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Case No: BL-2024-MAN-000091

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS IN MANCHESTER
BUSINESS LIST (Ch)

Manchester Civil Justice Centre
1 Bridge Street West,
Manchester M60 9DJ

Date: 3/12/2024

Before:

HHJ CAWSON KC
SITTING AS A JUDGE OF THE HIGH COURT

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Between:

(1) JMW SOLICITORS LLP
(2) RALLI LIMITED
(3) HOWE & CO SOLICITORS — **Claimants**

- and -

(1) INJURY LAWYERS 4U LIMITED
(2) JAMES MAXEY
(3) DANIEL SLADE — **Defendants**

- -
- -

David Lascelles (instructed by **Horwich Farrelly Limited**) for the **Defendants**
Paul Chaisty KC and Nick Taylor (Instructed by **JMW Solicitors LLP**) for the **Claimants**

Hearing date:13 November 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 3 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HHJ CAWSON KC SITTING AS A JUDGE OF THE HIGH COURT

HHJ CAWSON KC:

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Introduction

1. By an application dated 10 October 2024 ("**the Application**"), the Defendants apply for reverse summary judgment pursuant to CPR 24.3 in respect of all the Claimants' claims in their Particulars of Claim.

2. The Application is supported by the witness statements of the Second Defendant, James Maxey ("**Mr Maxey**"), dated 10 October 2024 ("**Maxey 1**") and 7 November 2024 ("**Maxey 2**").

3. In opposition to the Application, the Claimants rely upon the witness statement of Michael Kennedy ("**Mr Kennedy**"), a partner in the First Claimant, JMW Solicitors LLP ("**JMW**"), and Adrian Anderson ("**Mr Anderson**"), a non-executive director of the Second Claimant, Ralli Ltd.

4. David Lascelles appeared as Counsel on behalf of the Defendants. Paul Chaisty KC and Nick Taylor (neither of whom settled the Claimants' Particulars of Claim) appeared on behalf of the Claimants. I am grateful to Counsel for their helpful written and oral submissions.

The Background

5. It was common ground that I should proceed to determine the application on the basis that the facts as pleaded in the Claimants' Particulars of Claim, in contrast to the Claimants' averments based upon those facts, are true and accurate. The following narrative proceeds on this basis.

6. The First Defendant, Injury Solicitors 4U Ltd ("**D1**"), was incorporated on 23 October 2002. It has, from incorporation, been used as the corporate vehicle to carry on the business of generating leads in respect of potential personal injury cases by way of

TV advertising for the benefit of firms of solicitors specialising in personal injury litigation.

7. As at autumn 2002, Amelans Solicitors ("**Amelans**") was a firm of solicitors specialising in personal injury litigation. Its then partners included Martin Cockx ("**Mr Cockx**"), Andrew Twambley ("Mr **Twambley**") and Denise Wilkinson ("**Ms Wilkinson**"). At that time, Mr Cockx and Mr Twambley began to approach other firms of solicitors specialising in personal injury litigation with a view to setting up a corporate vehicle to carry on the business subsequently carried on by D1, the intention being that £1 million should be raised in order to fund this business by allotting or transferring 100 shares therein at £10,000 per share. The business model was such that in return for each contribution of £10,000, the contributing party, a firm of solicitors, would be entitled to a *"slot"* on a rota basis, under which leads attracted as a result of the TV advertising would be allocated amongst those contributing. Further such contributions would then be made on an annual basis for slots.

8. The Claimants are all firms of solicitors specialising in, amongst other things, personal injury litigation. They, together with other firms of Solicitors, including Amelans, became founding shareholders in D1, having been approached as above by Mr Cockx and Mr Twambley.

9. Following the incorporation of D1:

   i) D1 had an authorised share capital of £100,000 divided into 5,000 "A" ordinary shares of £1 each (of which 5 had been issued and fully paid up), and 95,000 "B" ordinary shares of £1 each (of which 95 had been issued and fully paid up).

   ii) D1's then articles of association provided for the holders of the "A" shares to have power to appoint or remove directors;

   iii) The five issued "A" shares were allotted to Mr Twambley (as nominee for Amelans), and the 95 issued "B" shares were allotted to Mr Cockx (as nominee for Amelans) but on the basis that these shares would be transferred to other firms of solicitors (or nominees for the latter) that it was anticipated would become shareholders in due course.

   iv) On 28 October 2002, in exercise of the power in D1's articles of association conferred on the holders of the "A" shares, Mr Cockx and Mr Twambley were appointed as directors of D1.

10. On 21 November 2002, a shareholders agreement ("**the 2002 SHA**") was entered into between (1) Mr Cockx and Mr Twambley; (2) *"Any person named in the first column of Schedule 1 (together here in referred to as "Shareholders" or individually "Shareholder") who signs this Agreement on behalf of the Member Firm shown alongside his or her name and address in Schedule 1"*; and (3) D1.

11. It is apparent from the terms of the 2002 SHA that it was entered into in anticipation of other firms of solicitors becoming *"Member Firms"* by way of a representative of that firm signing the same alongside his or her name and address in Schedule 1, and

thereby becoming a "B" shareholder on behalf of the Member Firm which he or she represented.

12. The promotion of the venture to be carried on through D1 included a meeting held on 26 November 2002 hosted by Mr Cockx and Mr Twambley on behalf of D1. This meeting was attended by representatives of a number of firms of solicitors, including each of the Claimants. At this meeting, Mr Cockx and Mr Twambley explained the nature of the scheme, and the intention to raise £1 million by way of selling shares at £10,000 each in return for "B" shares and a slot on a rota basis under which leads attracted as a result of the proposed TV advertising would be allocated.

13. It is the Claimants' case that it was expressly discussed and agreed between all participating, or at least that it was implicit and understood amongst those participating, that the entitlement to participate in the venture and share in the allocation of potential clients according to the rota would be exclusive to those firms who became shareholders in D1.

14. Thereafter, a number of firms of solicitors, including the Claimants, subscribed to the 2002 SHA and acquired one or more "B" shares in D1 at a price of £10,000 per share, and thereby acquired a slot or slots in the rota operated by D1, with an ongoing requirement to contribute £10,000 per year for each slot. Each firm signed a Deed of Adherence confirming its agreement to be bound by the terms of the 2002 SHA. By the end of December 2002, the required £1 million had been raised.

15. The TV advertising campaign started on 3 February 2003 and proved very successful. The initial advert resulted in some 130 enquiries, and by the end of the first week some 400 enquiries had been received. The enquiries were routed through a call centre and then allocated to the founding shareholder, namely Amelans and the other firms of solicitors that had signed up (*"***the Founding Shareholders**").

16. However, Mr Cockx and Mr Twambley formed the view that, going forward, a marketing budget of only £1 million odd was insufficient for D1 to be truly successful and realise its full potential. Consequently, they approached various "B" shareholders, including each of the Claimants, with a view to securing their agreement to extending the scheme to further participants, i.e. to firms of solicitors other than the Founding Shareholders, which such firms would contribute funds to future marketing campaigns so as to increase the budget available for the same to significantly in excess of £1 million, in return for a slot or slots on the rota, but without becoming shareholders in D1.

17. The "B" shareholders were generally supportive of the idea of extending the scheme, but were concerned that if the scheme were extended to new members who were not shareholders, referred to as *"Panel Members"*, at the same price per slot as "B" shareholders, then the latter would obtain all the advantages of the scheme, without having taken the risk so far as the initial investment was concerned. Consequently, agreement was reached that there should be a slot price differential ("**the Slot Price Differential**") under which *"Panel Members"* would pay £15,000 per slot, whereas the existing "B" shareholders would continue to pay £10,000 per slot.

18. For the purposes of the present proceedings, significant reliance is placed by the Claimants on what is alleged to have been represented by Mr Cockx and Mr Twambley at a further meeting on 1 May 2003, hosted by the latter, and attended by all the Founding Shareholders. In paragraph 23 of the Particulars of Claim, it is pleaded as follows:

> "… At that meeting, it was represented by Mr Cockx and Mr Twambley (on behalf of the First Defendant, and also Amelans) that if the Founding Shareholders were to permit Panel Members (i.e. new firms) to participate in the scheme, then, throughout the life and operation of the scheme, there would be a price differential for each slot between the Founding Shareholders and any such Panel Members in that any such Panel Member would have to pay 50% more than the price charged to the Founding Shareholders (such that, in the first instance, while the Founding Shareholders would continue to pay £10,000 for each slot, any such panel member would have to pay £15,000 for each slot) ("**Representations**")."

19. On the same day, 1 May 2003, a supplemental deed ("**the Supplemental Deed**") was entered into between the same parties as the 2002 SHA, albeit that the "B" Shareholders who had by then subscribed to the 2002 SHA, could be named in Schedule 1 to the Supplemental Deed.

20. The following provisions of the Supplemental Deed are of particular relevance for present purposes:

    i) Recital (B) thereto provided that: *"This Deed is supplemental to the [2002 SHA] regulating the relationship between the Shareholders which remains in full force and effect save as varied here in."*

    ii) Recital (C) thereto provided that: *"The parties have agreed to extend the Business by creating the Panel and extending the referral of Referred Clients to Panel Members in consideration of the Panel Service Charge which will enable the Company to intensify its advertising and marketing, which will benefit the Member Firms as well as the Panel Members."*

    iii) By clause 1.1, *"the Panel"* was defined as meaning: *"... Collectively all those Panel Members who have been approved by the Board to have the benefit of referrals from Referred Clients in exchange for their contribution to the Panel Service Charge ..."*

    iv) By clause 4.3, which is of particular importance for present purposes, it was provided that:

    > "The contribution of each Panel Member to the Panel Service Charge shall (in respect of each Panel Unit held) be 50% more than the amount of the Service Charge which each Member Firm shall pay in respect of each share. By way of illustration, the initial payment for each Panel Member in respect of the Panel Service Charge shall be £15,000 for the first Panel Service Charge Year PROVIDED THAT each Member

> Firm shall be entitled during the calendar month of May in any year while the Panel Scheme is subsisting, to acquire as many Panel Units as may be available at the relevant time and the Panel Service Charge in respect of each such Panel Unit shall be a reduced (sic) equal to the amount of the Service Charge payment most recently paid by the Member Firms in respect of one share."

21. It is the Claimant's pleaded case that notwithstanding subsequent events that I will return to, clause 4.3 of the Supplemental Deed remains in full force and effect so as to continue to entrench the right of "B" Shareholders to insist on the continuation of the Slot Price Differential provided for thereby, and that the Defendants have acted in breach thereof by causing D1 to cease to apply the Slot Price Differential. In paragraph 26 of the Particulars of Claim, this is referred to as *"the Slot Price Differential Agreement"*.

22. However, in paragraph 27 of the Particulars of Claim, the Claimants advance a case based upon a collateral warranty further or in the alternative to their case based upon the Slot Price Differential Agreement. This is pleaded in the following terms:

> "Further or alternatively, the Representation (and in particular the representation that the Slot Price Differential would continue throughout the life and operation of the scheme) amounted to a collateral warranty in reliance on which the Founding Shareholders (including, in each case, the Claimants) agreed to enter into the Supplemental Deed and thereby permit the participation in the scheme of the Panel Members ("the Slot Price Differential Collateral Warranty"). Indeed, but for the representation that the Slot Price Differential will continue throughout the life and operation of the scheme, none of the Claimants would have entered into the Supplemental Deed."

23. Thereafter, a significant number of additional firms of solicitors signed up to become Panel Members. As a result, D1 was able to significantly increase its marketing budget, in some years up to as much as £5 million or £6 million. The Slot Price Differential continued to be given effect to as provided by clause 4.3 of the Supplemental Deed with, each year, Panel Members contributing £15,000 for each slot, whilst the Founding Shareholders continued to contribute only £10,000 for each slot. Further, Founding Shareholders continued to be able to take up spare slots for the advantageous price of only £10,000 per slot.

24. Matters so continued until 2009. Mr Maxey, in paragraph 11 of Maxey 1, refers to Mr Cockx and Mr Twambley having, in 2009 and as directors of D1, determined that the Founder Shareholders should no longer be entitled to any further discounted slots. In paragraphs 49 and 50 of his witness statement, Mr Anderson accepts that at an EGM of D1 held on 2 April 2009, Ms Wilkinson advised that the directors of D1 did not want to antagonise Panel Members by offering *"freed up slots"* to Founding Shareholders at the discounted rate of £10,000, and that it was therefore proposed that Founding Shareholders would not be allowed to purchase more slots that year at this reduced rate. Mr Anderson says that there was no objection to this. As I understand it,

the position since then has remained that Founding Shareholders have not been permitted to take up spare slots at the reduced rate of £10,000.

25. However, until a decision alleged by the Defendants to have been validly taken by the directors of D1 on 3 October 2023, that was carried into effect in April 2024, the Slot Price Differential continued to be applied on the levying of the service charge for slots each year.

26. In 2010, Mr Twambley circulated a note around the Founding Shareholders, regarding the *"Corporate Structure"* of D1, proposing a major review *"of the corporate structure of the Company"* in order to address a number of concerns set out in the note. As Mr Anderson describes in some considerable detail in his witness statement, the note was discussed at an EGM on 22 March 2010, and it was agreed that he, together with representatives of JMW and Pannone LLP, would be tasked with reviewing and revising the corporate documentation. At one stage, advice was obtained from Weightmans, Solicitors, and a number of draft shareholder agreements were circulated, including drafts prepared by Mr Anderson.

27. It is Mr Anderson's evidence that no stage did Mr Twambley mention any intention to change the commercial arrangements between the parties, in particular in relation to the Slot Price Differential, and he maintains that that was not the intention of any party.

28. Ultimately, a new shareholders agreement was entered into on 30 April 2013 ("**the 2013 SHA**"), the parties thereto being the persons named in Schedule 1 (1) and D1 (2). The persons named in Schedule 1 were all the shareholders, including Mr Twambley as holder of five "A" shares as nominee for Amelans, and all the various "B" shareholders.

29. It is common ground that the 2013 SHA is silent regarding any Slot Price Differential, at least in the sense that there is no express mention therein of the Slot Price Differential, or of any mechanism to maintain it.

30. The following provisions of the 2013 SHA are of particular relevance for present purposes:

    i) Recital (C) thereto provided as follows: *"The Shareholders previously entered into a shareholders agreement dated 21 November 2002 together with subsequent deeds of variation, (together "Current Documents") but now wish to consolidate and update those Current Documents in their entirety."*

    ii) Recital (D) thereto provided as follows: *"Accordingly they have agreed to terminate the Current Documents and enter into this agreement for the purpose of documenting their rights and responsibilities as shareholders of the Company."*

    iii) Clause 1.1 defined:

        a) *"Business"* as meaning *"… the business of providing advertising, marketing and other complimentary services with a view to*

generating Enquiries for Shareholders and Panel Members, together with such other business as the parties authorise hereunder."

a) *"Service Charge"* as meaning *"... the total amount calculated in respect of any Service Charge Year which is required to cover the Annual Budget for that Service Charge Year."*

iv) Clause 4, under the heading *"Management"*, provided as follows:

"4.1 Subject to clause 6 below, the day to day management of the Company shall vest in the Board, who shall carry out their duties in accordance with the provisions of this Agreement.

4.2 The Board may meet and discharge their duties at such time and in such manner as they think fit, and save where otherwise expressly provided in this Agreement such duties and powers include but are not limited to the following:

…

(c) accepting new members (including Panel Members) at any point during the year and agreeing the reasonable contribution to Service Charge payable by them;

(d) varying the amount of any Service Charge;

4.4 The Shareholders acknowledge that notwithstanding the provisions of clause 24, where the Board (acting reasonably) consider that it is in the Company's interests to make variations to this Agreement to enable the Company to comply with regulatory or statutory requirements or to operate more effectively or in the better interests of Shareholders and Panel Members as a whole, then the Board may make such changes by written notification to the Shareholders outlining the changes and the reasons therefor, and the Shareholders agree that such changes shall become part of this Agreement as if incorporated herein."

v) Clause 5, headed *"Board Obligations"*, provided that the Board agreed that they would (subject to their statutory duties), amongst other things:

"(a) At all times act in good faith towards the Company and the Shareholders as a whole;

…

(d) Administer the Company and the Business for the benefit of all the Shareholders and Panel Members."

vi) Clause 7, under the heading *"Matters Requiring Consent of the Shareholders"*, provided that each Shareholder should, for as long as they held any shares, procure that D1 should not undertake any of the matters set out in Part 1 of Schedule 2, without the prior written consent of the holders of 75% of the "A" Shares and 75% of the "B" shares. The matters set out in Part 1 of Schedule 2 included the alteration of the Articles of Association of the Company, but made no reference to the Slot Price Differential or the maintenance of the same.

vii) Clause 8, under the heading *"Obligations of Shareholders"*, provided that each Shareholder should, amongst other things: *"Pay the Service Charge when due or serve a Transfer Notice in respect of all the Shares held by that Shareholder in accordance with clause 11.3."*

viii) Clause 14, under the heading *"Change of Control and Beneficial Ownership"*, at clause 14.1, provided that if any Shareholder underwent a *"Change of Control"* then *"the Board may, acting reasonably having regard to the best interests of the Company require the Changed Shareholder to dispose of its shares."*

ix) Pursuant to clause 14.2, *"Change of Control"* was expressed as extending to, amongst other things:

> *a)* *"If a third party obtains control over the Changed Shareholder as defined by section 1124 of the Taxes Act 2010"* (clause 14.2(b));
>
> *b)* *"If there is a material change to the composition of the board of directors, management committee or partnership board of the Changed Shareholder"* (clause 14.2(c)); or
>
> *c)* *"If a shareholder holding shares on behalf of a named beneficial owner ceases to be a partner in or otherwise represent the beneficial owner …" (clause 14.2(d)).*

x) Clause 14.3 then provided that if the board so decided, then the Changed Shareholder should forthwith be deemed to have served a Transfer Notice and should dispose of its shares in accordance with the 2013 Articles (as defined in paragraph 31 below).

xi) Clause 15, under the heading *"Conduct of the Company's Affairs"*, at clause 15.1(g), provided that the parties should exercise all rights available to them in relation to the Company to ensure (so far as they are able to do so) that during the term of the 2013 SHA:

> "… the Board determines the general policy of the Company (subject to the express provisions of this Agreement)."

xii) Clause 24, under the heading *"Variation and Waiver"*, provided that, subject to clause 4.5 (sic):

> "any variation of this agreement shall be in writing and signed by or on behalf of the Shareholders at that time."

xiii) Clause 27 comprised an entire agreement clause in the following terms:

> "27.1 This agreement constitutes the whole agreement between the parties and supersedes any previous arrangement, understanding or agreement between them relating to the subject matter they cover, including for the avoidance of doubt the Current Documents.
>
> 27.2 Each party acknowledges that, in entering into this agreement, he does not rely on, and shall have no remedy in respect of, any statement, representation, assurance or warranty of any person other than as expressly set out in this agreement or those documents.
>
> 27.3 Nothing In this clause 27 operates to limit or exclude any liability for fraud."

xiv) Paragraph 1 of Part 2 of Schedule 2 provided that:

> "Notwithstanding the .provisions of clause 4.4 of the Agreement, where any proposed variation (not being something which has previously been decided by the Board without reference or recourse to the Members) would be reasonably likely to have the effect of materially and detrimentally affecting the Members' interest in the Company, that decision should .be passed to the Members as a whole and cannot be passed without the consent of the holders of 75% of the A Shares and 75% of the B Shares (together "Special Consent") such consent not to be unreasonably withheld or delayed."

31. Contemporaneously with the entry into the 2013 SHA, new articles of association of D1 were adopted ("**the 2013 Articles**"). The following provisions of the 2013 Articles are of particular relevance for present purposes:

i) Article 1.1 defined:

a) *"Amelans"* as meaning *"Amelans Solicitors (SRA number 570220) or any limited liability partnership into which that firm may convert."*

b) *"Permitted Transferee"* as having the meaning given in Article 18.

ii) Article 5 provided that the number of directors should not be less than two and no more than four.

iii) Article 11 concerned the appointment and removal of directors, and provided as follows:

> "11.1 The holder(s) of a majority of the A Shares for the time being shall be entitled to appoint two persons to be Directors of the Company

11.2 Any Director may at any time be removed from office by the holder(s) of the majority of the A Shares

…

11.4 Any appointment or removal of a Director pursuant to this article shall be in writing and signed by or on behalf of the holder of a majority of the A Shares and served on each of the other shareholders and the Company at its registered office, marked for the attention of the Company secretary. Any such appointment or removal shall take effect when received by the Company or at such later time as shall be specified in such notice

11.5 The right to appoint and remove directors shall be a class right attaching to the A shares

…

11.7 No director shall be appointed or removed otherwise than pursuant to these Articles, save as provided by law"

iv) Article 16.3 provided that no transfer of any shares or any interest in shares should be made unless:

a) "to a permitted Transferee under Article 18"; or

b) "to the Company as a result of an obligatory transfer under Article 17."

v) Article 18, headed *"Permitted Transfers"*, provided as follows:

"18.1 A Shareholder (the "Original Shareholder") may transfer all (but not some only) of his Shares to a Permitted Transferee

18.2 For the purposes of these Articles

(a) the Permitted Transferee for any holder of A Shares shall be the other 'A' Shareholder or, if there is no such holder, then a partner or member of Amelans,

(b) the Permitted Transferee for any person holding Shares on behalf of the firm in which he is a partner is any other partner within that firm."

32. Following the entry into of the 2013 SHA, the Slot Price Differential continued to be applied in favour of the Founder Shareholders.

33. It forms part of the Claimants' pleaded case that, in September 2016, Mr Twambley and Ms Wilkinson (who by then had replaced Mr Cockx as a director of D1), acting as D1's board, purported to vary the 2013 SHA pursuant to clause 4.4 thereof, and the

2013 Articles the net effect of which purported to be to permit any holder of the "A" shares (at that time Mr Twambley on behalf of Amelans) to transfer any such "A" shares to any transferee approved by the board, i.e. so as to permit Amelans to transfer its "A" shares (together with the exclusive power to appoint and remove directors) to any transferee in its absolute discretion.

34. This had purported to have been done by:

   i) Pursuant to clause 4.4, purporting to vary paragraph 12 of Part 1 of Schedule 2 so that the relevant protected matter now read: *"Alter the Articles of Association the Company other than to bring them in line with the terms of this Agreement."* [New wording underlined]

   ii) Varying Article 18 so as to add a new category of *"Permitted Transferee"* in a new Article 18.2(c).

35. In September 2018, D1 (through Mr Twambley) informed the Founding Shareholders that, with effect from April 2019, there would no longer be a Slot Price Differential going forward, so that both Founding Shareholders and Panel Members would have to contribute £15,000 for each slot. The Claimants allege that Mr Twambley's motivation for this was pressure being placed upon him by one particular Panel Member, Express Solicitors ("**Express**") which, at that time, was contributing in excess of £1 million per year for the purchase of a significant number of slots.

36. Correspondence was exchanged in which JMW, on behalf of the Claimants, and possibly other Founder Shareholders, objected to what was proposed. In a letter dated 4 February 2019, Excello Law, Solicitors then acting on behalf of Mr Twambley, Ms Wilkinson and D1 wrote to JMW setting out a detailed case as to why it was said that there was no contractual right on the part of the Founder Shareholders to insist upon the maintenance of the Slot Price Differential. In essence, it was said that any existing obligation under the 2002 SHA, as varied by the Supplemental Deed, had been brought to an end by the terms of the 2013 SHA, which contained no provision in relation to any Slot Price Differential, and gave a discretion to the board of D1 as to what *"Service Charge"* should be paid by Founder Shareholders.

37. This position was not accepted by JMW in response, although JMW's response contained no fully reasoned response as such to the arguments advanced by Excello Law. Nevertheless, as set out in an email dated 6 March 2019, Mr Twambley noted that the proposal to equalise the slot price had caused *"a great deal of consternation"*, and he expressed the view that litigation would not be beneficial for D1 and that the parties should look for a compromise. He thus suggested that he, Ms Wilkinson and D1 would not proceed with the removal of the Slot Price Differential for at least six months. However, he did state: *"For our part, we accept we will need to refrain from equalising the slot pricing across the shareholders and panel firms but we still believe that the current approach will need to be altered as not doing so would be highly detrimental to the company."*

38. On 3 October 2023, D1 emailed the Founding Shareholders (including the Claimants) stating that the board (by then purporting to comprise Mr Maxey and Mr Slade), had resolved to remove the Slot Price Differential and, further, that the price for all slots

for the next six months, for both the Founding Shoulders and Panel Members, would be £5,000. It was the position of D1, Mr Maxey, and Mr Slade that, by this date, Mr Twambley and Ms Wilkinson had transferred their shares in D1 to Mr Maxey and Mr Slade, and that Mr Maxey and Mr Slade had been validly appointed as directors of D1.

39. It is the Claimants' case that what was proposed was to the significant personal advantage of Mr Maxey and Mr Slade, through their involvement in Express, which was each year buying a significant number of slots as a Panel Member, and to the significant disadvantage of the Founding Shareholders, including the Claimants, given that the additional value that they had previously enjoyed would be removed leading to them receiving a reduced number of leads for an equivalent cost.

40. The matter was taken up in correspondence between the parties in which objection was taken on behalf of the Founding Shoulders, including the Claimants, as to what was proposed, it being contended on behalf of the Founding Shareholders that the latter had an entitlement to insist upon the maintenance of the Slot Price Differential, and that, in any event, any decision on the part of D1 to remove the Slot Price Differential was invalid because there had been no valid transfer of shares to Mr Maxey and Mr Slade, and no valid appointment of Mr Maxey and Mr Slade as directors of D1.

41. Notwithstanding such objections, as from April 2024 the Slot Price Differential has been removed.

42. So far as the transfer of shares by Mr Twambley and Ms Wilkinson to Mr Maxey and Mr Slade was concerned, and the appointment of Mr Maxey and Mr Slade as directors of D1, the objection was taken that the latter were invalid and ineffective as having been achieved consequential upon the variations to the 2013 SHA and the 2013 Articles purported to have been effected in 2016 pursuant to clause 4.4 of the 2013 SHA as referred to in paragraphs 33 and 34 above, and in particular the variation to add a new Article 18.2(c) that purported to permit the transfer of "A" shares to any transferee approved by the board.

43. The Claimants take the point that prior to the commencement of the present claim, the Defendants did not seek to disabuse them of their understanding that the Defendants relied upon the earlier purported variation of the 2013 SHA and the 2013 Articles to their position justify position, including that Mr Maxey and Mr Slade had been validly appointed, and that the suggestion that Mr Maxey and Mr Slade had been appointed by Mr Twambley before he ceased to be registered as "A" shareholder has only been made in the Defendants' evidence in support of the Application.

The Claimants' pleaded claims

44. The present proceedings were commenced on 9 September 2024, with the Claimants' case being pleaded out in their Particulars of Claim.

45. As referred to in paragraphs 21 and 22 above, it is the Claimants' case that clause 4.3 of the Supplemental Deed remains binding and effective notwithstanding the entry by the parties into the 2013 SHA, alternatively that they are entitled to rely upon the *"Slot*

Price Differential Collateral Warranty" referred to in paragraph 27 of the Particulars of Claim as providing them, and their fellow Founding Shareholders, with an entrenched right to insist upon the maintenance of the Slot Price Differential.

46. There is also pleaded in paragraph 46 of the Particulars of Claim an alternative case based on estoppel by convention as follows:

> "Further or alternatively, the First Defendant is estopped from implementing the scheme without the Slot Price Differential. The Claimants will rely on the Representations (and in particular the representation that the Slot Price Differential would continue throughout the life and operation of the scheme, in reliance on which they agreed to permit the participation in the scheme of the Panel Members and, but for which, they would not have done so) and, further, the convention accepted, effected and implemented between the parties since the start of the scheme until April 2024."

47. The *"Representations"* referred to in paragraph 46 of the Particulars of Claim are those referred to in paragraph 23 of the Particulars of Claim thereof referred to in paragraph 18 above.

48. On the basis of these allegations, it is the Claimants' case that they are entitled to a declaration that D1 is not entitled to implement the equalisation of the Slot Price Differential, an injunction requiring D1 to reapply the Slot Price Differential for the current marketing year, an injunction restraining D1 from acting otherwise in such a way as to apply the Slot Price Differential for any future marketing years, and damages for breach of contract.

49. Further or in the alternative, the Claimants seek a declaration that (a) the transfer of "A" shares in D1 to Mr Maxey, (b) the appointment of Mr Maxey and Mr Slade as directors of D1, and (c) any resolution of D1's board subsequent to the purported appointments of Mr Maxey and Mr Slade as directors (including the purported removal of the Slot Price Differential), are invalid, ultra vires and/or of no effect. As referred to above, in support of these contentions, the Claimants rely upon what they contend is the invalidity of the variations the 2013 SHA and 2013 Articles purported to have been effected pursuant to clause 4.4 of the 2013 SHA in 2016, which they had thought were relied upon by the Defendants as justifying the transfer of shares to Mr Maxey and Mr Slade, and the appointment of Mr Maxey and Mr Slade as directors.

The Defendants' application for summary judgment

50. The Application was issued at an early stage of the proceedings on 10 October 2024. In his witness statement in opposition to the Application, Mr Kennedy said the application was issued *"without warning"*. However, it is fair to say that in the course of the issues being ventilated in correspondence, the Defendants had, by way of a letter from Horwich Farrelly dated 12 January 2024 (misdated 12 January 2023), threatened to apply for summary judgment if the claim being intimated by the Claimants was brought.

51. The essence of the Application is that the Claimants' claim, at least as currently pleaded, can be seen to have no real prospect of success for the following reasons:

    i) It is submitted that the claim for breach of contract based upon clause 4.3 of the Supplemental Deed must fail because the terms of the Supplemental Deed were, as said to have been made clear by clause 27 of the 2013 SHA, superseded and replaced by the terms of the 2013 SHA which made no provision for a Slot Price Differential. The contractual obligation under clause 4.3 of the Supplemental Deed having been determined thereby, there can, it is submitted, be no claim for breach of contract based thereupon.

    ii) So far as the alleged Slot Price Differential Collateral Warranty is concerned, it is submitted on behalf of the Claimants that there is no merit in the contention that any such collateral warranty arose, not least because of the entire agreement clause in clause 20.6 of the 2002 SHA, if not also that contained in clause 27 of the 2013 SHA, and because, in any event, there is no real prospect of the Claimants being able to persuade the Court at trial that, viewed objectively, the parties had any intention of being bound by any alleged Slot Price Differential Collateral Warranty, not least because a mechanism for entrenching the entitlement to the Slot Price Differential was expressly provided for by the clause 4.3 of the Supplemental Deed.

    iii) As to the alternative estoppel by convention claim that the Claimants seek to pursue as pleaded at paragraph 46 of the Particulars of Claim, the Defendants note that this is expressed to be pursued in reliance upon *"the Representations"*, without the Particulars of Claim pleading any other basis for the alleged convention. The Defendants rely upon paragraph 46 of the Particulars of Claim having failed to plead any facts as supporting the continuation of any convention following the entry into the 2013 SHA. Consequently, in maintaining that the case of estoppel by convention has no real prospect of success, the Defendants rely upon much of the same considerations as they say apply to the alleged contractual warranty, including the entire agreement clauses in the 2002 SHA and the 2013 SHA and the fact that the alleged convention was reflected in the terms of clause 4.3 of the Supplemental Deed.

    iv) So far as the alleged invalidity of the appointment of Mr Maxey and Mr Slade as directors is concerned, the Defendants' short point is that they say that they do not seek to place any reliance upon any variation of the 2013 SHA or the 2013 Articles to add a new Article 18.2(c). It is their case for the purposes of the application for summary judgment that Mr Twambley appointed Mr Maxey and Mr Slade as directors of D1 pursuant to the original Article 11.1 on 21 July 2023, after the latter had become partners of Amelans prior to that date. On this basis, it is submitted that there is no real prospect of the Claimants successfully arguing that Mr Maxey and Mr Slade had not been validly appointed as directors of D1, with the ability to take the decision, as the board of D1, that D1 should no longer apply the Slot Price Differential.

52. As referred to above, the Claimants contend that this is a new line of argument, and that the Defendants had not disabused them of their belief that the Defendants relied upon the 2016 variations and, in particular the purported new Article 18.2(c).

However, Mr Lascelles, on behalf of the Defendants, did refer me to a letter dated 23 April 2024 in which JMW, on behalf of the Claimants, refer to the *"fiction"* of Mr Maxey having been made a partner in Amelans and to this being a *"sham"*, which would suggest that the Claimants were, at least up to a point, alive to the fact that the Defendants were relying on Article 11.1 of the 2013 Articles, notwithstanding that these allegations of *"fiction"* and *"sham"* formed no part of their pleaded case.

53. The Defendants' short point is that the Claimants' case as to the validity of the appointment of Mr Maxey and Mr Slade as directors of D1 has been answered, and that the onus was on the Claimants, having seen the way that the Defendants put their case in evidence in support of the Application, to apply to amend their Particulars of Claim to properly plead a different case challenging the appointment of Mr Maxey and Mr Slade on the grounds advanced at the hearing in argument. In the absence of such an application to amend, it is submitted that summary judgment should be entered on this element of the claim, and on thus on the claim as a whole.

54. It is appropriate, at this stage, to consider the Defendants' evidence so far as the transfer of shares and the appointment of Mr Maxey and Mr Slade as directors is concerned:

    i) In paragraph 15 of Maxey 1, it is alleged that <u>following</u> Express' acquisition of Amelans, both Mr Maxey and Mr Slade became partners in Amelans, and that given such acquisition, he and Mr Slade decided that *"it would be prudent"* if the "A" shares in D1 held by Mr Twambley on behalf of Amelans were transferred to him, and the "B" shares held by Ms Wilkinson were transferred to Mr Slade. In opening the Application, Mr Lascelles sought to correct this by saying, on instructions, that the events referred to in paragraph 15 occurred not after the completion of the acquisition of Amelans, but after Express had agreed to buy Amelans, and before completion. Following the hearing, a short witness statement was filed by Mr Maxey confirming that this was the case.

    ii) In paragraph 17 of Maxey 1, Mr Maxey asserts that the pursuant to the unvaried terms of Article 18.2 of the 2013 Articles, as a partner of Amelans, he was a *"Permitted Transferee"* of "A" shares, and Mr Slade was a *"Permitted Transferee"* of "B" shares.

    iii) Mr Maxey then referred in paragraph 18 of Maxey 1 to the transfer of shares to him and Mr Slade as having been approved at a Board meeting of D1 held on 21 July 2023. The minutes of this meeting identify it as being a meeting attended by Mr Twambley and Ms Wilkinson as directors of D1, and note that the business of the meeting was to consider, and if thought fit, approve the registration of the transfer of shares in D1 currently held by Mr Twambley and Ms Wilkinson as nominees on trust for Amelans to each of Mr Maxey and Mr Slade, described as *"each a partner of Amelans"*, in their capacity as nominee shareholders *"of the Partnership"*. The relevant resolution further stated that the effect that registration of the transfers would promote the success of D1 for the benefit of the members as a whole, and that the transfers were permitted to take place by Article 18.2(b) of the 2013 Articles, Mr Maxey and Mr Slade each being *"partners within the Partnership"*. It was resolved, amongst other things, that the transferees be registered as holders of the shares transferred. It is said

on behalf of the Defendants that the reference in the minutes to Article 18.2(b) a mistake, and that Article 18.2(a) of the 2013 Articles had been intended to be referred to.

iv) In paragraph 19 of Maxey 1, Mr Maxey went on to say that he and Mr Slade were also appointed as directors *"at that meeting"*. The minutes noted that: *"in connection with the Transfers, each of James Maxey and Daniel Slade, would be appointed as directors of the Company."* Further, paragraph 6.2, the minutes recorded that:

> "IT WAS RESOLVED THAT each of James Maxey and Daniel Slade, having consented to act, be appointed as an additional director of the Company with immediate effect from the end of the meeting."

v) Mr Twambley and Ms Wilkinson were subsequently recorded as having ceased to be directors of D1 on 1 September 2023.

vi) Despite how the resolution referred to in paragraph 6.2 of the minutes of the meeting on 21 July 2023 is expressed, it is the Defendants' case that it was Mr Twambley who validly and effectively appointed Mr Maxey and Mr Slade as directors pursuant to Article 11.1 as explained by Mr Maxey in paragraph 19 of Maxey 1.

vii) In paragraph 9 of Maxey 2 it is alleged that it was a prior condition of the SRA's approval of Express' purchase of Amelans that the latter would continue trading for a period post acquisition to protect the interests of its clients, and that the SRA also required that Mr Maxey and Mr Slade become partners of Amelans, in addition to Express. Mr Maxey then asserted in paragraph 9 that: *"This was all confirmed and agreed prior to Mr Slade and I becoming partners before the 21 July 2023 meeting."*

The Claimants' response to the Application

55. So far as the Application concerns the Claimants' case of breach of contract, and also the Claimants' case as to there being an estoppel by convention that the Slot Price Differential be maintained, the essence of the Claimants' case in response to the Application is as follows:

i) It is submitted that the Claimants have at least a real prospect of successfully arguing at trial that the 2013 SHA did not, as a matter of true construction thereof, have the effect of terminating their contractual rights under clause 4.3 of the Supplemental Deed, and it is their case that the latter provision remains in full force and effect, and that D1 is in breach thereof by no longer applying the Slot Price Differential. It is submitted that such a construction of the 2013 SHA, and specifically clause 27 thereof, is required as a matter of business common sense. Further, the point is taken that the 2013 SHA remained silent so far as the Slot Price Differential is concerned, making no express mention thereof, which is said to support a case that, objectively considered, clause 4.3 of the Supplemental Deed was intended to continue to have full force and effect notwithstanding the terms of the 2013 SHA.

ii) Further or in the alternative, it is submitted that the Slot Price Differential Collateral Warranty remains in full force and effect, and that the operation thereof was not affected in any way by the entire agreement clauses in either the 2002 SHA or the 2013 SHA. It is submitted on behalf of the Claimants that this collateral warranty *"sat outside and separate to"* clause 4.3 of the Supplemental Deed (which varied the 2002 SHA), such that it remained unaffected by any entire agreement clauses.

iii) Further or in the alternative, it is submitted that the Claimants' pleaded case as to estoppel by convention based upon *"the Representations"* is not undermined by the entire agreement clauses in the 2002 SHA or the 2013 SHA, or otherwise by the terms of the 2013 SHA. It was submitted in argument that a case as to estoppel by convention is supported by the fact that the Slot Price Differential continued to be applied notwithstanding the entry by the parties into the 2013 SHA, and the fact that there was nothing within the subsequent correspondence between the parties leading up to the entry into the 2013 SHA, including draft agreements passing between the parties, that suggested that there was to be any departure from the alleged convention. In addition, reliance is placed upon the correspondence in 2018/2019 which ultimately led to Mr Twambley backing down from the threat to cause D1 to withdraw the Slot Price Differential.

iv) A further line of argument advanced by Mr Chaisty KC on behalf of the Claimants was that if the entire agreement clauses did have the effect contended by the Defendants, then that *"would be grounds for rectification of the 2013 Agreement"*. In paragraph 80 of the Claimants' Skeleton Argument, it is submitted that:

> "Whether there was a shared mistaken belief between the then-board of IL4U and the Founding Shareholders or a unilateral mistake on behalf of the Founding Shareholders which Mr Twambley and Ms Wilkinson (with a view to future commercial opportunities) knew of and have now sought to take advantage of now cannot be decided today on the basis of the evidence to date. But that does not render such an argument fanciful."

v) A further line of argument advanced on behalf of the Claimants is that the decision to disapply the Slot Price Differential was a breach of the good faith obligation on, and fiduciary duties of the directors of D1. Reliance is placed upon clause 5.1 of the 2013 SHA as providing that the board should at all times *"act in good faith towards the Company and the Shareholders as a whole."* It is submitted that the Defendants' actions that are complained of were taken in bad faith as, even if not dishonest, Mr Maxey and Mr Slade were seeking to use Express' acquisition of Amelans to destroy long-standing agreements for the commercial benefit of Express, and contrary to the interests of D1, in circumstances where, so it is said, there was a clear conflict of interest between their position as directors of D1, and their ownership and control of Express.

56. With regard to the validity of the appointment of Mr Maxey and Mr Slade, with the Defendants relying upon Mr Twambley having appointed Mr Maxey and Mr Slade pursuant to the Article 11.1 before he ceased to be registered as holder of the "A"

shares, rather than upon 2016 variations and a new Article 12.2(c), the Claimants' pleaded case has fallen away, and it is necessary for them to seek to rely upon different grounds for challenging the appointment of Mr Maxey and Mr Slade, and/or the relevant decision of the board to disapply the Slot Price Ratio.

57. The new (unpleaded) arguments sought to be advanced by the Claimants are, in essence, as follows:

i) Firstly, the Claimants seek to challenge the transfer of shares to Mr Maxey and Mr Slade on the basis that they cannot have been partners in *"Amelans"*, within the meaning of the definition of *"Amelans"* in clause 1.1 of the 2013 Articles, at the time that Mr Twambley and Ms Harrison purported to transfer them to Mr Maxey and Mr Slade because *"Amelans"* cannot have existed at that time. This is said to be because either:

a) Express had, according to Mr Maxey, acquired the partnership before the shares were transferred, so the partnership must have ceased to exist when the transfer took place; or

b) The application of the general principle, which I do not understand to be in issue, that when the composition of a partnership changes, either upon a partner retiring or a new partner joining, then, strictly speaking, the original partnership will generally determine and a new partnership will come into existence. Consequently, if Mr Maxey and Mr Slade did ever become partners in Amelans, which is disputed, then that will have been in a new partnership, rather than in *"Amelans"* as defined by the 2013 Articles. Consequently, so it is argued, Article 18.2(a) can have been of no application to permit the transfer of shares.

ii) Further, it is submitted, that Article 18.2(a) of the 2013 Articles is to be read as subject to an implied term that this provision could not be used to permit a transfer of "A" shares if Amelans had been acquired and no longer operated as an independent firm.

iii) A further argument, foreshadowed by JMW's letter dated 12 April 2024, is that any appointment of Mr Maxey and Mr Slade as partners of Amelans was a sham, i.e., a transaction that by common design was not intended to have the legal effect that it gave the impression of creating – see *Snook v London and West Riding Investment Company Ltd* [1967] QB 786 at 802C-F, per Diplock LJ. It is submitted that the purported transfer of the "A" shares to Mr Maxey has all the appearance of a sham expressly designed to circumvent the pleaded issues that challenge the purported variations to the 2013 Agreement and 2013 Articles, i.e. that fixing Mr Maxey and Mr Slade with a label of *"partners in Amelans"* was not intended to give them any actual rights in that regard, but rather to give an external appearance to achieve a certain effect, namely the transfer of "A" shares to Mr Maxey without the need to rely upon the contentious Article 18.2(c).

iv) A further argument relies upon clauses 14.1 to 14.3 the 2013 SHA. It is submitted that, pursuant thereto, Mr Twambley and Ms Wilkinson, being the

board of D1, had the right and discretion to require a *"Changed Shareholder"* to dispose of their shares and serve a Transfer Notice, that they should have considered the exercise of that discretion in respect of the shares held by Mr Twambley and Ms Wilkinson on behalf of Amelans, and that had they exercised that discretion rationally, reasonably and in good faith, and not arbitrarily or capriciously then they would have required the shares held for the benefit of Amelans to be transferred and thus become the subject matter of a transfer notice under clause 14.3 of the 2013 SHA, thereby entitling the other existing Shareholders to acquire the same. Reliance is placed by the Claimants on *Braganza v BP Shipping Ltd* [2015] UKSC 17 with regard to the obligation to exercise a contractual discretion in good faith.

v) In the course of submissions, reliance was placed by Mr Chaisty on the fact that apart from the minute of the board meeting held on 21 July 2023, the Defendants have not exhibited or produced any documents that document the circumstances behind the acquisition of Amelans by Express and the appointment of Mr Maxey and Mr Slade as partners.

The correct approach to an application for summary judgment

58. With regard to an application for summary judgment pursuant to CPR Part 24:

i) The question is whether the respondent to the application can show that they have a *"real prospect"* of succeeding on the relevant claim or issue, or of successfully defending the relevant claim or issue, as appropriate, within the meaning of CPR 24.2.

ii) What this means was helpfully explained by Lewison J (as he then was) in his oft approved and applied passage in *Easyair Ltd (ta Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15], referred to in Civil Procedure 2024 at 24.2.3. In short:

a) The court must consider whether the respondent to the application has a *"realistic"* as opposed to a *"fanciful"* prospect of success.

b) The question boils down to whether the claim carries some degree of conviction, is more than merely arguable and has reality to it;

c) The Court should not conduct a *"mini trial"* in reaching its decision, although that does not mean that it is bound to accept everything that a party says if factual assertions lack reality, particularly if contradicted by contemporaneous documents;

d) Although micawberism will not assist a party seeking to rely on something that might turn up at trial, the Court should take account of evidence that can reasonably be expected to be available at trial. Thus if reasonable grounds exist for believing a fuller investigation into the facts would add to or alter the evidence available to a trial judge, or if a factual dispute is unlikely to be able to be resolved without reference to further (and especially oral) evidence, then a case should be permitted to

proceed to trial – see *Three Rivers DC v Bank of England* [2003] AC 1, and *Doncaster Pharmaceuticals v Bolton* [2007] FSR 63 at [18];

e) On the other hand, if a case or issue can be disposed of on the basis of a short question of law or construction, and all the relevant materials are before the court to enable it to do so, then the Court should grasp the nettle and decide it.,

59. As to the latter point, Mr Lascelles drew my attention to what was said by Jacobs LJ in *Khatri v Cooperative Central Raiffeisen-Boerenleenbank BA* [2010] EWCA Civ 397; [2010] IRLR 715 at [4] and [5], namely that:

> "The court should not be over-astute to decline to deal with the construction of a contract summarily merely on the basis that something relevant to the matrix might turn up if there were a full trial. Most disputes as to "pure" construction of a contract will be suitable for summary determination because the factual matrix necessary for its construction will itself be determinable on that application."

60. On the other hand, Mr Chaisty referred me to authority that emphasised the need for the court to tread carefully in considering an application for summary judgment, where disclosure might throw a different light on matters, for example in relation to the factual matrix against which a contract required to be construed. In particular, Mr Chaisty referred to the question posed by Lord Hamblen JSC in *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3, at [128], namely:

> "In other words, are there reasonable grounds for believing that disclosure may materially add to or alter the evidence relevant to whether the claim has a real prospect of success?"

61. In the course of submissions, Mr Lascelles referred to *Folgender Holdings Ltd v Letraz Properties Ltd* [2019] EWHC 2131 (Ch) at [29], taking the point that I should decide the application for summary judgment on the basis of the Claimants' pleaded case, and that if the Claimants, in the face of the Application, wished to run a new unpleaded case, e.g. as to the appointment of Mr Maxey and Mr Slade or as to the effect of the 2013 SHA, then they should have applied to amend. Mr Lascelles emphasised that it is not permissible to advance a new case by way of Reply - see CPR PD 16, paragraph 9.2.

62. In *Folgender* at [29], Chief Master Marsh said this in the context of an application for summary judgment against a defendant:

> "On the hearing of an application for summary judgment, it is incumbent on the respondent to put forward its best case and, if the statement of case does not reflect the basis upon which the defendant says it has a real prospect of defending the claim, an application must be made for permission to amend the defence which should be listed for hearing with the application for summary judgment. The hearing of an application under Part 24 may not be the trial of the claim. It is,

> however, an analogue for a trial for the purposes of applying the principles concerning amendment."

63. I do have some difficulty with this passage, at least as an absolute proposition, given that CPR 24.4(4) expressly provides that if either the claimant or the defendant makes an application for summary judgment, then there is no obligation to serve a defence. However, in circumstances where a claimant is only going to be able to save their claim by amending their Particulars of Claim, because the pleaded claims have no real prospect of success, then there is force in the point that in many if not most cases, the Court cannot reasonably or realistically be expected to determine whether the claim is one of that would stand a real prospect of success at trial without seeing how the proposed new claim is pleaded in draft amended particulars of claim. In those circumstances, I consider that the onus would be on the claimant to seek permission to amend, and in determining that application the Court would have to consider whether the new case had any real merit before granting permission to amend.

The Claimants' breach of contract/estoppel by convention claim

Did Clause 4.3 of the Supplemental Deed survive the 2013 SHA?

64. The Claimants principal argument is that, as a matter of commercial common sense given the importance and value to the Founding Shareholder of the Slot Price Differential, viewed objectively, the parties to the 2013 SHA should be taken to have intended that the 2013 SHA, and in particular the entire agreement clause at clause 27 thereof, should not interfere with the provision made for maintenance of the Slot Price Differential by clause 4.3 of the Supplemental Deed. Consequently, so it is submitted, clause 27 of the 2013 SHA should be construed consistently therewith, and therefore as not providing that the terms of the 2013 SHA should replace or supersede clause 4.3 of the Supplemental Deed, should be found to remain in full force and effect.

65. As to the principles to apply in construing a contractual document, I was referred by parties respectively to summaries of the relevant principles by Deputy High Court Judges in two cases. However, I prefer to adopt the helpful summary of the relevant principles as set out by Birss LJ in *Adaptive Spectrum and Signal Alignment Inc v British Telecommunications plc* [2023] EWCA Civ 451 at [17] to [20]:

> "[17] The law on contractual interpretation was definitively established by the trio of Supreme Court cases on the subject, namely *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900, *Arnold v Britton and others* [2015] UKSC 36; [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173.
>
> [18] There is no need to review these authorities or any others at any length. The guiding principle is that the task of the court is a unitary exercise involving an iterative process to ascertain the objective meaning of the language used by the parties to express their agreement (*Wood v Capita* at [10] per Lord Hodge). Or putting the same thing another way, it is a unitary process to ascertain what a reasonable person with all the background knowledge reasonably available to the

> parties at the time would have understood the parties to have meant (taken from *Britvic Plc v Britvic Pensions* [2021] EWCA Civ 867 at [29] (per Sir Geoffrey Vos MR).
>
> [19] A further aspect is that in this exercise the court can give weight to the implications of rival constructions by reaching a view as to which construction would be more consistent with commercial common sense (*Wood v Capita* at [11] per Lord Hodge), nevertheless it is important to see that this applies when there actually are rival constructions to consider (see *Britvic*, particularly Coulson LJ at [57] and Nugee LJ at [70]). It is much harder (one might say impossible) to weigh up implications against the meaning of clear language. That is because, as Lord Hodge also pointed out in [11], there is always the possibility that a party might have accepted something which with hindsight did not serve its interest.
>
> [20] A different issue, and not relevant in this case, is a situation in which clear language might be overridden because something has just gone wrong with the language (see *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 and also *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 93D-E about not attributing to the parties an intention which they plainly could not have had)."

66. In seeking to ascertain what a reasonable person with all the background knowledge reasonably available to the parties at the time would have understood the parties to have meant, the court should have regard to the background or factual context of the contract at the time that it was entered into, but:

    i) This is limited to the "*knowledge a reasonable observer would have expected and believed both contracting parties to have had"* – see *Challinor v Juliet Bellis & Co* [2013] EWHC 347 (Ch) at [277] *per* Hildyard J; and

    ii) The court is not entitled to have regard to the negotiations leading to the conclusion of the contract nor evidence as to the parties' subjective intentions.

67. As to the use of business or commercial common sense as an aid to construing a contractual document, of the decisions of the Supreme Court identified by Birss J as referred to in paragraph 65 above, the high watermark is almost certainly *Rainy Sky SA v Kookmin Bank* (supra). It is important to note what Lord Clarke, with whom the other members of the Court agreed, said in the latter in this regard at [21] and [23]:

> "21. The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has 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, would have understood the parties to have meant. In

> doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other." [My emphasis].

…

> 23. Where the parties have used unambiguous language, the court must apply it. This can be seen from the decision of the Court of Appeal in *Co-operative Wholesale Society Ltd v National Westminster Bank plc* [1995] 1 EGLR 97 ."

68. This accords with what Lord Hope had said in *Multi-Link Leisure Developments Ltd v North Lanarkshire Council* [2010] UKSC 47, [2011] 1 All ER 175, at [11], namely:

> "[11] The court's task is to ascertain the intention of the parties by examining the words they used and giving their ordinary meaning in their contractual context. It must start with what it is given by the parties themselves when it is conducting this exercise. Effect is to be given to every word, so far as possible, in the order in which they appear in the clause in question. Words should not be added which are not there, and words which are there should not be changed, taken out or moved from the place in the clause where they have been put by the parties. It may be necessary to do some of these things at a later stage to make sense of the language. But this should not be done until it has become clear that the language the parties actually used creates an ambiguity which cannot be solved otherwise."

69. On a proper application of the above principles, I am satisfied that, as a matter of true construction of clause 27 of the 2013 SHA, any argument that clause 4.3 of the Supplemental Deed survived the same as an enforceable obligation as between the relevant parties is hopeless.

70. The language of clause 27 of the 2013 SHA is, in my judgment, clear and unambiguous and does not leave any scope for an argument that there is some ambiguity that requires to be resolved by reference to business or commercial common sense. Indeed, Mr Chaisty was unable to point to any ambiguity in the language thereof.

71. Clause 27.1 clearly provides that the 2013 SHA constitutes *"the whole agreement"* between the parties and *"supersedes any previous arrangement, understanding or agreement between relating to the subject matter they cover."* That, to my mind, is sufficient in itself to exclude any ambiguity. However, clause 27.1 goes on to provide *"for the avoidance of doubt"*, that reference is being made to the Supplemental Deed and all that it encompassed, as the Supplemental Deed clearly falls within the definition of *"Current Documents"*, which are defined in Recital (C) as meaning the 2002 SHA *"together with subsequent deeds of variation"*, which is plainly included the Supplemental Deed.

72. Further support for this construction is provided by Recitals (C) and (D) to the 2013 SHA which referred to a wish to consolidate and update the Current Documents *"in their entirety"*, and to an agreement to *"terminate the Current Documents and enter into this agreement for the purpose of documenting their rights and responsibilities as shareholders of the Company."*

73. Further, I do not consider that this is a case where it can realistically be argued that something has gone wrong with the language of the 2013 SHA so as to bring into play the authorities referred to by Birss LJ in *Adaptive Spectrum* at [20]. Indeed, this is not how it was put by Mr Chaisty in argument.

74. Further, and for what it is worth, I do not consider that the evidence as to business or commercial common sense is so obvious that it would necessarily resolve any ambiguity if there were any. Clearly, it was in the commercial interests of the Founding Shareholders to maintain the Slot Price Differential. However, it is clear, not least, from Mr Twambley's email dated 6 March 2019 that there were wider considerations in play, and he appeared to be suggesting that the maintenance of the Slot Price Differential *"would be highly detrimental to the company"*. Further, as referred to in paragraph 24 above, the reason why, in 2019, it was agreed that Founding Shareholders should not be able to obtain further slots at the lower rate because there was a desire not to antagonise Panel Members. There were clearly tensions on both sides between Founding Shareholders and Panel Members, and a balance to be struck.

Rectification?

75. It is argued on behalf of the Defendants that even if clause 27 of the 2013 SHA is construed against the Claimants, this element of the claim can be rescued by an argument that the Claimants would stand a real prospect of success in obtaining rectification of the 2013 Agreement so that it took effect in such a way as to leave unaffected the contractual obligations under clause 4.3 of the Supplemental Deed. I note the recent authority of the Supreme Court to the effect that an action for rectification is not necessary for the Court to treat a contract as rectified, on the basis of equity treats as done that which ought to be done – see *National Union of Rail, Maritime and Transport Workers and another (Respondents) v Tyne and Wear Passenger Transport Executive T/A Nexus* [2024] UKSC 37.

76. However, where a party is advancing a claim for breach of contract that depends for success upon the terms of a relevant document being rectified, I consider that it must be incumbent upon that party to plead their case for rectification, and that on an application for reverse summary judgment brought by a defendant in this situation, the principles considered by Master Marsh in *Folgender* at [29] come into play and that simply raising in evidence an unpleaded and unparticularised argument as to rectification is unlikely to provide the answer to the application for summary judgment.

77. Further, even though a maintainable case as to rectification might have been capable of saving this element of the present claim by providing a way around the entire agreement provision in clause 27 of the 2013 SHA (cf. *Dubai Islamic Bank PJSC v PSI Energy Holding Co BSC* [2011] EWHC 2718 (Comm), per Hamblen J at [83]), I

do not consider that an argument based on rectification assists the Claimants in the present circumstances in any event even if the Claimants can overcome the pleading point.

78. At paragraph 77 of their Skeleton Argument, the Claimants referred the helpful summary of the relevant requirements of a claim for rectification in the judgment of Paul Stanley KC, sitting as a Deputy High Court Judge, in *Internacional - Azores Airline SA v Hi Fly Ltd* [2024] EWHC 2762 (Comm) at [126] et seq. Whether the rectification sought is based upon (a) prior agreement, (b) a shared common mistake or (c) a unilateral mistaken belief that one party was aware of but preferred to allow the other party to enter into the contract under the influence of that mistake, evidence is required of, amongst other things, the agreement, the mistake being a common mistake, or the other party being aware of the mistake but remaining silent. The only evidence to support there having been any mistake on the part of any party in the present case is the fact that for the time being following the entry into of the 2013 SHA, the Slot Price Differential continued to be applied notwithstanding.

79. However, this has to be viewed against the fact that this is not, per se, inconsistent with the terms of the 2013 SHA that, by clauses 4.2(g) thereof, expressly conferred the power on the board to determine the amount of the *"Service Charge"*, and the board might simply have decided not, for the time being, to depart from the status quo. Further, it is of note that although there has been extensive correspondence and communication between the parties both before and after the entry into of the 2013 SHA, no document has been identified or referred to as supporting a case of rectification, i.e. as going any way to identify and prove the factual basis for any *common* mistake or assumption or for a finding of any *unilateral* mistake on the part of the Claimants that D1 (by its board) sat back and let the Claimants make.

80. In short, therefore, I do not consider that the Claimants have demonstrated any real prospect of establishing a case in rectification at trial, and that what is in reality no more than assertion of a claim in rectification provides no answer to the Application.

Collateral warranty or estoppel by convention?

81. As to the Claimants' alternative case based upon the Slot Price Differential Collateral Warranty and estoppel by convention, I consider the claim to be equally unmeritorious. These elements of the claim each depend upon the *"Representation"* or *"Representations"* alleged to have been made by Mr Cockx and Mr Twambley at the meeting on 1 May 2003 referred to in paragraph 23 of the Particulars of Claim that preceded the entry into the Supplemental Deed the same day.

82. The conclusion of a binding collateral warranty, as with any contract, will depend, amongst other things, upon the parties having had an intention to create legal relations in respect thereof. So for as estoppel by convention is concerned, *Baird Textile Holdings Limited v Marks & Spencer Plc* [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737, at [92] per Mance LJ, provides authority for the proposition that the parties must have an objective intention to make, affect or confirm a legal relationship before the Court can properly conclude that an estoppel by convention has arisen.

83. I consider it to be of fundamental importance that clause 4.3 of the Supplemental Deed provided the contractual mechanism to give effect to the agreement between the parties that the 2002 SHA should be varied so as to allow for the sale of slots to Panel Members as well as Founder Shareholders, but on the agreed basis that the Founder Shareholders would be entitled to the benefit of the Slot Price Differential. In these circumstances and considering the matter objectively, I find it impossible to see how it can realistically be suggested that the parties to the Supplemental Deed can have intended, as a result of what might have been said at the meeting held on 1 May 2003 shortly prior to the entry into of the Supplemental Deed, to enter into some legal relationship, whether operating as a collateral contract or as an estoppel by convention, that put a gloss on what had been agreed and reflected in the terms of the Supplemental Deed.

84. Even if, which appears somewhat unlikely, what was said at the meeting went beyond that which was agreed as provided for by clause 4.3 of the Supplemental Deed, as was pointed out in *Baird Textile Holdings Limited v Marks & Spencer Plc* at [92] by reference to *Amalgamated Investments and Property Co. Ltd v Texas Commerce International Bank* Ltd [1982] QB 84 at 107, per Robert Goff J, a mere promise to increase an obligation under an existing contract will generally not give rise to an estoppel, even if acted on by the promisee, for the promisee may reasonably be expected to appreciate that, to render it binding, it must be incorporated in a binding contract or contractual variation, and that they cannot therefore safely rely upon it as a legally binding intention and a promise.

85. Further, in *BMIC Limited v Chinnakannan Sivasankaran* [2014] EWHC 1880 (Comm), Popplewell J (as he then was), at [45], observed that:

    i) The purpose of a written, formally executed agreement is to avoid disputes which commonly arise when the parties' bargain is not completely recorded in writing.

    ii) Where parties contemplate that their agreement will be reduced to lengthy written agreements, drafted and advised on by lawyers, and formally executed, as in the present case, there is a strong presumption (quite apart from any entire agreement clause) that the parties do not intend to be bound by anything not recorded in their written agreement.

86. The Claimants' pleaded case as to estoppel by convention in paragraph 46 of the Particulars of Claim relies upon the representations alleged to have been made at the meeting on 1 May 2003. However, to the extent that any contractual obligation or estoppel by convention might not have survived the 2013 SHA, Mr Chaisty argued that the Claimants stand a real prospect of success in showing that a new estoppel by convention came into existence after the entry into of the 2013 SHA arising from the fact that, notwithstanding the entry into of the 2013 SHA, the Slot Price Differential continued to be applied by D1 acting by its board.

87. Assuming for one moment that the terms of the 2013 SHA did not prevent some new estoppel by convention in respect of future conduct arising, the difficulty is, as I see it, that what occurred after the entry into of the 2013 SHA is equally consistent with the directors of D1, in the exercise of their discretion in respect of the *"Service*

Charge" under clause 4.2(e) of the 2013 SHA, simply deciding to continue to apply the Slot Price Differential for the time being, without being under any obligation to do so. There is no evidence, as I see it, *"crossing the line"* or that otherwise supports there having been a common assumption that was acted upon by the Claimants. As with the suggested case of rectification, no document has been referred to or identified which supports any such common assumption existing after the entry into of the 2013 SHA.

88. Further, in the circumstances, I do not consider there to be any realistic prospect of showing the required objective intention to make, affect or confirm a legal relationship with regard to a continued obligation to apply the Slot Price Differential going beyond the terms of clause 4.3 of the Supplemental Deed up to the entry into of the 2013 SHA, or at all thereafter.

89. A further difficulty for the Claimants is, I consider, the existence of the entire agreements clauses, namely clause 20.6 of the 2002 SHA and clause 27 of the 2013 SHA, and also the non-oral modification ("**NOM**") clause in clause 24.1 of the 2013 SHA.

90. The effect of these sorts of provision was extensively reviewed by the Supreme Court in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24; [2019] AC 119. Lord Sumption (with whom Lady Hale, Lord Wilson and Lord Lloyd-Jones agreed) held (at [12]) that NOM clauses bring at least three benefits:

> "The first is that it prevents attempts to undermine written agreements by informal means, a possibility which is open to abuse, for example in raising defences to summary judgment. Secondly, in circumstances where oral discussions can easily give rise to misunderstandings and crossed purposes, it avoids disputes not just about whether a variation was intended but also about its exact terms. Thirdly, a measure of formality in recording variations makes it easier for corporations to police internal rules restricting the authority to agree them."

91. At [14], Lord Sumption recognised that entire agreement clauses raise very similar issues to NOM clauses, and that entire agreement clauses:

   i) Are intended to achieve contractual certainty about the terms agreed, in the case of entire agreement clauses by nullifying prior collateral agreements relating to the same subject-matter.

   ii) Preclude a party to a written agreement from threshing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim to the existence of a collateral warranty.

   iii) Obviate the occasion for any such search and the peril to the contracting parties posed by the need which may arise in its absence to conduct such a search.

   iv) Constitute a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere,

and that accordingly any promises or assurances made in the course of the negotiations (which in the absence of such a clause might have effect as a collateral warranty) shall have no contractual force, save insofar as they are reflected and given effect in that document. The operation of the clause is thus not to render evidence of the collateral warranty inadmissible but to denude what would otherwise constitute a collateral warranty of legal effect.

v) Work such that if the collateral agreement is capable of operating as an independent agreement supported by its own consideration, then most standard forms of entire agreement will not prevent its enforcement. But if the clause is relied upon as modifying what would otherwise be the effect of the agreement which contains it, the court will apply it according to its terms and decline to give effect to it.

vi) Operate such that if the parties agree that the written contract is to be the entire contract, it is no business of the courts to tell them that they do not mean what they have said.

92. Although *MWB Business v Rock* involved a NOM clause, Lord Sumption also addressed the position (*obiter*) in respect of an estoppel (at [14] and [16]). He indicated that: (i) an entire agreement clause might possibly not prevent an estoppel; (ii) (in the context of NOMs) the scope of the estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when agreeing the NOM and at the very least there would have to be (a) some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; (ii) something more would be required for this purpose than the informal promise itself.

93. The decision of Christopher Nugee QC (as he then was), sitting as a Deputy High Court Judge in *Sere Holdings Limited v Volkswagen Group United* [2004] EWHC 1551 (Ch), at [25], provides authority for the proposition that a suitably worded entire agreement or non-reliance clause can prevent an estoppel by convention arising where the alleged common assumption was as to the future conduct of the defendant and was alleged to be shared at the time of entering into the contract:

> "In order to succeed in this argument the claimant must establish that the defendant has, by sharing and acquiescing in the claimant's assumption, precluded itself from appointing another dealer, or allowing a dealer an additional outlet, for the requisite period. But this is on analysis simply another way of saying that the defendant has committed itself to a particular course of future conduct, or in other words that it has agreed or promised to act in a particular way in circumstances which the law regards as making the promise binding. Save that in the one case the ground on which the law does so is that there is offer, acceptance and consideration, while in the other the ground for enforcing the promise is that there is a shared assumption which it is inequitable to allow the defendant to go back on, this differs very little from a promise that is enforceable as a matter of contract. But if the entire agreement clause is effective, as for the reasons I have given in my view it is, to rob an express promise made in

> precontractual negotiations of any legal effect, it seems to me that it must equally be effective to prevent a promise from having any legal effect where that promise is said to arise out of an assumption shared by the parties when entering into the contract."

94. In response, to Mr Lascelles' reliance on this authority, Mr Chaisty relies upon what was said by Hamblen J (as he then was) in *Dubai Islamic Bank PJSC v PSI Energy Holding Co BSC* [2011] EWHC 2718 (Comm), at [83], as to the interplay between rectification and entire agreement clauses, where he said:

> "As the Defendants pointed out, there is authority that [entire agreement] clauses do not preclude claims for rectification, a principle which, like estoppel by convention, is based on considerations of unconscionability – see Hodge on Rectification paras. 3-165 to 3–168. Further estoppel by convention in this context, unlike a collateral warranty claim, does not involve the assertion of an additional contractual promise, but rather precludes a party from enforcing an existing contractual promise in a way contrary to the parties' shared understanding."

95. This is relied upon in support of the contention that an entire agreement clause ought not to prevent the operation of an estoppel by convention. Hamblen J's judgment related to an interlocutory application. It is instructive to see how the case as to estoppel by convention was dealt with by the trial judge, Flaux J (as he then was), reported at [2013] EWHC 3718 (Comm), at [31]:

> "Given that the case fails on the facts, it is not necessary to consider the law in any detail. So far as estoppel by convention is concerned, even if there had been a communication crossing the line between the parties, which would be a pre-requisite for such an estoppel, the entire agreement clause at clause 25.6 of the RSA presents an insuperable difficulty. It gives rise to a contractual estoppel, precluding the defendants from asserting that something outside the four corners of the RSA had contractual effect: see *Matchbet Ltd v Openbet Retail Ltd* [2013] EWHC 3067 (Ch) at [112] and [132] per Henderson J."

96. I consider that the rationale of this is that a distinction requires to be drawn between an estoppel based upon a pre-contractual representation, or some other assumption said to exist at the time of entering into the contract containing the entire agreement clause, and an estoppel based upon representations made or conduct after the contract has become binding on the parties. In the former case, the contractual estoppel created by the entire agreement clause will preclude reliance upon the pre-contract representation or assumption. Where reliance is placed upon post-contractual representations or conduct, then the contractual estoppel created by the entire agreement clause will not bite, but an NOM may serve to prevent reliance upon an estoppel by convention, at least unless there are some words or conduct unequivocally representing that the variation was valid notwithstanding its informality, something more being required for this purpose than the informal promise itself (*MWB Business v Rock* at [16]).

97. Applying this to the facts of the present case, it seems to me clear that even if there were, contrary to my conclusion above, some operative collateral contract or estoppel by convention was in play prior to the entry into of the 2013 SHA, the effect of clause 27 of the 2013 SHA was that a contractual estoppel operates to prevent any such claims now being asserted.

98. As the position after the entry into the 2013 SHA, one does have the fact that D1 continued to operate a Slot Price Differential. However, there is absolutely no evidence of any representation or conduct whereby D1 or its board communicated that, notwithstanding the discretion provided to them by the terms of the 2013 SHA, they considered themselves bound to continue to operate the Slot Price Differential, and specifically there is no evidence of any representation that D1 or its board considered such to be the case notwithstanding the lack of the formality required by the relevant NOM clause, Clause 24.1 of the 2013 SHA. The mere fact that Mr Twambley might, by his email dated 6 March 2019, have backed down when the issue arose in 2018/19 falls well short, in my judgment, of assisting the Claimants for this purpose.

99. In short, therefore, I do not consider that there is any real prospect of a claim based upon breach of collateral warranty, or the assertion of an estoppel by convention succeeding at trial.

Breach of obligation of good faith/fiduciary duties

100. In the Claimants' Skeleton Argument, the argument that the directors of D1 (Mr Maxey and Mr Slade) acted in breach of the obligation of good faith under clause 5.1 of the 2013 SHA and/or in breach of their fiduciary duties in causing D1 to cease to apply the Slot Price Differential is dealt with under the breach of contract/estoppel by convention element of the claim. However, this is a wholly new unpleaded claim based on a very different cause of action than those advanced in the Particulars of Claim based upon clause 4.3 of the Supplemental Deed, the alleged Slot Price Differential Collateral Warranty and estoppel by convention.

101. Even if there were merit any such new claim, I do not consider that it is open to the Claimants to advance it as a basis for resisting the Application so far as it concerns the Claimants' pleaded case as formulated based upon clause 4.3 of the Supplemental Agreement, the alleged Slot Price Differential Collateral Agreement, and the alleged and pleaded estoppel by convention.

Conclusion regarding breach of contract/estoppel by convention

102. Given that I have concluded that there is no real prospect of the claims based upon clause 4.3 of the Supplemental Agreement, the alleged Slot Price Differential Collateral Agreement or the alleged and pleaded estoppel by convention claim succeeding at trial for the reasons set out above, I consider that the Defendants are entitled to summary judgment on these claims, and that I should grant summary judgment thereupon accordingly.

Claim based upon invalid appointment of Mr Maxey and Mr Slade

103. As already identified, the Claimants' pleaded case has fallen away in that the Defendants do not, as to the validity of the appointment of Mr Maxey and Mr Slade as directors, rely upon any variation of the terms of the 2013 SHA, or the 2013 Articles. Rather, they upon Mr Maxey and Mr Slade having been appointed as directors on 21 July 2023 by Mr Twambley as "A" shareholder pursuant to Article 11.1.

104. However, I can see a number of potential difficulties with the Defendants' contention that Mr Maxey and Mr Slade were so appointed, including the following:

    i) The resolution recorded in paragraph 6.2 of the board minute of D1's board meeting dated 21 July 2023 that provides for the appointment of Mr Maxey and Mr Slade as *"additional director"* of D1 is recorded as being a resolution of the board of D1, and not an appointment made by Mr Twambley in his capacity as "A" shareholder. This is consistent with Mr Maxey saying in paragraph 19 of Maxey 1 that he and Mr Slade were appointed *"at that meeting"*, but that was a board meeting;

    ii) There is no evidence of the formalities of Article 11.4 having been followed. Article 11.4 requires that an appointment be: *"in writing and signed by or on behalf of the holder of the majority of the A Shares and served on each of the other shareholders and the Company at its registered office, marked for the attention of the Company secretary"*, and further provides that any such appointment or removal *"shall take effect when received by the Company or at such time as shall be specified in such notice"*; and

    iii) The entitlement under clause 11.1 of the 2013 Articles for the holder of the majority of the "A" shares to appoint directors is expressed as being an entitlement to appoint *"two persons to be Directors of the Company"*. At the time that Mr Maxey and Mr Slade were purported to have been appointed as directors, there were already two directors in place, Mr Twambley and Ms Wilkinson, who will already have been appointed by the holder of the majority of the "A" shares and who did not cease to be directors until 1 September 2023. Notwithstanding that the number of directors is expressed by Article 5 as being required to be not less than two and no more than four, the only power to appoint directors is pursuant to Article 11 (see Article 11.7), and it might be said that the holder of the majority of "A" shares is only entitled to appoint two directors to serve at any one time, and not four given the terms of Article 11.1.

105. These arguments might be academic if the "A" shares were validly and effectively transferred to Mr Maxey, with Mr Maxey being registered as holder of the shares in D1's register of members thereafter, in that Mr Maxey might well be able, at "A" shareholder, to simply appoint himself and Mr Slade as directors pursuant to clause 11.1, to the extent that they were not both already validly appointed, and as newly appointed directors ratify any otherwise invalid or ineffective decision by the directors (through lack of appointment) to remove the Slot Price Differential, thereby depriving the Claimants of their entitlement to the declaratory and injunctive relief that they seek.

106. However, this does then, potentially at least, bring into play the as yet unpleaded new arguments advanced by the Claimants in response to the Application in seeking to challenge the validity of the transfer of shares to Mr Maxey, namely, to re-cap:

   i) The argument that, as a matter of true construction, the reference to *"Amelans"* in D1's Articles of Association is to the partnership as such existing as at the date of the 2013 Agreement;

   ii) The argument that Article 18.2(a) of the 2013 Articles is subject to an implied term that Article 18.2(a) could not itself be used to permit a transfer of "A" shares if Amelans was acquired and no longer operated as an independent firm;

   iii) The argument that the board ought to have considered the exercise of its discretion under clause 14.1, and that had it done so it ought to have concluded that the holders of the "A" and "B" shares on behalf of Amelans should serve a transfer notice under clause 14.3, thereby entitling the other existing Shareholders to acquire the same; and

   iv) The "sham" argument regarding Mr Maxey and Mr Slade becoming partners in Amelans.

107. Further, I consider that, at this point, it is appropriate to consider whether there might be any merit in the argument that the decision of Mr Maxey and Mr Slade, if validly appointed, to cause D1 to remove the Slot Price Differential, amounted to a breach of the obligation of good faith under clause 5.1 of the 2013 SHA, and/or a breach of statutory fiduciary duty (most pertinently s. 172 and/or s. 175 of the Companies Act 2006).

108. As to the construction issue, as Mr Chaisty identified, the articles of association of a company fall to be construed in accordance with the established rules for the interpretation of contracts – see *Towcester Racecourse Co Ltd v The Racecourse Assn Ltd* [2003] 1 BCLC 260, 268b [16].

109. On the evidence before the Court, this is, at least at first blush, a difficult argument for the Claimants to sustain. Considering the definition of *"Amelans"* in Article 1.1, I would have thought that that the reasonable objective observer would consider this to mean a reference to the solicitors' practice trading as Amelans with SRA number 570220, whether or not there had been a change in the composition of the partnership through which such business was carried on, and even though, in consequence it might not strictly be the same partnership, and any limited liability partnership carrying on business in succession to the latter. Albeit conscious of the authorities referred to in paragraphs 59 and 60 above, I do not consider that it can be ruled out that there might be background material which might demonstrate that some rather more limited meaning was, objectively considered, intended, that could be pleaded out in amended particulars of claim.

110. So far as the implied term case is concerned, again as the argument as articulated in the Claimants' Skeleton Argument is not immediately attractive, not least given that the touchstone for implying an implied term is necessity – see e.g. *Baird Textiles v Marks and Spencer* (supra) at [13]-[21]. However, again, I consider that it is quite

possible that when properly pleaded and/or with the benefit of further evidence demonstrating why it might be necessary to imply the alleged term, there might be a real prospect of the Claimant sustaining the argument at trial as to implication of a term that Article 18.2(a) could not itself be used to permit a transfer of "A" shares if Amelans was acquired and no longer operated as an independent firm.

111. This implied term point does, I consider, potentially tie in with the Claimants' argument concerning clauses 14.1 to 14.3 of the 2013 SHA under which the board may require a *"Shareholder"* to dispose of their shares on a *"Change of Control"*. Significantly perhaps, *"Shareholders"* is defined in clause 1.1 of the 2013 SHA as meaning: *"together the 'A' Shareholder and 'B' Shareholders"*, suggesting that these provisions apply to the "A" shares held for the benefit of Amelans. *"Change of Control"* is quite widely defined, and clauses 14.2(b)-(d) might well extend to Express's acquisition of Amelans and the change of control occasioned thereby. The inclusion of clause 14 in the 2013 SHA does point to an intention to limit the ability of third parties to involve themselves in the affairs of D1, albeit that it might be said that the board is given a discretion in that respect. However, there may be a case for saying that that should not be an unfettered discretion, in particular where the directors have a serious conflict of interest.

112. So far as the argument as to "sham" is concerned, an explanation has been provided by Mr Maxey as to why it was necessary for Amelans to continue in existence notwithstanding its acquisition by Express, and thus as to why he and Mr Slade become partners therein. There is no real reason to doubt this, and I am not convinced that the argument as to sham takes matters further.

113. I do, however, consider that there might, potentially at least, be more in the case as to breach of the obligation of good faith under Article 5 and/or breach of fiduciary duty. The former is perhaps more difficult given the connotations of failing to act in good faith. A case based on the latter may be more realistic given the potential for a conflict of interest between Mr Maxey's and Mr Slade's positions as partners in/directors of Express and their position as directors of D1.

114. Of relevance may be clause 5.1(d) of the 2013 SHA which imposes an obligation on the board to: *"Administer the Company and the Business for the benefit of all the Shareholders and Panel Members"*, although Mr Maxey and Mr Slade may say that by removing the Slot Price Differential, they were striking a balance between the two.

115. One approach would be to say that *Folgender* at [28] should be applied with full rigour, and that as the Claimants have not come to Court with an application to amend in order to properly plead out the above arguments, I should simply decide the case on the basis of the Claimants' pleaded case as it stands, and therefore grant summary judgment in the Defendants' favour.

116. However, I am not persuaded that, in the circumstances, this would be the correct approach. It is true that the Claimants could, in the light of the arguments advanced in support of the Defendants' application for summary judgment, have drafted amended particulars of claim, and asked the Court for permission to amend at the hearing. However, as matters stand, the consequence would be to force the Claimants to issue fresh proceedings in circumstances in which there might be potential abuse of process

arguments having regard to *Aldi Sores Ltd v WSP Group Plc* [2008] 1 WLR 748 considerations. Further, requiring the Claimants to issue fresh proceedings would, as I see it, be a disproportionate exercise that would not serve to further the overriding objective under CPR 1.1.

117. Consequently, if I thought that there might be something in the arguments that the Claimants now seek to deploy to challenge the validity of the decision of Mr Maxey and Mr Slade, as the board of D1, to disapply the Slot Price Differential, then I consider that I should give the opportunity to the Claimants apply to amend their Particulars of Claim before granting summary judgment on this element of the claim.

118. As to this, I am reluctant to go too far in my consideration of the merits of these further arguments for fear of prejudging any application to amend, and doing so without having had the benefit of seeing a pleaded, and fully articulated case in relation thereto. The arguments are not without difficulty, and an application to amend may fail. However, I consider there to be just about enough in them to require me to allow the Claimants an opportunity to seek permission to amend, and for me to find that summary judgment should only be granted if the Claimants fail to apply for permission to amend within, say, 14 days, or, having so applied, fail to obtain permission to amend.

119. In the circumstances, I have come to the view that I should direct that summary judgment should be entered for the Defendants on the Claimants' claim as to the validity of the transfer of shares to Mr Maxey, the appointment of Mr Maxey and Mr Slade as directors of D1, and consequently as to the validity of the purported decision of the board of D1 to remove the Slot Price Differential, and thus effectively on the whole claim given my determination of the other issues, but only if the Claimants fail, within 14 days, to issue an application to amend the Particulars of Claim together with draft amended particulars of claim, or if such application is issued but is not successful. Of course, the Court should only grant permission to amend if the case proposed be advanced by way of amendment stood a real prospect of success, and would therefore survive an application for summary judgment.

120. I consider that the appropriate course would be for any such application to amend to be heard, as soon as possible, at the same time as I determine other consequential issues arising from this judgment.

Overall conclusion

121. For the reasons that I have set out above, I consider that the Defendants are entitled to summary judgment on the Claimants' claims based upon breach of clause 4.3 of the Supplemental Deed, the alleged Slot Price Differential Collateral Warranty, and estoppel by convention.

122. So far as the Claimants' claims in respect of the validity of the appointment of Mr Maxey and Mr Slade as directors, the transfer of "A" shares to Mr Maxey, and hence the decision to remove the Slot Price Differential, I consider that the Defendants should be granted summary judgment thereon unless the Claimants, within 14 days, issue an application to amend the Particulars of Claim, and succeed, on the hearing of

that application, in obtaining permission to amend the Particulars of Claim to enable them to advance the relevant arguments.

123. I consider that the hearing of any application to amend should be heard at the same time as I deal with other consequential matters arising from this judgment. I would therefore propose, on the hand down of this judgment, to adjourn all consequential matters that cannot be agreed, including any application for permission to appeal, to be determined at a hearing to be listed on the first available date after 28 days, to allow for any application to amend to be made.

124. The parties should please seek to agree an order to be made on hand down addressing the above, and liaise with the Court with regard to a date for the consequential hearing, providing an agreed ELH.