors were identified as being Mr. Fitzgerald of Amber and the then-principal of the applicant, Mr. Thomas Tougher.

10. One of the difficulties with the shareholders' agreement is that it is very badly drafted such that the intended meaning of some of its clauses is not just ambiguous but impossible to discern. Apart from clause 11 which is central to this application, this is unfortunately also the case as regards clause 7 on which the applicant relies to complain about the more recent transfer of shares from Amber to Otto. It appears that clause 7 is intended to designate certain transactions as "*restricted transactions*" and to make those transactions subject to certain limitations or additional procedural requirements. However, the introductory part of the clause makes little linguistic sense. It reads as if a number of subclauses were inadvertently omitted and nobody proof-read the document - or even read the document - before signing it. The applicant says that clause 7.5 precluded Amber from parting with the material part of its undertaking, property or assets other than in the ordinary course of business without the prior consent of both shareholders. It may well be that this is what clause 7 was intended to achieve but I am far from

convinced that it actually does so to a sufficient extent to allow the court to interpret it in that manner. Apart from anything else, the introductory part of clause 7 appears to be intended to impose restrictions on “*the company*” and “*its subsidiaries*”. Amber, as the disposing party of its shares in the company, is neither the company nor a subsidiary of the company and, thus, is not clearly caught by whatever restrictions clause 7 was intended to impose.

11. Clause 11, dealing with the transfer of shares, is central to the dispute between the parties. The first four subclauses, which I do not propose to set out in full, establish a detailed mechanism for the transfer of shares under which a shareholder intending to sell all or part of its shareholding is obliged to offer those shares to the company and the other shareholders at a discounted price. This process is initiated by the proposed transferor serving a transfer notice on the company and the other party under clause 11.1. If the parties cannot agree a price within 30 days, reference can be made to the company’s auditors to determine the value of the shares (clause 11.1.1). Clause 11.1.2 sets out the basis on which the valuation is to be prepared and then provides for a 30% discount on that value. Subsequent to the auditors advising all concerned of the valuation, there is a fourteen-day cooling off period within which the intending transferor can withdraw the transfer notice and the transferee also has fourteen days within which to accept the valuation and to confirm that they will purchase the shares (clause 11.2.1). If neither the company nor the other shareholders agree to purchase the shares within this fourteen-day period, the transferor may then sell the shares on the open market (clause 11.2.2 and 11.2.3). Under clause 11.3.1, payment for the shares must be made 28 days after the price being agreed and, on the same date, the transferor must execute a stock transfer form in favour of the purchaser and hand over the share certificates and other relevant documents. Registration of any purchaser who is not already a shareholder is made subject to the execution by that person of a deed of adherence to the shareholders’ agreement (clause 11.3.2)

12. Notwithstanding this process, under clause 11.4 *“the directors may, in their absolute discretion, and without assigning any reason therefore, decline to register any transfer of any share, whether or not it is a fully paid share”*. Thus, separate to any agreement as to the transfer of shares that might be reached by the shareholders or as between a shareholder and a third party as to the transfer of shares in the company, the directors of the company may refuse to register the resulting transfer. This effectively gives the directors of the company a final say over the ownership of shares in the company.

13. Under clause 11.5, in certain circumstances, a corporate shareholder will be deemed to have offered its shares for sale. The clause reads as follows: -

“Upon the insolvency or upon a liquidator, receiver or examiner being appointed over the assets of any corporate shareholder, such shareholder shall be deemed to have served a transfer notice immediately before the appointment of such liquidator and the provisions of this section shall apply to such shareholder’s shares save only that the period of 14 days specified at clause 12.3.1 shall be extended to a period of three months and the proceeds or amounts payable in respect of such shares shall be paid to the liquidator.”

Clause 11.6 deals with equivalent circumstances in which a personal shareholder will be deemed to have offered their shares for sale and is not relevant to the factual position in this case. Clause 11.7 then provides: -

“The company shall not register any transfer made in breach of this agreement and the shares comprised in any transfer so made shall carry no rights whatsoever unless and until, in each case, the breach is rectified.”

Finally, clause 11.8 obliges the parties to the agreement to co-operate and to do all things necessary to give effect to the shareholders’ agreement concerning the transfer of shares including the registration of

such transfer by convening a meeting of the board of directors of the company to approve and register each such transfer of shares.

14. It is readily apparent from a close reading of clause 11.5 under which the disputed transaction is alleged to have taken place, that it is fraught with difficulty. Firstly, the first line indicates that the trigger for the operation of the clause will be the insolvency or the appointment of a liquidator, receiver or examiner over the assets of any corporate shareholder. However, the balance of the clause deals only with the appointment of a liquidator providing that the shareholder in question will be deemed to have served a transfer notice immediately before the appointment of the liquidator and the amounts payable for the shares will be paid to the liquidator. Thus, there is no express provision for how the clause is to work in the event of it being triggered by the appointment of a receiver or an examiner. Further, despite the reference to the period of fourteen days specified in clause 12.3.1, there is in fact no clause 12.3.1 in the shareholders' agreement. The respondents argue that this is clearly an error and should be read as a reference to the cooling off period in clause 11.2.1 which, it is contended, is to be extended from fourteen days to three months.

The Disputed Transaction

15. Reverting to the history of interactions between the parties, on 14th November 2012, subsequent to the appointment of an examiner to the applicant on 31st October 2012, Amber's then-solicitor wrote to the examiner invoking the provisions of clause 11.5 of the shareholders' agreement and accepting the applicants deemed offer for sale of its shares.

16. The solicitor suggested that the parties should agree that the shares had a nil or par value and advised that, in default of agreement, Amber would request the company's auditors to complete a valuation and report back to the parties. The exhibited material does not indicate what, if any, response

was received from the examiner. However, the matter was referred to the auditors who reported by letter dated 8th January 2013 that as the property at Waterford Port, being the only asset of the company, was valued at 50% of its cost it was in negative equity and the company had a deficiency of assets. Consequently, the view of the auditors was that the shares had a nil value. On 29th January 2013, Amber's solicitor wrote to the examiner again enclosing the auditor's report and a cheque for €50 dated 7th January 2013 payable to the applicant and a share transfer form to be completed on behalf of the applicant. The amount of the cheque is not related to the valuation as it reflects the par value of the shares without a 30% deduction. Mr. Fitzgerald, a director of both respondent companies, has deposed on affidavit that Amber's then-solicitor (who is not the same solicitor currently acting on behalf of the respondents) received the completed stock transfer form on 19th February 2013. The exhibited form which is completed and signed by Mr. Thomas Tougher, then a director of the applicant, is undated. Extracts from Amber's bank statements are exhibited which show that a cheque for €50 bearing the same reference as the cheque made out to the applicant was lodged on 20th February 2013 and that amount was debited from Amber's account. Mr. O'Regan on behalf of the applicant contends that the stock transfer form was not legally executed on behalf of the applicant and that the €50 was never received by the applicant. Mr Tougher resigned as a director of the company in September 2011.

17. In normal course, subsequent to the steps outlined above, it would be expected that Amber would no longer treat the applicant as having any interest in the company. However, this is not what happened. Instead, in July 2013 annual returns were filed on behalf of the company up to 11th June 2013 listing the applicant as the owner of 50 shares in the company. This return was signed by the directors of the company including Mr. Fitzgerald. Similar returns were filed for each year between 2014 and 2020. Further, in February 2015, a special resolution was passed by the company converting the 50 shares nominally held by the applicant from ordinary shares to redeemable preference shares which did not carry the same voting

rights attached to ordinary shares or any entitlement to dividends. Despite this change being submitted to the CRO, the annual returns filed subsequent to that date still show the applicant as the owner of 50 ordinary shares, rather than redeemable preference shares. However, the applicant was not informed of the sale of the company's property which took place in 2019. The sale realised a sum of €3,400,000 – a considerable shortfall on the amount borrowed. The proceeds of sale were paid to the bank and Amber paid the outstanding balance so as to fully discharge the loan.

18. The most recent interaction between the parties, which ultimately triggered this application, was a letter from Amber to the applicant dated 16th November 2020 notifying the applicant of Amber's intention to transfer its shareholding in the company to Otto. The reason for this was a proposed sale of shares in Amber to a UK based oil distributor. It was a condition of this sale that any companies not carrying out the core business of fuel sales had to be transferred out of the Amber group before the completion of the transaction. The letter clearly stated that the company had sold the land at Waterford Port at a loss and was carrying a large deficit on its balance sheet. The letter then proceeded to invoke clause 11.5 of the shareholders' agreement as follows: -

“According to clause 11 of the shareholders' agreement, should a shareholder of Bellvue wish to sell/transfer or otherwise dispose of their shareholding the transferor is obliged to first offer its shareholding to the other shareholders of the company. This letter shall constitute the 'transfer notice' informing you of the intention of Amber to transfer its 950 ordinary shares of €1 each in Bellvue (the Amber shares) to Fitzgerald Otto at par value.”

It is clear from this letter that Amber regarded the applicant as a shareholder in the company as of November 2020. It is unclear whether the reference to 950 shares is an error or if Amber, in the intervening period, had issued additional shares to itself. The letter concluded by stating: -

“Alternatively, should you wish to sell the Tougher shares, Amber would be willing to acquire such shares at their par value.”

19. This correspondence appears to have led to discussions between the applicant and Amber on the basis that both were shareholders in the company. Those discussions did not lead to an agreement on the price at which the applicant would purchase Amber’s shares. Consequently, on 29th January 2021, Amber wrote to the applicant advising that it was proceeding to get a valuation of the shares under clause 11.1.2 of the shareholders’ agreement or, alternatively, offering to sell the shares at par value less for 30% discount (which was ultimately the price paid). The figure quoted was €665 indicating Amber’s belief that it held 950 shares. This prompted a response from the applicant on 1st February 2021 in which issue was taken with the number of shares Amber wished to dispose of and with the disposal of the company’s property without the applicant’s knowledge or consent. The applicant requested that it be provided immediately with information including copies of the minutes of board meetings, monthly management accounts, resolutions passed by the company, details of the loan repayments and current balances and all documentation in relation to the sale of the property. This was followed up on 3rd February 2021 by a solicitor’s letter noting with concern the disposal of a company’s asset without notice to the applicant, extending the period within which the information was to be provided and threatening litigation.

20. Some days later, on 8th February 2021, Amber’s solicitor sent a letter in which an entirely different approach was adopted. Following consultation with Amber’s former solicitor, it was now contended that Amber had purchased the applicant’s shares in 2013 on foot of a transfer notice deemed to have been sent under clause 11.5 of the shareholders’ agreement when an examiner was appointed to the applicant in October 2012. The letter enclosed copies of some of the relevant correspondence dating from 2012/ 2013 and of the cheque, the stock transfer form and extracts from Amber’s bank statement. The letter explained that due to the fact the company was a loss-making entity at the material time, *“administrative matters”*

were not attended to and no formal steps were taken to formally update the ownership of the company either in its own records or in the public record. The letter acknowledged that the steps taken in February 2015 to convert the applicant's shareholding in the company into redeemable preference shares were unnecessary and had been taken on Amber's behalf by different advisors. Finally, the letter noted that Amber had now presented the stock transfer form to the company for approval, had updated the register of members and that the entire issued share capital in the company had been transferred by Amber to Otto.

21. Unsurprisingly, the applicant's solicitor replied immediately taking issue with Amber's change of position. He argued that the purported transfer was invalid for a number of reasons including the fact that there was only one signature on the stock transfer form, that the directors had not accepted the transfer and, more generally, due to the efflux of time. He pointed to the accounts and returns which had been submitted by the company in the intervening period showing the applicant as a shareholder.

22. These arguments proceeded to be played out in a further exchange of correspondence concluding on 18th February 2021. I do not propose to set out the detail of all of this correspondence. The key points made by Amber were that, notwithstanding the failure to re-register the disputed shares until 2021, from the point at which the cheque was cashed they were held by the applicant on trust for Amber and the applicant no longer had any beneficial interest in them. It was suggested that the applicant should take the matter up with either the examiner or with Mr. Tougher, the director who signed the stock transfer form. It was argued that the fact the directors of the company took no steps to register the transfer cannot be deemed to be a refusal to register a transfer when the transfer had not been formally presented to the company. The applicant pointed out that Mr. Tougher was no longer the controlling shareholder of the applicant at the time he signed the stock transfer form and that he had no involvement at all with the applicant at the time the stock transfer form was registered. The applicant contends that the €50 paid by Amber for the disputed shares was never lodged to the company's account. The applicant also continued

to raise issues regarding the writing off of the loan made by the applicant to the company and the sale of the lands by the company.

The Form of the Proceedings

23. On 24th February 2021, these proceedings were issued by way of originating notice of motion grounded on an affidavit of Mr. O'Regan seeking an order under s. 173 of the Companies Act 2014 rectifying the register of members of the company by the entry of the applicant's name as the owner of 50 ordinary shares together with various ancillary relief. I will consider the scope of the court's jurisdiction under s. 173 further below. The form of the proceedings has been challenged by the respondents on two different grounds. The first has to do with the suitability of the application for summary disposal on affidavit; the second with the joinder and non-joinder of parties.

24. The application was made by way of originating notice of motion on the basis that *prima facie* it is one which falls within O. 75, r. 3 of the Rules of the Superior Courts. Order 75 deals with proceedings under the companies legislation not relating to winding up and r. 3 captures all applications under the Companies Act 2014 save for *ex parte* applications and applications in respect of which separate provision is made in O. 74, O. 74A or O. 74B. It seems fairly clear that an application under s. 173 of the 2014 Act comes within the scope of this rule. The language of the rule ("*shall be made by originating notice of motion*") suggests proceeding in this manner is mandatory. Thus, I do not think that the applicant can be criticised for having initiated this application by way of originating notice of motion which necessarily carries with it an assumption that the application is suitable for summary disposal.

25. This is not, however, the end of the matter. Order 75, rule 4 provides for the possibility of an application for directions in any case where an originating notice of motion is issued under r. 3. Under r. 4(3), the court has express jurisdiction to direct a plenary hearing in the matter where the court considers

it necessary or desirable in the public interest to do so and it has an ancillary power to direct the exchange of pleadings and the setting of the issues between the parties. Thus, a matter under the Companies Act 2014 may be properly commenced by way of originating notice of motion under O.75, r.3 and thereafter converted to a plenary hearing if it is unsuitable for summary disposal. Neither side sought such directions in this case. Equally, no notice to cross-examine was served by either side on the other side's deponent.

26. Instead, the respondent contended from the outset (i.e. in the first affidavit sworn on their behalf by Mr. Fitzgerald) that the reliefs sought were not suitable for summary disposition. The argument made on affidavit distinguished between the first two reliefs sought in the notice of motion (being orders dealing expressly with the company's register of members) and the third and fourth relief which are directed more generally at the rights of the parties in the company *inter se* and the propriety of the actions taken by the company to complete the registration of the transfer in February 2021. The argument made at the hearing and in the written submissions filed prior to hearing is more general, conceding only that the first relief fell within the scope of O. 75, r. 3, and contending that the affidavit evidence demonstrated "*considerable factual disputes (and shortcomings in the evidence)*" such that it could not properly be determined by the court on a summary basis.

27. To my mind, there are two discrete issues raised here. The first concerns the alleged existence of factual disputes arising on foot of each side's affidavits and the second concerns an evidential deficit due to the non-exhibiting of material the respondents regard as essential to the fair determination of the case. I accept that, as a matter of general principle, a summary jurisdiction should not be invoked where there is a substantial dispute as to fact (per *Halsbury's Laws of England Volume 14* at para. 354). Of course, the extent to which there is a factual dispute will not always be apparent to the party initiating proceedings and it may only be possible to assess this when replying affidavits have been received from the other side.

28. The matter was addressed in an application with some similarities to this by Baker J. In *Re Park Magic Mobile Solutions Ltd* [2017] IEHC 287 as follows: -

“60. Under s. 173 a court can determine questions of the legal and beneficial ownership of the shares. It is within the competence of a court hearing an application under s. 173 to direct the rectification of the share register to reflect as legal owners the persons who have a beneficial interest in the shareholding. The application by its nature is by originating motion and grounded on affidavit or affidavits. As with any application on affidavit a court cannot resolve disputed issues of fact in the absence of cross-examination, but it is easy to envisage difficulties that might arise even were cross-examination to take place as the application by its nature is summary in form, and would admit of the type of application where a court might have to construe documents or resolve legal argument....

65. An application under s. 173 is an attractive and cost effective way of determining questions of title, and in general it would seem that the legislation does not envisage a court refusing to exercise its jurisdiction save in circumstances where it found itself unable to resolve the matter by summary application. This application is one such. The complexity of the evidence highlights what I believe to be the true dispute between the parties. Leaving aside the role that E-Code might take as a member or a putative member, there is a significant and ongoing dispute between the current members of the Company, and those claiming to be members. That dispute cannot be resolved in this application. The question of the beneficial ownership of the shares is one between these applicants and E-Code.”

Whilst Baker J. was critical of the evidence before her and the absence of more complete details of certain key matters, it is interesting to note that (at para. 70 of the judgment) she ultimately reached the conclusion

that she was not satisfied on the facts before her that the company had wrongly registered the putative purchaser as the owner of the shares and consequently refused to make the order requested under s. 173.

29. I agree with the statement of principle in para. 60 of Baker J.'s judgment as quoted above. However, it is clear from para. 65 that the question of whether affidavits disclose a dispute incapable of summary resolution (even with the benefit of cross-examination on those affidavits) is very much dependent on the asserted facts of each case and the evidence adduced to support or contest those facts. I note also that she also refers to a court declining to exercise its jurisdiction under s.173 in a summary application only where it is unable to do so. There is quite a difference between it being preferable that an application be heard on oral evidence and the court being unable to resolve it because it is not. I described *Re Park Magic Mobile Solutions Ltd* as a case with some similarities to this. Although it also involved an application to rectify the register of members of a company under s. 173, a key difference is that it concerned an executory contract on foot of which payment for the shares had not been made. There were significant disputes between the parties as to the terms of the contract, whether the purported purchasers actually intended closing the sale and the reasons why the purchasers had not paid the agreed consideration.

30. Here, the level of factual dispute is significantly less. The documentary evidence provided by the respondents' solicitor under cover of his letter dated 8th February 2021 is not seriously disputed. Indeed, it could not be seriously disputed by the applicant, especially in circumstances where the applicant's deponent has no personal knowledge of these matters not having had an interest in the applicant at the material time. Instead, the applicant makes legal arguments as to the validity of the transaction evidenced by those documents and the effect, if any, of the efflux of time between the actions evidenced by the documents and the registration of the transfer in 2021. The only factual issue which could arguably be said to arise is whether the cheque – made out in the name of the applicant – was cashed by a third party

on the basis that there is no corresponding lodgement to the applicant's account. However, in my view, this is not really a dispute as between the parties before the court. The applicant cannot dispute the respondents' evidence as set out on affidavit by Mr. Fitzgerald who was a director of Amber at the material time and supported by documentary evidence. This evidence establishes that having invoked clause 11.5 of the shareholders' agreement and obtained a valuation from the auditors, Amber paid for the shares it intended to purchase by a cheque made out to the company and sent to the examiner which cheque was subsequently cashed and the amount debited from Amber's account. If there is an issue as to what transpired with that cheque subsequent to its receipt by the examiner, that is a matter between the applicant and either its former director or the examiner. Consequently, I do not think that this is a factual dispute which renders this application incapable of summary disposal.

31. This leads to the second issue which is the alleged deficit of evidence on key matters. During the course of the hearing, the principal absence identified was of evidence relating to the examinership which was both the trigger for the invocation of clause 11.5 and which was ongoing when the steps described above were taken. The court has no knowledge of the assets of the applicant in examinership nor of the scheme of arrangement which may have resulted nor of the role of Mr. O'Regan in that scheme or in acquiring an interest in the applicant at the conclusion of the examinership. Whilst Mr. O'Regan has stated on affidavit that "*that asset*" (meaning, presumably, the applicant's shares in the company and the company's ownership of the lands at Waterford Port) formed "*part of the reasons*" for investing in the applicant, the court has no information as to the extent of that investment and the value of the lands nor the value placed on the applicant's share in the company at the material time nor, crucially, the extent of the applicant's other assets which, presumably, also formed part of Mr. O'Regan's reasons for his investment. It has to be borne in mind that this is, of course, an application brought by the applicant and not one brought by or on behalf of Mr. O'Regan. The court has no knowledge of what view, if any, was

taken by the examiner of the consideration offered by Amber for the purchase of the applicant's shares in response to the deemed transfer notice. In circumstances where the company was heavily indebted at the time and the property was in negative equity, the court cannot make any assumption that the applicant's shares in the company were regarded as a valuable asset.

32. For the sake of completeness, I should note that the respondents also criticise the absence of evidence relating to the books and records of the applicant, both generally and more specifically, the absence of evidence from those records to show that the applicant considered itself the owner of the disputed shares at any time post-2013. Equally, it was pointed out that there was an absence of evidence to show that either the applicant or Mr. O'Regan had taken any part in the affairs of the company post-2013. The respondents characterised these absences as being relevant to the estoppel argument raised against them by the applicant based on the continued filing of returns in the CRO showing the applicant to be a shareholder in the company. I will return to this in due course.

33. To a certain extent, both parties rely on the absence of potentially relevant evidence. The respondents rely on it fundamentally to say that the applicant has not made out its case. The applicant in reply asserts that the respondents must prove the facts on which they rely for their defence and argues that there is insufficient evidence before the court to show that clause 11.5 was properly complied with. I do not think that a shortfall of evidence on any issue prevents the application being disposed of on a summary basis. Whilst it is certainly possible that further evidence might be led at a plenary hearing, as neither side sought a plenary hearing, the application must stand or fall on the basis of the evidence that is before the court. I anticipate that this will impact more heavily on the applicant which is the moving party in the application and which bears the onus of proof. Whilst it is undoubtedly correct to observe that the respondents must prove any defence on which they will rely, this will only arise if I am satisfied on a *prima facie* basis that I can make the order sought on the basis of the evidence before the court.

34. In conclusion as regards this aspect of the respondents' preliminary objection, I am of the view that the application can be properly and fairly disposed of on a summary basis. The circumstances of the case are such that the documentation exhibited by the respondents is not, and in reality could not be, disputed by the applicant. There are certainly significant legal disputes between the parties but, for the reasons explained above, there are not factual disputes of any moment. I agree with the respondents' view that the applicant has not put all potentially relevant evidence within its procurement before the court. This may have a bearing on the applicant's ability to discharge the onus upon it to satisfy the court of the matters required under s. 173 (as indeed it did in *Re Park Magic Mobile Solutions Ltd.*) but this is not a reason for dismissing the application *in limine*. Equally, although I have not reached a concluded view as to whether the respondents have failed to put the necessary evidence before the court to establish their defence, any failure to do so on their part will go to the proof of that defence rather than the court's jurisdiction.

Proper Parties to the Application

35. The second element of the respondents' preliminary objection concerns whether the parties before the court are proper parties to the application. The respondents contend that Amber is not a proper party as, at the time the proceedings were issued, it no longer held any shares in the company. It seems to be accepted that Otto is a proper party, having acquired Amber's shareholding before the proceedings were issued. I note that Amber and Otto are related companies and the deponent on behalf of the respondents, Mr. Fitzgerald, is a director of both. Further, Otto is a company which appears to have been incorporated (or perhaps acquired) for the sole purpose of acquiring Amber's shareholding in the company. In any event, in circumstances where there appears to be a strong community of interest between Amber and Otto and both companies were represented by the same legal team, I do not consider that the joinder of Amber

in addition to Otto is a legal error or a matter which should have any bearing on the outcome of this application. In circumstances where the same lawyers act for both respondents, no additional costs have been incurred by reason of the joinder of Amber as well as Otto. In any event, the applicants are impugning the purported transfer by Amber to Otto of the disputed shares alongside the shareholding that Amber indisputably held in the company. In my view, at very least Amber is a proper respondent to that element of the case.

36. The second aspect of this complaint is perhaps more fundamental and relates to the non-joinder of the company itself. The respondents rely on the views of Dr. Courtney in his text, *The Law of Companies* (4th Ed.) at para. 9.072, that it is “*imperative that the company, whose register it is sought to have rectified, be joined as a party*”. The text cites a decision of the courts in New South Wales in *Auto Data v. Gibbons* (13th July 2000) SC which was not opened to the court. The respondents also relied on the statement in *Halsbury* (Volume 14, para. 354) that “*the proper respondents to an application to rectify the register are the company and the registered holder or holders of the shares whose registration is in question...*”. The authority cited for this proposition is the decision of Millet J. in *Morgan v. Morgan* [1993] BCLC 676.

37. The judgment in *Morgan* does not deal specifically with the joinder of the company to an application of this nature. Instead, it concerned the costs of an application to rectify a register following the refusal of the board of directors of a company to register the transfer of a share to the majority shareholder’s daughter. The majority shareholder brought an application in which the company and the other shareholders were named as respondents. The application itself was disposed of on consent in circumstances where the directors received legal advice that they could not refuse to register the transfer. The applicant then sought the costs of the application against the other shareholders whereas the shareholders wanted the costs of all parties to be borne by the company (of which the applicant was the majority shareholder). The propriety of the joinder of the company to the application was not in issue. The

costs judgment in the case from which the quotation in *Halsbury* as to the “*proper respondents*” to such an application is taken, proceeds from the starting point that the UK Rules of Court required, at a minimum, that a notice of motion seeking rectification be served on the company. The text of the relevant UK rule is not quoted in the judgment and it was not opened to me. Consequently, I am unable to treat the statement of Millet J. in *Morgan v. Morgan* as a statement of general principle as distinct from a statement based on the correct interpretation and application of rules of procedure which do not apply in this jurisdiction and which may differ from those which do apply here.

38. As previously noted, there is no specific rule setting out the procedure to be followed in an application under s. 173. Instead, such applications fall to be dealt with in the manner prescribed generally for applications under the Companies Act 2014 under O. 75 of the RSC. Order 75, rule 3 does not require that all motions issued under that rule name the company concerned as a party to the application. Instead, O. 75, r. 3(2) requires that “*copies of the originating notice of motion and any affidavit grounding the application (and any exhibits thereto) shall be served on the company...*”. The reference to “*copies*” is significant as the Rules normally require the service of originals rather than copies of pleadings on the parties to the proceedings unless the parties are outside the jurisdiction. A rule requiring the service of copies of the pleadings inferentially suggests the party on whom the copies are being served is not a mandatory party to the application.

39. When this issue was raised in the respondents’ initial replying affidavit, Mr. O’Regan swore a supplemental affidavit on 12th May 2021 in which he stated (at para. 19) that the company had been served with the papers. He exhibited certain correspondence which was subsequently received from the company dated 3rd March 2021 and signed by Mr. Fitzgerald in which no issue was taken with the non-joinder of the company to this application. I note that the exhibited correspondence does not itself deal with the application but, rather, with the loans which had been made by both the shareholders to the company and

the sale of the company's lands. In the same paragraph, Mr. O'Regan offers to make the company a party to the application provided that this does not lead to any delay in having the matter determined. In a final affidavit on behalf of the respondents, Mr. Fitzgerald did not reply specifically to the contents of para. 19 of Mr. O'Regan's affidavit saying instead that it would be addressed by way of legal submission.

40. Therefore, the factual position is that the company has been served with the application in accordance with O. 75, r. 3(2) although it has not been formally joined as a party. No issue has been raised by the company as to its non-joinder. On the issue being raised by the respondents, the applicant offered to join the company but the respondents did not accept, or indeed reject, that offer. Further, in this case, the entire issued shareholding in the company is currently held by Otto which is a respondent to the application.

41. I can certainly see the logic in requiring a company be joined as a party to any application concerning the rectification of its register of members. Any order for rectification will have to be given effect to by the company and, as a matter of general principle, if the company is required to comply with an order, it should be on notice of the application and afforded the opportunity to defend the application if it wishes to do so. The rules of court as currently framed are sufficient to ensure that a company will be placed on notice of any application brought under s. 173 of the 2014 Act potentially affecting its register of members. The provisions of O. 75, r. 4 under which the court may give such directions as it thinks fit specifically provide under O. 75, r. 4 (4) that the court can adjourn the hearing of any motion to allow parties to be notified. Presumably, any company which wished to be heard on an application of this nature and being on notice of the application by reason of the service effected under O. 75, r. 3(2), would be afforded that opportunity by the court before any order was made under s. 173.

42. Although there may well be circumstances in which it is appropriate that the company be formally named as a respondent to an application under s. 173 in addition to the shareholders whose shareholding

is in dispute, I do not think that this is such a case. In circumstances where the applicant expressly offered to join the company as a formal party to the application and the respondents declined to engage with that offer, I am of the view that the continued reliance on this point by the respondents is a purely technical strategy devoid of substantive merit.

Section 173 of the Companies Act 2014

43. Turning to the substantive application, s. 173 of the 2014 Act insofar as relevant provides as follows: -

“(1) If—

(a) the name of any person is, without sufficient cause, entered in the register of members or omitted from it, in contravention of subsections (1) and (3) of section 169, or

(b) default is made in entering on the register, within the period fixed by subsection (4) of section 169, the fact of any person’s 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) Where an application is made under this section, the court may either refuse the application or may order rectification of the register and payment by the company of compensation for any loss sustained by any party aggrieved.

(3) On an application under this section the court may decide any question relating to the title of any person who is a party to the application to have his or her 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.”

44. The respondents contend that the applicant, being the person aggrieved under s. 173(1), bears the burden of demonstrating that the order for rectification should be made. I accept that this is so largely because, in normal course, as the moving party, the applicant bears the onus of proof in the application which it has brought before the court. The respondents also point to s. 171 of the 2014 Act under which the register is *prima facie* evidence of the matters directed or authorised by the Act to be recorded in it. Relying on the presumption of the correctness of the register, the respondents argue that the applicant bears the onus of dislodging this evidential presumption. The latter argument would carry more weight were the actions of the directors of the company in completing the registration of the transfer in 2021 not themselves impugned in the proceedings. However, I regard this consideration as largely redundant because, in my view, the applicant bears the onus of proof in any event. The correctness of the register in this case depends on the validity of the steps taken to effect the 2013 transaction and not the registration of the transfer in 2021.

45. Secondly, it is accepted by both parties that the key matter of which the court must be satisfied is whether the removal of the applicant’s name from the register of members, or conversely, the entry of Amber’s name as the owner of shares transferred by the applicant, was done “*without sufficient cause*”. In this context, the applicant relies on what it characterises as being the *status quo* which pertained until February 2021 when all of the formal company documentation and the returns made to the CRO showed both the applicant and Amber as being the owner of 50 ordinary shares in the company. The applicant disputes the respondents’ contention that the rights purportedly exercised by Amber in 2013 constitute a

“*sufficient cause*”. Alternatively, the applicant argues that the respondent has not put evidence before the court to establish the steps taken to vest the shares in Amber. The respondents, in contrast, rely on their purchase of Amber’s shares in 2013 pursuant to a deemed transfer notice as having transferred the beneficial interest in those shares to Amber regardless of the fact that the shares were only registered in Amber’s name some eight years later in February 2021.

46. Essentially, the issue in this case nets down to the question of whether the steps taken pursuant to clause 11.5 of the shareholders’ agreement in 2012/2013 constitute “*sufficient cause*” to justify the removal of the applicant’s name from the register of members of the company, especially when considered in light of all of the circumstances, including the delay in registering the transfer and the continued returns to the CRO showing the applicant as a member of the company. In order to consider the adequacy and indeed the legal validity of the steps taken under clause 11.5, it will be necessary to construe the terms of that clause. As previously noted, this likely to present some difficulties.

47. The final matter to note in looking at s. 173 is the breadth of the jurisdiction conferred on the court under s. 173(3). The jurisdiction is not limited to the formalities of registration but allows the court to decide any question in relation to the title of any person to the shares, and any question necessary or expedient to be decided for the rectification of the register. The applicant describes s. 173(3) as conferring on the court “*a strikingly broad discretion*”. I am not certain that the subsection confers a discretion as such. The jurisdiction is undoubtedly broad but it is not necessarily a discretionary one. In my view, questions as to the title to shares must be determined in accordance with the applicable legal principles with the view of the court being relevant only to the sufficiency of the cause shown. By way of an aside on this issue, although I have dealt with the respondents’ preliminary objection as to the form of the proceedings on a different basis, it seems to me that the relief sought by the applicant regarding the decision of the directors to remove the applicant from the register of members as reflected in the solicitor’s

correspondence of 8th and 12th February 2021, is a matter within the scope of s. 173(3) as a matter or question necessary to be decided for the rectification of the register. By extension it is properly the subject of an application brought on foot of an originating notice of motion under O. 75 of the RSC.

Clause 11.5 of the Shareholders' Agreement

48. In order to determine whether the steps taken by the respondent under clause 11.5 are adequate and/or legally valid, it is necessary to consider what clause 11.5 requires. The full text of the clause is set out earlier in this judgment. Unfortunately, it is obvious that the clause has been very poorly drafted. Whilst the general intent and scheme of the provision is relatively clear, the precise manner in which it was intended to operate – especially where, as here, its operation is triggered by the appointment of an examiner – is difficult to discern. The intent of the clause is that in the event of the insolvency of a shareholder, that shareholder will be required to offer its shares to the company or the other shareholder on the terms applicable generally under clause 11. As noted, although the appointment of an examiner is listed as a trigger for the operation of clause 11.5, the clause does not mention examiner or examinership thereafter. The same difficulty arises in relation to the appointment of a receiver. The clause does not expressly provide for the point in time at which the transfer notice is deemed served in the event that its operation is triggered by the appointment of an examiner or indeed of a receiver. Thus, if clause 11.5 is read strictly, a transfer notice is deemed to have been served immediately prior to the appointment of a liquidator only and not prior to the appointment of an examiner. The deemed service of a transfer notice at a point prior to the commencement of a liquidation is legally significant as the commencement of the litigation itself may operate to restrict the ability of the company and/or its shareholders to deal with the company's shares.

49. The applicant argues for a construction of the clause which would render it inoperable due to the absence of any timeframe for the deemed service of the notice of transfer in the circumstances which have arisen. Essentially, the applicant's case is that notwithstanding the appointment of an examiner, in the absence of the appointment of a liquidator, no transfer notice was deemed to have been served. The respondents contend that the absence of any subsequent reference to receiver or examiner is clearly an error in a poorly drafted provision. Consequently, the subsequent reference to "*liquidator*" should be read as if it also referred to a receiver or examiner or, that subsequent references to a liquidator should be read more generally as references to an "*insolvency practitioner*". An immediate difficulty arises with this interpretation as that would mean the final portion of clause 11.5 would require payment for the shares to be made to the examiner.

50. There are major differences between the role of a liquidator, a receiver and an examiner. The role of a liquidator arises on the winding up of an insolvent company. The principal duty of the liquidator is to collect the assets of the company and to distribute those assets to the company's creditors in accordance with the relevant statutory priorities. An examiner, on the other hand, oversees a process where a company is placed under court protection whilst its affairs are scrutinised with a view to a scheme of arrangement being put in place to facilitate the survival of the company if it is potentially viable. If a payment is to be made to a company in liquidation, it is properly made to the liquidator and added to the pool of assets available for distribution to the creditors. However, the examiner of a company in examinership does not normally collect in the assets of the company nor take over the management of the company even during the period of the examinership. Consequently, an examiner would not normally receive any payment on behalf of the company. Thus, whilst it is logical to treat the word liquidator as meaning liquidator, receiver or examiner where it appears on the third line of clause 11.5, it is less logical to do so on the last line of that clause.

51. Both parties pointed the court towards similar material in relation to the proper construction of commercial contracts, the difference between them lying in how relatively settled principles should be applied in the particular circumstances. The leading Irish authority is the decision of the Supreme Court (Geoghegan J.) in *Analog Devices BV v. Zurich Insurance Company* [2005] 1 IR 274 approving the decision of Lord Hoffman in *ICS v. West Bromwich BS* [1998] 1 WLR 896. That judgment is seen as a key step in a movement from a purely textual approach to a broader contextual approach to the interpretation of commercial contracts. For present purposes, the principles recorded at paras. 1, 4 and 5 of the judgment of Lord Hofmann, approved by Geoghegan J. at p. 280 of the report of *Analog Devices*, are relevant: -

- “(1) *Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
- (4) *The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meaning of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must for whatever reason, have used the wrong words or syntax...*
- (5) *The “rule” that words should be given their “natural and ordinary meaning” reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless*

*conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v. Salen A.B.* [1985] A.C. 191, 201:*

‘If details semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense’.”

52. The more recent judgment of O’Donnell J. in *Law Society of Ireland v. MIBI* [2017] IESC 31 is to similar effect and the comments made by him at para. 12 of that judgment describing the role of the court in interpreting a commercial contract are relevant to this case: -

“Agreements are intended to express in a clear and functional manner what the parties have agreed upon in respect of their relationship, and the agreements often do so in a manner which gives rise to no dispute. But language, and the business of communication is complex, particularly when addressed to the future, which may throw up issues not anticipated or precisely considered at the time when an agreement was made. It is not merely therefore a question of analysing the words used, but rather it is the function of the court to try and understand from all the available information, including the words used, what it is that the parties agreed, or what it is a reasonable person would consider they had agreed. In that regard, the Court must consider not just the words used, but also the specific context, the broader context, the background law, any prior agreements, the other terms of this Agreement, other provisions drafted at the same time and forming part of the same transaction, and what might be described as the logic, commercial or otherwise, of the agreement. All of these are features which point towards the interpretation of the agreement, and in complex cases, a court must consider all of the factors, and the weight to be attributed to each.

The reasonable person who is the guide to the interpretation of the agreement is expected not merely to possess linguistic skills but must also have, or acquire, a sympathetic understanding of the commercial or practical context in which the agreement was meant to operate...”

The applicant places particular reliance on the reference to the “*background law*” and to the statutory protection afforded to a company in examinership, a point to which I shall return.

53. The starting point remains the words actually used by the parties in drawing up the contract by which they have chosen to be bound. In this case, the applicant essentially argues that the exercise should stop at this point. Apart from contending that on the plain meaning of the language used, there was no deemed service of a transfer notice, the applicant also argues that this is what the parties intended – i.e. a forced sale of the shares would not arise if the corporate shareholder successfully exited from an examinership and no liquidator was appointed. Further, the applicant argues that, as under clause 11.3.1, payment for the shares was to take place at the earliest 28 days after the price was agreed and since the auditor’s valuation is dated 8th January 2013, payment by a cheque delivered on 9th January 2013 did not comply with this provision. In fact, it seems that the valuation and the cheque were sent to the examiner on the same date. Although the amounts are small, the cheque is made out in the amount offered by Amber for the shares which was higher than the amount which would have applied by discounting the auditor’s valuation by 30%.

54. The respondents characterise the applicant as urging on the court a very technical interpretation of a very poorly drafted provision. Whilst accepting that the starting point is to look at the language used, the respondents argue that where the language used is ambiguous or results in the provision being rendered largely inoperative, three further canons of interpretation can be, and in this case should be, called in aid. These are, firstly, a presumption in the case of commercial contracts that they should be interpreted so as to give the provision business efficacy. Secondly, the poorer the drafting of the contract, the “*more ready*

the court can properly be to depart from their natural meaning” (per Lord Neuberger in *Arnold v. Britton* [2015] UKSC 36). Thirdly, the words used should, if possible, be given some meaning as the parties should not be taken to have included a text for no purpose at all.

55. It is apparent that the intended purpose of clause 11 generally was to ensure that, if one of the shareholders wished to leave the company, that shareholder would be obliged to offer their shareholding at a 30% discount to the other party before offering it for sale to any third party. In this context, clause 11.5 provides for the specific circumstances of the insolvency or likely insolvency of a corporate shareholder in which case, on the happening of certain events, that shareholder is deemed to have offered its shareholding to the other shareholder on terms which mirror those applying generally under clause 11. As the respondents point out, clause 11.5 operates for the benefit of the shareholder who is not insolvent. This, it is argued, is consistent with the fact that the shareholders’ agreement arose in the context of a company set up to pursue a joint venture. The agreed mechanism forces an insolvent shareholder to sell its shares in the company and provides a first option on the purchase of those shares to the other shareholder. The insolvent shareholder cannot, through the sale of its shares, force the other shareholder into a joint venture with a partner not of its choosing.

56. Within the context of this intended arrangement, the applicant argues that notwithstanding the reference in the first line of clause 11.5 to the deemed service of the transfer notice upon the appointment of a “*liquidator, receiver or examiner*”, the appointment of an examiner does not trigger the operation of clause 11.5. More specifically, it is argued that a liquidator must be in place for payment to be made for the shares. Consequently, the examinership must have failed and a liquidator appointed subsequent to the conclusion of the examinership and separately to the appointment of the examiner. I have some difficulty with this interpretation as it would render meaningless the reference to “*receiver or examiner*” in the first line of clause 11.5. If the appointment of a liquidator is a prerequisite to the operation of the clause, then

why did the parties refer to the two other forms of insolvency practitioner at all? Under this interpretation, the only relevance of the examinership is that, if unsuccessful, it may proceed a liquidation but, as a liquidator would have to be appointed in any event, the fact that the liquidation was preceded by an examinership would be entirely irrelevant. The applicant did not identify how the appointment of a receiver might fit into this argument.

57. The applicant relies in part on the reference to the interpretation of an agreement in light of the background law in *Law Society of Ireland v MIBI* (above) and points to the protection afforded to a company under statute whilst an examinership is in being. Although the relevant law is now found in the Companies Act, 2014, the applicant relied on the provision of s. 5(2)(a) to (d) of the Companies (Amendment) Act, 1990, which was the relevant provision at the time the shareholders' agreement was entered into. It is not contended that this makes a material difference. During the period of an examinership, a winding up may not be commenced, a receiver may not be appointed and, if previously appointed, cannot act. The assets of a company cannot be attached or executed against, and no action can be taken to realise any security over the company's assets save with the consent of the examiner. No particular provision was brought to my attention which would prevent the sale of a company asset during the period of an examinership whether on an entirely voluntary basis or, as here, pursuant to an agreement entered into many years prior to the commencement of the examinership.

58. The applicant seeks to draw an analogy between this case and the circumstances considered in the unanimous decision of the Supreme Court in *Re Holidair Ltd* [1994] 1 IR 416 where it was held that the statutory provisions concerning examinerships should be interpreted bearing the objectives of the legislation in mind. The applicant characterises the Supreme Court as having adopted a broad or expansive view of the protections afforded by the examinership legislation to argue that "*the appropriation of the applicant's shareholding in the company during the protection period [should] be prohibited by the*

examinership scheme". The Supreme Court saw the object of the legislation as being to provide a period of protection for a company to try and make a scheme of arrangement "*rather than an immediate liquidation or receivership at the hands of one or more large secured creditors*". Of course, Amber was not a creditor of the applicant and was not trying to enforce a security over the applicant's assets. Rather, the applicant and Amber were pursuing a joint venture through the mechanism of the company in which they both held shares. The provisions of clause 11 generally and clause 11.5 more specifically were designed to ensure that the parties to the joint venture had a measure of control over the identity of the other party to the joint venture in which they were mutually involved.

59. Whilst it is difficult to be definitive about the meaning of any provision as poorly drafted as clause 11.5, I am inclined to the view that the interpretation advanced by the respondents is closer to the intention of the parties in including this clause in the shareholders' agreement. This interpretation gives business efficacy to the reference to the appointment of a receiver or an examiner as a factor which triggers the operation of the clause. Whilst it does require a consequently broad interpretation of the word "*liquidator*" in the subsequent parts of the clause so as to read "*liquidator, receiver or examiner*", this seems to be more in keeping with the intention of the parties than a process which is nominally triggered by the appointment of an examiner, but which cannot thereafter take place because of the omission of any subsequent reference to an examiner in the balance of the provision.

60. I am less convinced that the reference to the non-existent clause 12.3.1 should be read as a reference to the cooling off period in clause 11.2.1, at least insofar as that applies to the transferor (i.e. the applicant in this case). Under clause 11 generally in circumstances where a shareholder wishing to dispose of its shareholding must offer it for sale to the other shareholder at a 30% discount, it makes sense that that party have a cooling off period within which it can decide not to proceed with the transaction if the valuation provided by the auditor makes the sale an unattractive proposition. Presumably, it was not

intended that a shareholder coming within the circumstances set out in clause 11.5 who is deemed to have offered its shareholding for sale will then have the right to withdraw from this sale because the price fixed was unattractive to it, much less that it should have a period of three months within which to elect to do this. It is more likely that any such extended period was intended to apply only to the period within which Amber, as transferee, could elect to accept or reject the valuation. Therefore, as the cooling off period under clause 11.2.1 extended to both the transferor and the transferee, it seems to be more likely that the erroneous reference to clause 12.3.1 was intended as a reference to clause 11.2.2 or 11.2.3 in which the consequences of the transferee declining or failing to purchase the shares within the relevant period are set out. This distinction is significant because a cooling off period within which the transferor can elect not to proceed must run to completion if the transferor does not engage with the transaction. The period, as it applies to the transferee, is one within which the transferee can accept or reject the valuation and agree to proceed with the sale such that, if the transferee positively accepts the valuation and wishes to proceed with the sale, the entire period does not have to elapse before it can do so. It does not make any commercial sense for the parties to have agreed that the insolvent shareholder which is required to sell its shareholding under the mechanism provided for in clause 11.5 should then have 3 months within which to reject auditor's valuation.

61. I do not think there is a significant difficulty with reading the second reference to "*liquidator*" in clause 11.5 as meaning a liquidator, receiver or examiner, so as to deem the transfer notice served immediately before the appointment of any such insolvency practitioner. The third reference to liquidator in the stipulation that the payment for the shares be made to the liquidator is undoubtedly more problematic. However, I do not think it is so problematic as to render the clause incapable of any practical operation insofar as it relates to an examinership. I note that, in this case, Amber sent a cheque to the examiner which was made payable to the applicant. Whilst not strictly provided for in clause 11.5, this

seems to me to be consistent with the scheme of the clause. In other words, the payment was sent through the examiner's office but, because an examiner unlike a liquidator does not assume control of the company's assets and is not a person to whom payments are made on behalf of the company, the actual cheque is not made out to him.

Validity of Steps Taken under Clause 11.5

62. The applicant argues that even if the deemed service of the transfer notice was valid, this operated to commence a process under clause 11 and that Amber remained under an obligation to comply with all of the steps in that process. The applicant makes four main arguments to say that Amber did not properly comply with this process. The first is to say that the cooling off period under clause 11.2.1 was extended to a period of three months by clause 11.5 and, crucially, that meant that the proposed transaction could not be carried out within the period of the examinership. This is also relevant to the case made by the applicant that it never received payment for the shares because, it contends, that payment was taken personally by Mr Tougher who, crucially, was no longer a director of the applicant after the examinership.

63. I have already found that the erroneous reference to clause 12.3.1 and the extension of a fourteen-day period to three months cannot logically have been intended to refer to the cooling off period afforded to a transferor under clause 11.2.1 in circumstances where the transferor is deemed to have served a transfer notice and is required to sell its shareholding unless the other shareholder does not wish to purchase it. The company's auditors can be asked to provide a valuation of the shares in circumstances where the shareholders have been unable to agree this price between themselves. Given the commercial intent of clause 11.5 it would make no logical sense to allow the transferor to simply refuse to sell the shares at the valuation fixed by the auditors, less 30%, much less to have an extended period of three months within which to make that decision.

64. This leads to the second complaint made by the applicant which is that under clause 11.3.1 it is stipulated that the entire of the agreed price be paid on the 28th day following the price being agreed and, on the same date, the stock transfer form is to be executed by the transferor and the share certificates handed over. The applicant argues that this provision was not complied with because Amber sent the auditor's valuation and the cheque on the same date and requested return of the stock transfer form within fourteen days. In response, the respondents point out that clause 11.3.1, unlike clause 11.5, is primarily for the benefit of the transferor and ensures that a transferor selling its shareholding will be paid within 28 days of the price being agreed unless the transferor permits an extension of that deadline. It would make no commercial sense to invalidate a transaction and to allow the seller resile from it because the seller was paid – and accepted payment – earlier than the date stipulated in the contract as being the date on which payment must be made. I think this is correct. It would have been open to the applicant, as transferor, to refuse to accept a payment made to it for shares in advance of the date upon which the transferee was contractually obliged to pay for those shares. However, once the payment was accepted by the applicant, then I do not think it can simultaneously complain that the transfer is invalid because it has received that payment too early.

65. Related to this, the applicant argues that the purchase monies were somehow diverted from the applicant and it seems to be alleged that they were misappropriated by a former director of the applicant. Even allowing for the fact that the amount of money in issue is negligible, this is a serious allegation made against someone who is not a party to the application. There is little or no evidence before the court to support this allegation save for Mr. O'Regan's averment (without exhibiting any relevant supporting documentation) that the cheque was not lodged to the benefit of the applicant's bank account. The argument elaborated upon in the written submissions is that the cheque made out to the applicant was cashed by Mr. Tougher when he was no longer a director of the applicant company and the monies were

not received by the applicant. According to the applicant, the effective date and time for the implementation of the scheme of arrangement proposed by the examiner was 9:00am on 19th February 2013 and Mr. Tougher resigned from the applicant with effect from that time pursuant to a court order made on 18th February 2013 approving that scheme of arrangement. However, the applicant has not placed any evidence before the court to support this narrative. In particular, the applicant has not placed the documentation in relation to the examinership and the scheme of arrangement approved by the High Court before the court. Reverting to the discussion earlier in this judgment on the preliminary objections made by the respondents, the onus is on the applicant as the moving party in an application under s. 173 to establish that the removal of its name from the register was without sufficient cause. In circumstances where the applicant has not put evidence before the court to support key elements of its argument as to why there was not sufficient cause, it has not discharged the onus of proof upon it.

66. As against this, the respondents have exhibited a copy of the cheque made payable to the applicant company which was sent to the examiner during the period of the examinership. They have also exhibited an extract from Amber's bank account in which a debit in that amount with the same reference number as the cheque appears on 20th February 2013. If, as Mr. O'Regan alleges, the purchase price for the shares was somehow misappropriated within the applicant company, that, in my view, does not alter the evidential position before the court which is that Amber paid the applicant for the purchase of the applicant's shares in the company.

67. For clarification, it might be noted that I make these observations in circumstances where I have already held, firstly, that the protection afforded by the examinership did not preclude the transfer of shares pursuant to clause 11.5 of the shareholders' agreement during the currency of the examinership and, secondly, that as payment for the shares was by way of a cheque made out to the company and sent to the examiner, that if the proceeds of that cheque were subsequently misappropriated (and I make no finding

that they were) that is a matter between the applicant, its former director and the examiner and not a matter which invalidates Amber's purchase of the shares pursuant to the said transfer.

68. Thirdly, the applicant contends that the steps necessary to ensure the valid registration of the transfer of the shares were not properly taken. Although the applicant points generally to clause 11.7 which provides that the company shall not register any transfer made in breach of the agreement and the shares comprised in any such transfer shall not currently carry any rights until the breach is rectified, as far as I understand the only additional clause of which breach is alleged is clause 11.3.2. This requires that before any person is registered as the holder of shares in the company, that person is to enter into a deed of adherence to the shareholders' agreement. In circumstances where the company was set up for the purposes of a joint venture it makes sense that if a third party is coming into the company through the purchase of shares, that party be required to sign up to the shareholders' agreement. However, the disputed transfer was as between the two original parties to the shareholders' agreement. In my view there was no additional obligation on Amber arising under clause 11.3.2. because Amber was already a party to the shareholders' agreement. The effect of the transfer was to increase its shareholding rather than to add a new shareholder.

69. The point may be of some relevance as regards the transfer between Amber and Otto since Otto is not otherwise a party to the shareholders' agreement. However, if the applicant does not succeed in establishing an entitlement to the disputed shares through its challenge to the validity of the transfer to Amber, I do not think it has *locus standi* to complain about the adherence or non-adherence of Otto to the shareholders' agreement.

70. The final complaints made by the applicant alleging a failure to comply with the shareholders' agreement concern the non-registration of the transfer of the shares until February 2021. It seems that subsequent to the auditor's valuation, the cheque and the stock transfer form being sent to the examiner,

that the cheque was lodged on 20th February 2013 and the completed stock transfer form was returned to Amber's then-solicitor. The stock transfer form, although signed by a director of the applicant, is undated. The applicant initially complained that the stock transfer form had not been properly executed but this was not something elaborated on at the hearing. It was unclear whether the applicant was making a complaint as regards the formal execution of the stock transfer form as distinct from the more general complaint, which I have not accepted, that no transfer of shares could take place during the period whilst the applicant was under the protection of the High Court in the examinership.

71. Significantly, it seems that Amber's then-solicitor did not forward the completed stock transfer form to Amber nor to the company and, consequently, the transfer of shares reflected therein was not recorded on the register of members of the company. As a further consequence, the auditors continued to prepare annual returns for the CRO without taking account of the transfer and the directors continued to sign those returns. It is in many respects bizarre that having put in train the process under clause 11.5 in order to acquire the applicant's shares and having ostensibly achieved that objective, Amber did not then either take the formal steps necessary to complete the transaction or treat itself as the owner of those shares. Indeed, the actions taken by Amber in 2015 and the correspondence prior to February 2021 suggests that the transfer of shares had, for practical purposes, been forgotten by Amber.

72. That said, the applicant has not pointed to any statutory provision or rule of law which would preclude the court recognising the transfer of its shares to Amber solely because of an interval of nearly eight years between the date of the transfer and the date upon which the transfer was registered. In circumstances where the evidence suggests that a completed transfer form was not sent by Amber's then-solicitor to the company, there is no basis for treating the non-registration of the transfer by the company as a refusal to register the transfer of the shares under clause 11.4. The reality is that the directors of the company were not asked to register the transfer of the shares until 2021 and, when asked, they did so.

73. Apart from the fact that I have not upheld the specific complaints made by the applicant, in my view the applicant's reliance on clause 11.7 which precludes the company from registering a transfer made in breach of the shareholders' agreement until the breach is rectified is misplaced. Under clause 11.7, the consequence of non-registration is that the shares comprised in the unregistered transfer "*carry no rights whatsoever*" until the breach is rectified. Therefore, clause 11.7 does not invalidate a transfer of shares that is made in breach of the shareholders' agreement; rather, it requires that the breach be rectified and penalises the acquiring party in the interim by treating the shares as ones which do carry voting rights or the right to dividends. Thus, if the applicant had identified a breach of the shareholders' agreement, it would not follow that the transaction was invalid and that the applicant remained the owner of the shares.

Estoppel by Convention

74. The final argument made by the applicant is that the behaviour of the company and of Amber during the period 2013 to 2021 is such that it cannot now rely on its strict legal rights pursuant to the transfer. The applicant characterises this as the conduct of both parties being based on a common understanding of the shared interest in the company during this period. The applicant relies on the decision of the Supreme Court (Charlton J.) in *Ulster Investment Bank Ltd v. Rockrohan Estate Ltd* [2015] 4 IR 37 in which it is identified that, where both parties proceed "*on the basis of a clear common understanding, the mutual convention of the parties may suffice as a foundation for estoppel*". *Rockrohan* itself concerned a claim for adverse possession made in circumstances where a bank had secured a well charging order and an order for sale more than twelve years earlier. The bank had not moved to sell the land because the defendant had sought a deferral of such sale pending the conclusion of related litigation which, if successful, would have enabled it to clear the debt. The bank argued, successfully, that the defendant was estopped from relying on the Statute of Limitations to defeat the claim for possession.

75. Clearly, the factual matrix in *Rockrohan* is materially different to this case. Central to the decision in *Rockrohan* is the element of mutuality in the parties' understanding and their assumptions as to the state of affairs. This is put by Charleton J. at p. 55 of the report as follows: -

“There was a common assumption between these parties, reasonably held and based on unequivocal circumstances, that the parties would hold their hand as against each other until such time as that litigation had come to a practical conclusion one way or the other.”

Here, the respondents argue that there was no common assumption as between the parties. On Amber's part, it is contended that the failure to register the transfer of shares was an error which arose because the relevant documentation was not forwarded to it by Amber's then-solicitors. More importantly, it is contended that the evidence does not establish the existence of any understanding or assumption on the applicant's side. I have considered all of the evidence before the court very carefully. The respondents are correct in identifying an absence of evidence to demonstrate that the applicant considered itself the owner of shares in the company at any time after 2013 until the matter was raised in correspondence, initiated by Amber in 2020. Strikingly, there is no evidence before the court to suggest that the applicant engaged with or reacted to the purported downgrading of its shareholding in the company in 2015. Although Mr. O'Regan has averred that the applicant's interest in *“that asset”* (presumably meaning the property held by the company) formed part of the reason for his investment in the applicant, as previously noted, there is no documentary evidence before the court on any of these matters.

76. I do not regard the facts evident from the material before the court as establishing that there was any form of contrivance on the part of Amber or on the part of the company. The possibility of a form of false crystallisation of a floating charge by a debenture holder being contrived in circumstances where a company was imminently facing insolvency is clearly the basis for the concern identified by the Laffoy J. *Re J.D. Brian Ltd* [2016] 1 IR 131. Importantly, this is not a case in which a company continued to carry

on business to the detriment of any third party whilst failing to register a transaction which might have a bearing on the business being conducted. This company was not a trading company and the only steps taken by it since its incorporation were the purchase and then the sale of the property.

77. Whilst in many respects a situation where Amber purchased the applicant's shares in the company and immediately forgot it had done so and the applicant continued to be formally treated as the owner of those shares without paying any heed to that fact is bizarre, it is nonetheless understandable in the particular circumstances. The company was formed with the sole objective of being the vehicle through which a joint venture between the applicant and Amber to carry out a specific development would be pursued. Having bought the lands upon which it was intended to build the development, the economy crashed and the shareholders in the company, most particularly the applicant, were unable to service the company's loans. The value of the property declined and was in serious negative equity. To all intents and purposes, both the company and the only asset it possessed, namely the lands, were worthless – although I note that the applicant claims that the company's losses have a value to it for revenue purposes. The company was not trading and, effectively, remained dormant until the monies due to the bank were repaid through a combination of the sale of the land and further investment by Amber. Whilst to put it mildly the treatment of the shares was sloppy from a company law perspective, it was not unreasonable from a purely commercial perspective.

78. Whilst the making of returns to the capital CRO is an important matter and directors are under a statutory duty to ensure the truth and accuracy of returns made, in the particular circumstances I do not regard the filing of these returns as raising an estoppel against Amber so as to preclude the completion of the transfer through the re-registration of the shares in 2021.

79. As noted by Haughton J. in *Garcia v. Kilkenny* [2015] IEHC 272 the overarching principle in estoppel by convention (as indeed in other forms of estoppel) is that it must be unconscionable to allow

the estopped party to rely on their legal rights. I am unable to identify any basis in the papers before me as to why it would be unconscionable to allow the respondents to rely on their legal rights. Amber invoked the provisions of the shareholders agreement that had been entered into with the applicant in circumstances where the applicant was facing insolvency and had entered into examinership. Amber purchased the applicant's shares and paid for those shares. At the material time the shares had no appreciable value. Although errors were clearly made by Amber and its advisors in failing to register the transfer and in continuing to formally treat the applicant as the owner of the shares, there is no evidence before the court that the applicant continued to regard itself as the owner of the shares. Instead the applicant did not involve itself with the company at all. It provided no funding to meet the company's continuing debt and played no part in the formal running or management of the company.

80. In conclusion, I do not find that the applicant has established that the registration of the transfer which took place in 2013 and the consequential removal of the applicant's name from the register of members of the company was without sufficient cause. I will, therefore, refuse the relief sought under s. 173 of the Companies Act, 2014.