Neutral Citation Number: [2025] EWCA Civ 1206

Case No: CA-2024-001924

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Richard Farnhill (sitting as a Deputy High Court Judge)
[2024] EWHC 1357 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/09/2025

Before:

LORD JUSTICE NEWEY
LADY JUSTICE ASPLIN
and
LORD JUSTICE LEWIS

- -

Between:

ROHIT KULKARNI	**Claimant/ Appellant**
- and -	
(1) GWENT HOLDINGS LIMITED	**Defendants/**
(2) ST JOSEPH'S INDEPENDENT HOSPITAL LIMITED	**Respondents**

- -
- -

Andrew Butler KC and Hugh Rowan (instructed by **Acuity Law Ltd**) for the **Appellant**
Jonathan Crow KC and Thomas Braithwaite (instructed by **Veale Wasbrough Vizards LLP**) for the **First Respondent**

Hearing dates: 1 and 2 July 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 26 September 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Newey:

1. This appeal is from a judgment given by Mr Richard Farnhill ("the Judge"), sitting as a Deputy High Court Judge, on 5 June 2024 ([2024] EWHC 1357 (Ch)) ("the Judgment"). The appeal concerns a shareholders' agreement ("the SHA") which the appellant, Mr Rohit Kulkarni, and the first respondent, Gwent Holdings Limited ("Gwent"), entered into with the second respondent, St Joseph's Independent Hospital Limited ("the Company"), on 13 February 2020.

Early history

2. Mr Kulkarni is a consultant surgeon. By 2019, he had worked at St Joseph's Independent Hospital ("the Hospital") in Newport, South Wales for many years and was its medical director and, as its "responsible officer", responsible for clinical governance processes.

3. The Hospital was owned by St Joseph's Hospital Limited ("OldCo"). Mr Kulkarni was a director and shareholder of OldCo, as were Mr Brian Staples and Mr Paul Jenkins. Mr Kulkarni held about 22.5% of the shares. Other consultants at the Hospital also had shareholdings, but they were smaller and, unlike the shares held by Mr Kulkarni, Mr Staples and Mr Jenkins, carried no voting rights.

4. Mr Kulkarni and other consultants had acquired their shares under an Enterprise Investment Scheme, which had tax advantages. One consequence was that Mr Kulkarni could not be an employee of OldCo for the first three years. He became one later, in 2018, in order to meet the requirements of the Private Healthcare Market Investigation Order 2014, which had followed an investigation into the private healthcare market by the Competition and Markets Authority. The 2014 Order imposed a prohibition on clinicians having equity interests in hospitals at which they held practising privileges, but there was an exception for employees.

5. Mr Kulkarni was also a creditor of OldCo. He put the total amount owing to him at around £750,000.

6. However, a dispute had arisen involving Mr Kulkarni, Mr Staples and Mr Jenkins and, at least in part as a result, OldCo had serious financial problems. In mid-2019, OldCo sought advice from Begbies Traynor, insolvency practitioners. On 14 February 2020, OldCo appointed administrators.

7. Some months earlier, Mr Kulkarni had approached Mr David Lewis ("Mr Lewis"), a successful businessman, for assistance. Mr Lewis came to agree to invest in a company (in the event, the Company) that would buy the Hospital from OldCo.

8. A meeting to work through the arrangements was fixed for 7 February 2020 and, before joining that meeting, Mr Kulkarni, Mr Lewis and Mr Robert Davies, a solicitor who was also a director of both OldCo and the Company, had a separate discussion (referred to in the Judgment as the "Pre-Meeting") lasting in the region of 15 to 20 minutes. During the Pre-Meeting, Mr Lewis insisted on Gwent having control of the Company's board and Mr Kulkarni accepted that "because he was forced to": see paragraph 72 of the Judgment. For his part, Mr Kulkarni raised the £750,000 that he said he was owed by OldCo and a "highly contingent" agreement was reached in that connection which

Mr Kulkarni "believed … was binding in honour only": see paragraphs 77 and 79. A third issue which arose at the Pre-Meeting related to the shares which Mr Kulkarni was to have in the Company. A complicating factor was that, to comply with the Private Healthcare Market Investigation Order 2014, Mr Kulkarni needed to be an employee of the Company, but, if he wished to participate in an Enterprise Investment Scheme, he could not be an employee for three years: see paragraphs 80 and 81. The Judge found that, at the end of the Pre-Meeting, Mr Lewis said something to the effect of "You can have the shares": see paragraphs 85 and 89.4. The Judge concluded that Mr Kulkarni "could not have understood it to be a binding agreement" and that no contract was in fact concluded: see paragraphs 360 and 362 to 387. However, Mr Kulkarni "strongly believed … that he should not have to pay [for his shares in the Company]": see paragraph 170.

9. On 14 February 2020, the day that OldCo went into administration, the Company purchased the Hospital for £2 million.

10. Mr Kulkarni, Gwent and the Company had entered into the SHA on the previous day. Gwent is a vehicle for Mr Lewis. While his wife is the company's shareholder and director, Mr Lewis is its directing mind.

The SHA

11. Under the heading "Background", the SHA recited as follows:

> "(A) The Company currently has an issued share capital of £ 3,370, divided into 3,370 A Shares of £ 1.00 each, all of which are fully paid.
>
> (B) Each Initial Shareholder is the registered owner of the number and class of Shares set out opposite his name in Part 1 of Schedule 1.
>
> (C) The parties have agreed to enter into this agreement as a deed for the purpose of regulating the exercise of their rights in relation to the Company and for the purpose of making certain commitments as set out in this agreement."

12. Schedule 1 identified the "Initial Shareholders" as Gwent and Mr Kulkarni. Gwent was said to have 1,718 A Shares and Mr Kulkarni to have 1,652 A Shares.

13. By clause 2.2, Gwent and Mr Kulkarni undertook to use their reasonable endeavours to promote the success of the Company's business. By clause 3, the Company agreed not to take any of the actions set out in schedule 2 without "Shareholder Consent", and by clause 4.1 Gwent and Mr Kulkarni agreed to use their reasonable endeavours to procure that the Company did not take any such action without "Shareholder Consent". The matters specified in schedule 2 included these:

> "3. Increase or reduce the amount of its issued share capital, grant any option or other interest over or in its share capital, redeem or purchase any of its own shares, sell,

> transfer or cancel any shares held from time to time in treasury or otherwise alter, or effect any reorganisation of, its share capital.
>
> 4. Permit the registration (upon subscription or transfer) of any person as a member of the Company other than pursuant to an allotment or transfer permitted or required by, and made in accordance with, this agreement or the Articles."

14. "Shareholder Consent" was defined in clause 1.1 to refer to "the prior consent of a majority of the holder(s) for the time being of the A Shareholders, excluding, where relevant, any Shares held by an Excluded Shareholder". "Excluded Shareholder" was stated in clause 1.1 to mean "each Shareholder whose proposed course of action is the subject of the relevant Shareholder Consent".

15. Clause 6 required a shareholder wishing to transfer any shares to give a "Transfer Notice". When a Transfer Notice was served, the Company was to offer the relevant shares to other shareholders. The "Transfer Price" for each share was to be "Fair Value" unless the Transfer Notice was served within three years of the date of the SHA. In that event, by clause 6.6, the Transfer Price was to be "restricted to a maximum of the lower of the subscription price paid for each Sale Share, including any share premium, and the Fair Value of each such Sale Share unless agreed otherwise in writing with Shareholder Consent".

16. Clause 7 provided for "Compulsory transfers". Clause 7.1 was in these terms:

> "A Shareholder is deemed to have served a Transfer Notice under clause 6.4 immediately before any of the following events:
>
> (a) the Shareholder's death;
>
> (b) a bankruptcy petition being presented for the Shareholder's bankruptcy, or an arrangement or composition being proposed with any of his creditors, or where he otherwise takes the benefit of any statutory provision for the time being in force for the relief of insolvent debtors;
>
> (c) the Shareholder lacking capacity (under section 2 of the Mental Health Act 2005) to make decisions in relation to the Company or his shareholding unless he/she has a valid registered power of attorney in place; and
>
> (d) the Shareholder committing a material or persistent breach of this agreement which, if capable of remedy, has not been so remedied within 10 Business Days of notice to remedy the breach being served by the Board (acting with Shareholder Consent)."

17. A Transfer Notice deemed to have been served under clause 7.1 was defined in clause 1.1 as a "Deemed Transfer Notice". By clause 7.2, a Deemed Transfer Notice "deemed to be served under clause 7.1(d) shall immediately and automatically revoke a Deemed Transfer Notice deemed to be served by the relevant Shareholder under any of the events set out in clause 7.1(a) to clause 7.1(c) (inclusive)". By clause 7.3, the provisions of clause 6 were to apply to a Deemed Transfer Notice, except that (among other things):

> "(d) if the Seller is deemed to have given a Transfer Notice as a result of clause 7.1(d), the Transfer Price shall be restricted to a maximum of the lower of the subscription price paid in respect of each Sale Share, including any share premium, and the Fair Value of each such Sale Share; and
>
> (e) the Seller does not have a right to withdraw the Deemed Transfer Notice following a valuation."

Clause 6.7 had also stated that a Deemed Transfer Notice "may not be withdrawn".

18. Clauses 9 and 10 provided respectively for "Drag along" and "Tag along" rights. Clause 11 recorded that it was agreed by the A Shareholders that the Company would issue up to 3,235 B Shares.

19. Clause 13 dealt with the appointment and removal of directors. Clause 13.2 stated:

> "Each holder of any A Shares shall have the exclusive right to appoint one director as an A Director, at all times during the continuance of this agreement. The holder(s) of the A Shares shall also have the exclusive right by notice to the Company remove and replace any directors appointed in accordance with this clause 13.2."

By clause 13.3, the holders of B Shares were also to have the right, by way of majority vote, to appoint one director.

20. Clause 14, which was concerned with directors' meetings, enhanced the position of Gwent. A directors' meeting could not be quorate without a director appointed by Gwent (clause 14.1) and clause 14.5 stated:

> "In relation to any transaction of the Company which requires a decision of the Board of Directors, the Controlling Shareholder Director [i.e. the director appointed by Gwent] shall be entitled to have such number of votes as enables him/her to carry or defeat any proposal for a resolution of the directors."

21. By clause 16.1, shareholders agreed to exercise their powers as shareholders to "procure that the provisions of this agreement are properly and promptly observed and given full force and effect according to the spirit and intention of the agreement". Clause 19 was an "entire agreement" provision.

Subsequent history

22. When the SHA was entered into, Mr Kulkarni did not in fact hold the shares in the Company which the SHA recorded. While Gwent became the owner of the 1,718 shares specified in the SHA at that stage, Mr Kulkarni had just the single share which he had acquired on the Company's incorporation. As I have mentioned, it was his belief that he should not have to pay for the other 1,651 shares which the SHA attributed to him.

23. As for the Company's board, at the point the SHA was concluded that comprised Mr Kulkarni and a number of other individuals who had been directors of OldCo. These included Mr Stuart Hammond, who had been the chief executive of OldCo and now became the chief executive of the Company.

24. On 17 February 2020, Mr Andrew Lewis, a brother of Mr Lewis, joined the Company's board. Mr Lewis largely left the running of the Company to Mr Andrew Lewis, who was also a director of Gwent.

25. Mr Andrew Lewis and Mr Kulkarni had very different views about the future direction of the Hospital and the Company. From an early stage, Mr Andrew Lewis formed the view that Mr Kulkarni was not someone who should be managing the Hospital. Matters were aggravated by the Covid-19 pandemic. Not only was elective surgery such as Mr Kulkarni undertook suspended, but he was advised to shield. While Mr Andrew Lewis had initially tried to work with Mr Kulkarni, from 7 May 2020 he ceased to do so and instead sought to resolve the situation unilaterally.

26. On 21 June 2020, Mr Kulkarni emailed Mr Hammond to inform him that he was going to stop shielding and would be returning to work. That same evening, Mr Andrew Lewis purported to dismiss Mr Kulkarni for gross misconduct. The Judge described this action as "wholly misconceived" (paragraph 239 of the Judgment) and said that Mr Kulkarni was "fully entitled to feel aggrieved" (paragraph 248).

27. On 25 June 2020, Mr Kulkarni resigned both as a director and as an employee of the Company with pay in lieu of notice. He was sent a stock transfer form so that he could transfer to Gwent the only share in the Company that he then held. He did not, however, execute this. The Judge commented in paragraph 267 of the Judgment that Mr Kulkarni "was in a position he did not want and he hoped that Mr and Mrs Lewis would step in".

28. On 21 August 2020, however, Gwent procured the Company to allot to it both the 1,651 A Shares which had been attributed to Mr Kulkarni in the SHA and also 2,000 B Shares.

29. A week later, on 28 August 2020, Mr Andrew Lewis wrote to Mr Kulkarni attaching a termination notice which read:

> "Without prejudice to any argument we might have that the [SHA] never came into force and effect, we are writing to you today to give notice to terminate (or cancel) the SHA with immediate effect.
>
> Our termination is on the grounds that the SHA is based on a fundamental flaw, namely that the Initial Shareholders included Mr … Kulkarni owning 1,652 A Shares in [the Company]. By

> contrast, Mr Kulkarni only owned 1 A Share and he did not properly subscribe for, nor was he issued with, any additional 1,651 A Shares.
>
> Our termination of the SHA is without prejudice to any other rights or remedies we might have, and we reserve all those rights and remedies. You do not have to acknowledge this letter for it to be effective. However, we would be grateful if you could acknowledge receipt by return email."

30. On 21 May 2021, Mr Kulkarni's then solicitors sent letters of claim to Gwent and the Company. As well as asserting claims, these sought to exercise the right conferred on Mr Kulkarni by clause 13.2 of the SHA to appoint a director. Mr Shelim Hussain was named as the appointee.

31. However, Mr Andrew Lewis promptly sent Mr Hussain an email in which he said that "neither Gwent Holdings nor I personally accept the validity of your purported appointment". On 10 June 2021, Gwent's solicitors wrote that, "as the SHA has been rescinded by our client, your client has no entitlement to appoint a director".

32. Gwent subsequently backtracked. In a letter from its solicitors dated 24 September 2021, the Company recognised that Mr Kulkarni was still entitled to appoint a director. At first, the solicitors argued that clause 13.4 of the SHA required notification to every other shareholder and the Hospital before Mr Hussain's appointment could be confirmed. At a meeting on 12 November 2021, however, the Company's board approved the appointment.

33. Also on 24 September 2021, the Company's solicitors wrote to Gwent's solicitors inviting it to return the 1,651 A Shares with a view to their being registered in Mr Kulkarni's name and also to return the 2,000 B Shares. The Judge explained what happened next as follows in paragraph 303 of the Judgment:

> "[Gwent's solicitors] agreed to the proposal on 27 September 2021. Shareholder approval for the buyback of the A and B Shares was granted by way of written resolution on 29 September 2021. The shares were returned to [the Company], which held them in treasury, and the purchase price refunded to Gwent. This is what the Defendants rely on to show remediation of the A and B Shares Breaches. On 26 May 2022 following unconditional payment by Mr Kulkarni of £80,000 [the Company] transferred to him the A shares that it held in treasury."

34. The present proceedings had been issued on 13 October 2021. By them, Mr Kulkarni claimed, among other things, that Gwent had breached the SHA by procuring the Company to allot the 1,651 A Shares to it ("the A Shares Breach"), by causing the Company to allot 2,000 B Shares to it ("the B Shares Breach"), by purporting to terminate the SHA on 28 August 2020 ("the Termination Breach") and by refusing to recognise Mr Hussain's appointment as a director of the Company ("the Hussain Breach"). Mr Kulkarni claimed that, in consequence, Gwent was deemed to have served a Transfer Notice pursuant to clause 7.1(d) of the SHA.

35. By the time the matter came on for trial before the Judge, Gwent admitted the A Shares Breach, the B Shares Breach and the Termination Breach; that those breaches were "material" (within the meaning of clause 7.1(d) of the SHA); and that the first and third were repudiatory. The Judge concluded that all three breaches were "persistent" (within the meaning of clause 7.1(d)) as well as "material": see paragraphs 6.9 and 425 of the Judgment. He held, too, that the delay in appointing Mr Hussain as a director was a breach of the SHA and that that breach was "material" and "persistent": see paragraphs 6.7, 6.8, 419, 424 and 425.

36. The Judge also, however, concluded that the A Shares Breach, the B Shares Breach, the Termination Breach and the Hussain Breach had all been capable of being remedied and had in fact been remedied: see paragraph 6.10 of the Judgment. On that basis, the Judge held that Mr Kulkarni was not entitled to declarations in respect of the service of a Deemed Transfer Notice: see paragraph 6.14 of the Judgment.

37. Mr Kulkarni now appeals against the Judgment.

The issues

38. The main issues which arise can be summarised as follows:

    i) Is a shareholder who commits a material or persistent breach of the SHA to be considered to have served a Deemed Transfer Notice pursuant to clause 7.1(d) of the SHA regardless of whether the breach is remedied unless the Company's board serves notice to remedy the breach?

    ii) Is a repudiatory breach of the SHA necessarily incapable of remedy for the purposes of clause 7.1(d)?

    iii) Do the recitals to the SHA give rise to an estoppel such that, in construing their obligations under the SHA, the parties are bound to the fiction that Mr Kulkarni was at all material times the holder of 1,652 A Shares and, if so, with what consequence?

    iv) Did the Judge wrongly exclude from consideration as regards the construction of the SHA and, in particular, remediability the pre-existing relationship between, among others, Mr Kulkarni and Mr and Mrs Lewis?

    v) Was the Judge in any event wrong to conclude that Gwent's breaches of the SHA were remediable?

Issue (i): Construction of clause 7.1(d)

39. This issue is raised by ground 1 of the grounds of appeal.

Clause 7.1(d)

40. To recap, clause 7.1(d) of the SHA provided:

> "A Shareholder is deemed to have served a Transfer Notice under clause 6.4 immediately before any of the following events:

> …
>
> (d) the Shareholder committing a material or persistent breach of this agreement which, if capable of remedy, has not been so remedied within 10 Business Days of notice to remedy the breach being served by the Board (acting with Shareholder Consent)."

The Judgment

41. The Judge concluded as follows in paragraph 311 of the Judgment:

> "Where the breach is capable of remedy the plain reading of the language of the clause as a whole is that no Transfer Notice is deemed served until the 10 Business Day remedy period has expired. The 10 Business Day period only starts once the notice to remedy is served. Here, no notice to remedy was ever served, so the 10 Business Day period has not yet started to run and so cannot have expired. As such, the deeming conditions have not been satisfied and no Transfer Notice is therefore deemed served."

42. In the Judge's view, "commercial logic" chimed with that reading of clause 7.1(d): see paragraph 318 of the Judgment. Service of a remediation notice was thus "a necessary step in the deemed Transfer Notice process": paragraph 318.

Mr Kulkarni's case

43. Mr Kulkarni's case is that, where a shareholder has committed a material or persistent breach of the SHA, he will be deemed to have served a Transfer Notice under clause 6.4 unless (a) the breach is remediable, (b) the Company's board serves notice to remedy it and (c) it has not been remedied at the expiry of 10 business days. In the absence of such a notice to remedy, Mr Kulkarni maintains, remediation is irrelevant. A Transfer Notice will be deemed to have been served, with the consequences for which the SHA provides.

44. Mr Andrew Butler KC, who appeared for Mr Kulkarni with Mr Hugh Rowan, argued that support for Mr Kulkarni's case can be found in the fact that clause 7.1 provided for a Transfer Notice to be deemed to have been served "immediately before any of the following events" and in clause 7.1(d)'s use of "within". For the purposes of clause 7.1(d), Mr Butler submitted, the relevant "event" must be the commission of the "material or persistent breach", not the expiry of the 10 business days. Further, the "within" in clause 7.1(d) indicates that any remediation must take place neither after nor before that period. It therefore cannot avail a shareholder who has committed a breach to remedy it in advance of a notice to do so having been served.

45. Mr Butler recognised that his approach gave rise to a "twilight period" in which, as a result of a "material or persistent breach", a Transfer Notice would be deemed to have been served, but the deeming could be reversed if the Company's board served notice to remedy and remediation was achieved in the next 10 business days. He contended, however, that a comparable "twilight period" can exist between the forfeiture of a lease

and an application for relief from forfeiture (as to which, see e.g. *Meadows v Clerical Medical and General Life Assurance Society* [1981] Ch 70, especially at 75 and 78).

46. Mr Butler also accepted that, on Mr Kulkarni's case, a wrongdoer who remedied his breach immediately, without waiting for service of a notice to remedy, could be worse off than one who delayed until a notice was served and then remedied "within 10 Business Days". Mr Butler argued, however, that that consequence does not justify departure from the language of clause 7.1.

47. Mr Butler further made the point that, were the Judge's construction of clause 7.1 correct, a wrongdoer could render clause 7.1(d) toothless. If, Mr Butler said, the wrongdoer prevailed on the Company's board not to serve a notice, no Transfer Notice would ever be deemed to be served in the case of a remediable breach.

Discussion

48. In my view, the Judge was right.

49. In the first place, I do not think that the references in clause 7.1 to "events" and "within" help Mr Butler. There is no need to see the relevant "event" in the case of a remediable breach as the breach itself. There is no difficulty in taking that event as failure to remedy the breach before the end of 10 business days after a notice to remedy has been served. Nor need "within 10 Business Days" be read to mean "no later and no earlier than". It can instead be understood to signify that remediation must be complete by the expiry of 10 days after service of a notice. It would, moreover, be very odd if the parties had intended a shareholder who had committed a "material or persistent" breach but remedied it promptly to be in a less good position than one who undertook no remediation until after he had been served with a notice to remedy.

50. Secondly, Mr Butler's approach to clause 7.1(d) would render much of the provision more or less redundant. The Company's board cannot serve a notice to remedy without "Shareholder Consent", which requires the prior consent of a majority of the A Shareholders *excluding* any shares held by an "Excluded Shareholder". In practice, therefore, an innocent shareholder with more than half of the A Shares once those of the shareholder in breach had been discounted could prevent the service of any notice to remedy.

51. Thirdly, clause 7.1 does not in terms provide for a "twilight period" such as Mr Butler contemplated and, to the contrary, the language of the SHA tends to confirm that no such period was intended. Far from confirming that a Deemed Transfer Notice pursuant to clause 7.1(d) can cease to have effect if the breach is remedied following service of a notice to remedy, the SHA stated in clause 6.7 that a Deemed Transfer Notice "may not be withdrawn". Further, had the parties intended that a Deemed Transfer Notice pursuant to clause 7.1(d) could take effect but then be negated by the service of a notice and remediation, they could be expected to have limited the time within which a notice could be served. No such limit was, however, specified.

52. Fourthly, it is of significance that a Deemed Transfer Notice allows the other shareholder(s) to compel the shareholder who has committed a "material or persistent" breach of the SHA to transfer his shares and, moreover, to do so on potentially disadvantageous terms (since, by clause 7.3(d), the Transfer Price is to be "restricted to

a maximum of the lower of the subscription price paid for each Sale Share, including any share premium, and the Fair Value of each such Sale Share unless agreed otherwise in writing with Shareholder Consent"). That suggests that the Court should be slow to adopt a wide interpretation of clause 7.1. Remarks made by Arden LJ in *Re Coroin Ltd* [2013] EWCA Civ 781, [2014] BCC 14 are relevant in this context. When considering the meaning of a clause in a shareholders' agreement providing for the deemed giving of a transfer notice by a shareholder, Arden LJ said:

> "65. In addition, cl.6 of the shareholders' agreement and the pre-emption provisions in the articles set out circumstances in which members may lose the right to their shares. They are, therefore, expropriatory in nature. Given the ambiguity in the meaning of the phrase 'becomes enforceable', the court should in my judgment prefer the narrower meaning. This approach is consistent with the earlier decisions of this court on construing articles of association of a company restricting the transfer of shares laid down in: *Re Smith and Fawcett Ltd* [1942] Ch. 304 at 306 and *Greenhalgh v Mallard* [1943] 2 All E.R. 234 at 237: see, for example, per Lord Greene M.R. in the first of the cases cited:
>
> > '[When using their power under the articles to reject a share transfer, the directors] must have regard to those considerations, and those considerations only, which the articles on their true construction permit them to take into consideration, and in construing the relevant provisions in the articles it is to be borne in mind that one of the normal rights of a shareholder is the right to deal freely with his property and to transfer it to whomsoever he pleases. When it is said, as it has been said more than once, that regard must be had to this last consideration, it means, I apprehend, nothing more than that the shareholder has such a *prima facie* right, and that right is not to be cut down by uncertain language or doubtful implications. The right, if it is to be cut down, must be cut down with satisfactory clarity. It certainly does not mean that articles, if appropriately framed, cannot be allowed to cut down the right of transfer to any extent which the articles on their true construction permit.'
>
> …
>
> 67. In my judgment, the authorities reflect the basic principle that rights of property should not be taken away by a side wind and without warrant …."

It is fair to say, as Mr Butler did, that the other members of the Court (Moore-Bick and Rimer LJJ) parted company from Arden LJ as to the meaning of "becomes enforceable", but I do not think that denudes Arden LJ's comments of all their force. As *Gower's Principles of Company Law*, 11th. ed., explains in paragraph 26-007, "since shareholders have a prima facie right to transfer to whomsoever they please, this right is not to be cut down by uncertain language or doubtful implications".

53. Fifthly, the decision of the Court of Appeal in *Force India Formula One Team Ltd v Etihad Airways PJSC* [2010] EWCA Civ 1051, [2011] ETMR 10 ("*Force India*") lends a degree of additional support to the Judge's approach. That case concerned a sponsorship agreement relating to a Formula One team which had been called the "Etihad Aldar Spyker F1 Team" but had been renamed as "Force India Formula One Limited". The agreement contained a termination provision whose terms were very comparable to those of clause 7.1 of the SHA. It stated:

> "The Sponsors may terminate this Agreement with immediate effect on the giving of written notice to SPYKER at any time on the happening of any of the following events by or in relation to the other party:
>
> (a) SPYKER has committed any material breach of this Agreement which, if capable of remedy, has not been remedied within ten (10) Business days of receipt of written notice giving particulars of the breach and requiring its remedy …."

54. As was pointed out by Mr Jonathan Crow KC, who appeared for Gwent with Mr Thomas Braithwaite, it was assumed in *Force India* that the "Sponsors" could not terminate on the strength of a remediable breach without serving a notice. Rix LJ explained in paragraph 86 that counsel for the "Sponsors" "accepts that if the breaches complained about are remediable, then the sponsors must lose on liability, for no notice to remedy was ever given".

55. Sixthly, while the Judge's construction of the SHA means that an innocent shareholder cannot force a shareholder who has committed a remediable breach of the SHA to transfer his shares unless the latter has failed to remedy by the expiry of 10 business days after a notice to remedy has been served, that does not necessarily mean that there is no other remedy available. Only clause 7.1 is at issue. Depending on the circumstances, it may potentially be open to an innocent shareholder to accept a repudiatory breach, to claim damages for any loss or to seek relief by way of unfair prejudice petition under section 994 of the Companies Act 1996 (albeit that, as Mr Butler said, the scope for such a petition may be affected to an extent by the terms of the SHA: see *Re Saul D Harrison & Sons plc* [1994] 1 BCC 475, at 488-489).

Issue (ii): Remediability of repudiatory breaches

56. This issue is raised by ground 2 of the grounds of appeal.

The Judgment

57. The Judge concluded as follows in paragraph 348 of the Judgment:

> "I therefore reject the submission that the breaches in this claim were irremediable for all purposes where they were repudiatory in nature. To the extent they were repudiatory then neither Gwent nor [the Company] could deprive Mr Kulkarni of any right he had to terminate through tendering late or alternate performance. That is irrelevant here because Mr Kulkarni either never had that right (which I understand to be his case) or gave it up through affirming the SHA. Either way, finding that the breaches were remediable for other purposes does not deprive him of what Jacob LJ described as 'his clear choice: affirm or go'. The fact that certain of the breaches of the SHA were repudiatory in nature therefore did not, in itself, render them irremediable for the purposes of clause 7.1(d)."

Mr Kulkarni's case

58. Mr Butler submitted that, as a matter of law, a repudiatory breach of the SHA can never be "capable of remedy" for the purposes of clause 7.1(d) of the SHA. Since it is not disputed that the A Shares Breach and the Termination Breach were repudiatory, it follows, so Mr Butler argued, that the appeal must be allowed. There can have been no need for SHA's board to serve a notice to remedy.

Authorities

59. We were referred in this context to *F L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 ("*Schuler v Wickman*"), *Savva v Hussein* (1996) 73 P&CR 150, *Crane Co v Wittenborg A/S* (21 December 1999, unreported) ("*Crane*"), *Woodchester Lease Management Services Ltd v Swain & Co* [1999] 1 WLR 263 ("*Woodchester*"), *Stocznia Gdanska SA v Latvian Shipping Co (No 3)* [2002] EWCA Civ 889, [2002] 2 All ER (Comm) 768 ("*Stocznia*"), *Akici v LR Butlin Ltd* [2005] EWCA Civ 1296, [2006] 1 WLR 201 ("*Akici*"), *Force India*, *Bournemouth University Higher Education Corpn v Buckland* [2010] EWCA Civ 121, [2011] QB 323 ("*Buckland*") and *Wickland (Holdings) Ltd v Telchadder* [2014] UKSC 57, [2014] 1 WLR 4004 ("*Telchadder*").

60. In *Schuler v Wickman*, clause 11(a)(i) of an agency contract entitled a party to terminate if "the other shall have committed a material breach of its obligations hereunder and shall have failed to remedy the same within 60 days of being required in writing so to do". Lord Reid said at 249-250:

> "It appears to me that clause 11 (a) (i) is intended to apply to all material breaches of the agreement which are capable of being remedied. The question then is what is meant in this context by the word 'remedy.' It could mean obviate or nullify the effect of a breach so that any damage already done is in some way made good. Or it could mean cure so that matters are put right for the future. I think that the latter is the more natural meaning. The word is commonly used in connection with diseases or ailments and they would normally be said to be remedied if they were cured although no cure can remove the past effect or result of the disease before the cure took place. And in general it can only be in a rare case that any remedy of something that has gone wrong

> in the performance of a continuing positive obligation will, in addition to putting it right for the future, remove or nullify damage already incurred before the remedy was applied. To restrict the meaning of remedy to cases where all damage past and future can be put right would leave hardly any scope at all for this clause. On the other hand, there are cases where it would seem a misuse of language to say that a breach can be remedied. For example, a breach of clause 14 by disclosure of confidential information could not be said to be remedied by a promise not to do it again."

61. As I have already mentioned, *Force India* related to a sponsorship agreement which could be terminated in the event of a material breach which, though capable of remedy, had not been remedied within 10 business days of a notice. The Court of Appeal concluded that changes to the team's livery and name and the adoption of the logo of Kingfisher Airlines gave rise to "a series of repeated, or continuing, breaches which were sooner or later but ultimately repudiatory": see paragraph 87 of the judgment of Rix LJ, with whom Patten LJ and Sir Mark Waller agreed. The Court further held that the breaches were irremediable.

62. Rix LJ referred to *Schuler v Wickman* as the "leading case" on the remediability of contractual breaches: see paragraphs 103 and 104. Having quoted from *Schuler v Wickman*, Rix LJ said in paragraph 108:

> "The judge, without citing this authority, recorded the sponsors' counsel as accepting that the authorities 'favour a practical rather than an unduly technical test'. I think that is right. The judge concluded that any breaches of cll.4.6 or 4.7 were remediable, in the sense that Force India 'could have put matters right', either by changing the team name back to Etihad Aldar Spyker F1 Team and/or by reverting to the previous livery and removing the Kingfisher logo. However, in my judgment, these were not remediable breaches. The closest analogies are with the publication of confidential information or the publishing of advertising matter not containing a party's name: one releases information which should be kept confidential, the other broadcasts a product in an inappropriate way. Looking at the matter pragmatically and not technically, I think that a proper marketing campaign is, generally speaking, all of a piece. Where Dr Mallya and Force India had persistently marketed the team as 'Force India' to the Indian market and had publicised the car's new livery with deployment of the Kingfisher logo, and where Kingfisher was so much associated with Dr Mallya himself and he with Force India, and where, as Dr Mallya himself said in his interview which appeared on Force India's website on October 11, 2007, 'The name is an integral part of the team identity', which I regard as truly said, the marketing genie cannot be put back into the bottle. The breach is irremediable. This conclusion is to my mind re-emphasised where the breach or breaches are repeated, cumulative, continuing and repudiatory."

63. A similar approach has been adopted in relation to section 146 of the Law of Property Act 1925. Subsection (1) of that provides:

> "A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice—
>
> (a) specifying the particular breach complained of; and
>
> (b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and
>
> (c) in any case, requiring the lessee to make compensation in money for the breach;
>
> and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

It is thus relevant whether a breach is "capable of remedy".

64. In *Savva v Hussein*, where a landlord had sought to forfeit a lease, Staughton LJ said at 154:

> "In my judgment, except in a case of breach of a covenant not to assign without consent, the question is: whether the remedy referred to is the process of restoring the situation to what it would have been if the covenant had never been broken, or whether it is sufficient that the mischief resulting from a breach of the covenant can be removed. When something has been done without consent, it is not possible to restore the matter wholly to the situation which it was in before the breach. The moving finger writes and cannot be recalled. That is not to my mind what is meant by a remedy, it is a remedy if the mischief caused by the breach can be removed. In the case of a covenant not to make alterations without consent or not to display signs without consent, if there is a breach of that, the mischief can be removed by removing the signs or restoring the property to the state it was in before the alterations."

65. In *Akici*, where again a landlord claimed to forfeit a lease, Neuberger LJ, with whom Mummery LJ agreed, noted in paragraphs 67 and 68 that the authorities indicated that there were "two types of breach of covenant which are as a matter of principle incapable of remedy": subletting and illegal or immoral user. In general, though, Neuberger LJ considered that a "practical rather than technical" approach should be adopted. He said:

> "64. In those circumstances it seems to me that the proper approach to the question of whether or not a breach is capable of remedy should be practical rather than

> technical. In a sense it could be said that any breach of covenant is, strictly speaking, incapable of remedy. Thus, where a lessee has covenanted to paint the exterior of demised premises every five years, his failure to paint during the fifth year is incapable of remedy, because painting in the sixth year is not the same as painting in the fifth year, an argument rejected in *Hoffmann v Fineberg* [1949] Ch 245, 253, cited with approval by this court in *Expert Clothing Service and Sales Ltd v Hillgate House Ltd* [1986] Ch 340, 351c-d. Equally it might be said that where a covenant to use premises only for residential purpose is breached by use as a doctor's consulting room, there is an irremediable breach because even stopping the use will not, as it were, result in the premises having been unused as a doctor's consulting room during the period of breach. Such arguments, as I see it, are unrealistically technical.
>
> 65. In principle I would have thought that the great majority of breaches of covenant should be capable of remedy, in the same way as repairing or most user covenant breaches. Even where stopping, or putting right, the breach may leave the lessors out of pocket for some reason, it does not seem to me that there is any problem in concluding that the breach is remediable. That is because section 146(1) entitles the lessors to 'compensation in money... for the breach' and, indeed, appears to distinguish between remedying the breach and paying such compensation."

66. The Supreme Court borrowed from the case law relating to section 146 of the Law of Property Act 1925 when considering in *Telchadder* paragraph 4 of chapter 2 of part 1 of schedule 1 to the Mobile Homes Act 1983. That paragraph implied the following term in an agreement between the owner of a mobile home park and the occupier of a mobile home at the site:

> "The owner shall be entitled to terminate the agreement forthwith if, on the application of the owner, the appropriate judicial body— (a) is satisfied that the occupier has breached a term of the agreement and, after service of a notice to remedy the breach, has not complied with the notice within a reasonable time; and (b) considers it reasonable for the agreement to be terminated."

67. When considering whether a breach involving anti-social behaviour by Mr Telchadder, an occupier of a mobile home at a site owned by Wickland, had been remediable, Lord Wilson said:

> "31. In my view the answer is to be found by a practical inquiry whether and if so how (to adapt the words of Staughton LJ in the *Savva* case) the mischief resulting

> from Mr Telchadder's breach could be redressed. In relation to a breach of a covenant against anti-social behaviour, there is no escape from the conclusion that the inquiry requires a value judgment on the part, first, of the covenantee and, then, of the court in determining whether the requirements of section 146(1) of the 1925 Act, or, as the case may be, of the paragraph 4 term have been satisfied. Had Mr Telchadder not only jumped out at Miss Puncher [i.e. another occupier at the site] but, for example, deliberately perpetrated a significant injury on her, Wickland might well have been entitled to conclude that the breach was irremediable; that there was therefore no need for it to serve a notice to remedy; that it should apply directly to the court under the paragraph 4 term; but that, as a prelude to doing so, it should notify Mr Telchadder of its proposed application and of its reasons for having concluded that the breach was irremediable and that therefore there was no need for it to serve a notice to remedy. Obviously there would have been a risk that the circuit judge would either have disagreed with Wickland about the irremediability of the breach or have declined to consider it reasonable for the agreement to be terminated. Nevertheless, by reference only to the simple facts postulated, Wickland might have contemplated that risk with equanimity.
>
> 32. But Mr Telchadder's breach was in no way of that gravity. To an inquiry whether, and if so how, the mischief resulting from it could be redressed, the practical response is to say: yes, of course it can be redressed by his committing no further breach of his covenant against anti-social behaviour for a reasonable time."

68. In the same vein, Lord Toulson said:

> "51. The interpretation of paragraph 4(a) of the Mobile Homes Act 1983 raises the question what is required to remedy a breach. A linked question is, 'what is the correct procedure if a breach cannot be remedied within a reasonable time?'
>
> 52. I agree with Lord Wilson JSC that the answer to the first question calls for a practical approach, that is, whether and how the mischief caused by the breach can be redressed. The context is a relationship between an occupier of land and the owner of the land, who also has responsibilities towards others living in close proximity including the elderly and vulnerable. In a case of anti-social behaviour by an occupier towards a neighbour, much must depend on the nature of the conduct in

> determining whether and how the mischievous effect of a particular breach may be remediable.
>
> 53. A minor incident may not be expected to cause lasting harm to the peace of mind of other residents. In some cases an apology may be an appropriate means of redress. But human nature being what it is, there may be cases (for example, involving serious violence or threats of violence) where the conduct is such as to cause physical harm or feelings of fear and anxiety which the injured person could not be expected to get over within a reasonable time period, regardless of the other person's subsequent behaviour. There is no reason why neighbours, especially if elderly and vulnerable, should be expected to live for months (let alone years) in a state of fear and anxiety."

69. The authority on which Mr Butler principally relied was *Buckland*. In that case, a university had committed a repudiatory breach of a professor's employment contract by re-marking examination papers originally marked by the professor without consulting him. The professor resigned in response, but by the time he did so an inquiry set up by the university had acknowledged that the re-marking should have been undertaken in consultation with the professor.

70. As Sedley LJ noted in paragraph 1, one of the issues in the Court of Appeal was "whether an employer who has committed a fundamental breach of contract can cure the breach while the employee is considering whether to treat it as a dismissal". The Court answered the question in the negative.

71. Having quoted from Rix LJ's judgment in *Stocznia*, Sedley LJ in paragraph 40:

> "This account of the alternative courses which may be taken in response to a repudiatory breach leaves no space for repentance by a party which has not simply threatened a fundamental breach or forewarned the other party of it but has crossed the Rubicon by committing it. From that point all the cards are in the hand of the wronged party: the defaulting party cannot choose to retreat. What it can do is invite affirmation by making amends."

With "some reluctance", Sedley LJ accepted that the Court would not be justified in introducing into contract law "the doctrine that a fundamental breach, if curable and if cured, takes away the innocent party's option of acceptance": paragraph 44.

72. Jacob LJ expressed the principles crisply. He said:

> "52. … I do not share Sedley LJ's regret in holding that a repudiatory breach of contract, once it has happened, cannot be 'cured' by the contract breaker. Once he has committed a breach of contract which is so serious that it entitles the innocent party to walk away from it, I see no reason for the law to take away the innocent party's

> right to go. He should have a clear choice: affirm or go. Of course the wrongdoer can try to make amends—to persuade the wronged party to affirm the contract. But the option ought to be entirely at the wronged party's choice.
>
> 53. That has been the common law rule for all kinds of contract for centuries. It works. It spells out clearly to parties to contracts that if they actually commit a repudiatory breach, then whether the contract continues is completely out of their hands. The rule itself discourages repudiatory breach. In the context of employment law it means that employers know that if they treat an employee so badly as to commit a repudiatory breach, then they cannot hang on to the employee unless they can persuade him or her to decide to stay."

73. For his part, Mr Crow relied on *Crane*, *Woodchester* and *Force India* as cases in which, he said, Courts had proceeded on the basis that a repudiatory breach could be "capable of remedy". In *Crane*, clause 15B of an agreement between Polyvend and Wittenborg entitled a party to terminate if the other party "commits any substantial breach of any of the provisions of this Agreement and in the case of breach capable of remedy fails to remedy the same within 90 days of receipt of a written notice giving full particulars of the breach and requiring it to be remedied". Mance LJ, with whom Stuart-Smith and Aldous LJJ agreed, rejected Wittenborg's case that Polyvend had committed a repudiatory breach of the agreement. He nonetheless went on to consider what the position would have been had there been such a breach. As to that, he said in paragraph 21:

> "any termination on the grounds of actual breach would have to take place in accordance with clause 15B. This is so in my view, even if the breach was of a condition or repudiatory. I for my part doubt whether there is any distinction to be drawn between the 'substantial' breach required by that clause and a breach of condition or repudiatory breach …. The requirement, in the case of a remediable breach, that a notice to remedy should have been given and a 90 day period should have elapsed before any termination does not persuade me that the parties must have had in mind breaches which were less than repudiatory. I therefore consider that substantial should be read as equivalent to repudiatory."

74. *Woodchester* concerned a photocopier which was the subject of a regulated consumer hire agreement. The Consumer Credit Act 1974 prevented the owner from terminating the agreement without first serving a "default notice" which, in the case of a breach "capable of remedy", had to specify "what action is required to remedy it and the date before which that action is to be taken". The hirer having ceased to pay the sums due from it, the owner served a default notice but that was held to be invalid because it misstated the amount owing and, hence, what action needed to be taken to remedy the breach. It was thus assumed that the hirer's failure to pay was "capable of remedy" even

though the agreement between the parties provided for any failure to pay on time to be a "repudiatory breach".

75. In *Force India*, Rix LJ concluded in paragraph 87 that Force India had committed "a series of repeated, or continuing, breaches which were sooner or later but ultimately repudiatory". He nevertheless went on to consider whether they were remediable. Having noted a submission that "a 'material' remediable breach is not a repudiatory breach", Rix LJ said that he would "assume for the sake of argument that, whether or not a 'material' breach need be repudiatory or not, the clause is intended to and does cover repudiatory but remediable breaches": see paragraphs 101 and 102.

Discussion

76. In my view, it is not the case that a repudiatory breach of the SHA is necessarily incapable of remedy for the purposes of clause 7.1(d). I therefore agree with the Judge that "[t]he fact that certain of the breaches of the SHA were repudiatory in nature … did not, in itself, render them irremediable for the purposes of clause 7.1(d)".

77. Clause 7 provided for a shareholder to have the right to compel another shareholder to transfer his shares in the specific circumstances given in the clause. By clause 7.1(d), that right arises where a shareholder has committed a "material or persistent breach" of the SHA which, "if capable of remedy, has not been so remedied within 10 Business Days of notice to remedy the breach being served by the Board (acting with Shareholder Consent)". Under the terms of the provision, accordingly, its applicability depends on the existence of a "material or persistent breach" and a failure to remedy it within 10 business days of a notice to do so. Had they so intended, the parties could have stated that a repudiatory breach was to be considered irremediable, but they did not do so. In fact, the word "repudiatory" was not used at all. Plainly, a "material or persistent" breach such as clause 7.1(d) requires might well be repudiatory, but the clause still proceeds on the basis that such a breach might be "capable of remedy" and drew no distinction between repudiatory and other breaches.

78. *Buckland* was not concerned with the meaning of "capable of remedy" as used in a contractual provision. It addressed the position where, at common law, there has been a repudiatory breach of contract. In particular, it provides authority for the proposition that "a repudiatory breach of contract, once it has happened, cannot be 'cured' by the contract breaker" and the innocent party retains the "right to go" (to use words of Jacob LJ). The decision casts no light on the distinct question of whether a breach is "capable of remedy" within the meaning of a contractual provision such as clause 7.1(d).

79. It seems to me that the case law shows that, when determining whether a breach of contract is "capable of remedy" within the meaning of either a contractual provision or a comparable statutory one, a "practical rather than technical" approach is, at least normally, to be adopted. It may be that, in a specific contract or statute, "capable of remedy" could, because of the particular context, mean something different. In general, however, a question as to whether a breach of contract is "capable of remedy" for the purposes of either a termination clause (as in *Schuler v Wickman* and *Force India*) or a compulsory transfer provision such as clause 7.1 is to be determined in a "practical rather than technical" way in which common law rules as to repudiation have no place.

Issue (iii): Contractual estoppel

80. This issue is raised by ground 4 of the grounds of appeal.

Legal principles

81. What has been termed "contractual estoppel" arises where the parties to a contract have "agreed that a specified state of affairs is to form the basis on which they are contracting or is to be taken, for the purposes of the contract, to exist": *Chitty on Contracts*, 35th. ed., at paragraph 7-029. Such a "contractual estoppel" "precludes a party to the contract from alleging that the actual facts are inconsistent with the state of affairs so specified in the contract": *Chitty on Contracts*, at paragraph 7-029.

82. Statements of this kind are often to be found in recitals, but it is "a question of construction" whether a recital was "intended to be an agreement of both parties to admit a fact": *Greer v Kettle* [1938] AC 156, at 167, per Lord Atkin. Further, for a recital to give rise to an estoppel it "must relate to specific facts, must be certain, clear and unambiguous": *Greer v Kettle*, at 170, per Lord Maugham.

Mr Kulkarni's case

83. In the present case, Mr Kulkarni contends that a "contractual estoppel" arises from the recitals to the SHA. Read with schedule 1, the recitals stated that Mr Kulkarni "is the registered owner" of 1,652 A Shares in the Company.

84. Of course, that was not in fact the position. Mr Kulkarni had only one A Share when the SHA was entered into, and he did not become the registered owner of any more until two years later. Mr Butler did not, however, suggest that, as a result of the recitals to the SHA, Mr Kulkarni is to be taken to have been the registered owner of 1,652 A Shares at the date of the SHA for *all* purposes. His contention was that Mr Kulkarni has to be treated as holding the shares for the purpose of construing the parties' obligations under the SHA and, in particular, when deciding whether there was a "material or persistent breach" which was not "capable of remedy".

The Judgment

85. The Judge considered the "starting point" to be that the SHA's second recital ("Recital B") "means what it says – that at the time of execution Mr Kulkarni was the holder of 1,652 A shares that had been issued and were fully paid": see paragraph 408 of the Judgment. However, the Judge did not consider that to be the end of the analysis since "Mr Kulkarni must also show that the parties intended to be bound on the basis that Recital B was accurate, even though all parties knew that it was not": paragraph 409. In the Judge's view, Mr Kulkarni faced "insurmountable obstacles" in this respect: paragraph 409. In this connection, the Judge said, among other things, that "it is simply not credible that the initial shareholders reached an agreement under which they were content that saying they had contributed capital, when they had not, was sufficient" (paragraph 409.1); that "[i]t would be … a remarkable conclusion to say that [the B Shareholders who were to become parties to the SHA through deeds of adherence] contracted on the basis that they had to put in capital (which they were required to do under the articles before they could become shareholders) but the A shareholders did not" (paragraph 409.3); and that it was "highly unlikely that [the Company] contracted

on the basis that Mr Kulkarni had to pay under the allotment contract [which was made the same day] but not under the SHA" (paragraph 409.4).

Discussion

86. Mr Butler did not press this ground of appeal in his oral submissions. He observed that the point may be peripheral at best.

87. I agree. It is no longer in dispute that the A Shares Breach and the B Shares Breach were both "material" and "persistent". Mr Kulkarni does not need to invoke any estoppel to establish these points. Further, it is plain that the A Shares Breach related to the 1,651 A Shares which were not in fact registered in Mr Kulkarni's name. The single share of which he was already the holder remained in his name and was never allotted to Gwent. Further, the estoppel for which Mr Kulkarni contends has, as it seems to me, no importance in relation to remediability. Whether the breaches which the Judge held to have been committed were "capable of remedy" does not depend on whether Mr Kulkarni is in some way to be treated as having owned all 1,652 A Shares at the time of the SHA. In particular, the A Shares Breach either could, or could not, be remedied by returning shares to the Company. The process would be the same whatever the number of shares involved and regardless of whether there was an estoppel such as Mr Kulkarni alleged.

88. In any event, I agree with the Judge that there was no relevant estoppel. Interpretation of a contract involves assessment of "the objective meaning of the language which the parties have chosen to express their agreement" (to quote Lord Hodge in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173, at paragraph 10) or, in the words of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912, "ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". To my mind, such a "reasonable person" would not conclude that the parties to the SHA intended to bind themselves to accept that, contrary to the fact, Mr Kulkarni was already the registered owner of 1,652 A Shares, and such a construction is not consistent with the "objective meaning of the language". In the context, the recitals to the SHA must be understood as recognising that Mr Kulkarni was *entitled* to 1,652 A Shares, not that he already had them. The inherent probabilities so indicate. As the Judge said, implications of Mr Kulkarni's case are "not credible", "remarkable" and "highly unlikely".

Issue (iv): Excluding the pre-existing relationship from consideration

89. This issue is raised by ground 5 of the grounds of appeal. That is expressed as follows:

> "The Learned Judge was wrong to exclude from consideration of the construction of the SHA (and thus from the concept of remediability) the pre-existing relationship between the parties, and in particular (a) [Mr Kulkarni] and (b) Mr David Lewis, the shadow director and ultimate beneficial owner of [Gwent], and Mrs Jayne Lewis, the director."

Mr Kulkarni's case

90. Both at trial and in his skeleton argument for this appeal, Mr Kulkarni's case focused principally on the pre-existing relationship between Mr Kulkarni, on the one hand, and Mr Lewis and his wife, on the other. As explained in the skeleton argument, Mr Kulkarni contends that there was a pre-existing friendship between these three which formed part of the factual matrix against which the SHA fell to be construed but which the Judge disregarded. Neither the fact that the SHA did not contain any duty of trust or confidence nor the fact that the parties negotiated in their own interests rendered the prior relationship irrelevant to the construction of the SHA, it was argued. Further, while Mr and Mrs Lewis were not themselves parties to the SHA, Gwent was, and Mrs Lewis was that company's shareholder and director while her husband was its directing mind.

The Judgment

91. The Judge concluded in paragraph 447 of the Judgment that "[t]he fact that there was a background relationship between some or all of the parties" was "irrelevant to remediation". He had said in paragraph 441 that the contents of the SHA seemed to him "both entirely typical for a transaction of this nature and entirely inconsistent with the idea that the wider relationship, if any, between some or all of the parties (and indeed non-parties) to it is relevant". Having noted in paragraph 442 that there was no duty of trust and confidence, he expressed the view that, "[t]o accept that remediation is harder simply because of the parties' prior relationship would … introduce through that back door that which Mr Kulkarni could not secure through negotiation". In paragraph 443, the Judge said that it was "obvious from the facts of this case that at the time the SHA was negotiated Mr Lewis was acting in his own commercial interests, as he was entitled to do". The Judge went on:

> "443. … [Mr Lewis] secured control of the board, a reduction of Gwent's capital investment and the majority of the A shares. All of this was conceded reluctantly by Mr Kulkarni – not because of any sense of friendship for Mr Lewis but because he had no choice.
>
> 444. On the issue of control it is important to be clear on what insisting on control for Gwent meant in practice. As Mr Kulkarni described it in his witness statement, following the ouster of Mr Staples and Mr Jenkins, 'I ran the Hospital and appointed a new board to help me.' Mr Lewis was taking control away from Mr Kulkarni. This was the 'ruthless' Mr Lewis that Mr Davies described to me. I stress that this is no criticism of Mr Lewis; but it was the act of a businessman, not of a friend.
>
> 445. Moreover, Mr Kulkarni was prepared to respond in kind, albeit he had much the weaker hand. When Mr Lewis pushed too far at the Pre-Meeting, Mr Kulkarni threatened to collapse the whole transaction if he did not secure some concession. I have found that the

> concession he secured was inadequate, but the method he used is what matters here. This was not a loose arrangement between friends. It was a business negotiation.
>
> 446. By the time negotiations entered January and February 2020 Mr Lewis did nothing to suggest that he was acting as a friend and everything to show that he was acting as a commercial investor. Mr Davies saw that clearly, and repeatedly told Mr Kulkarni to operate on the same basis."

92. Returning to the subject in paragraph 468 of the Judgment, the Judge said:

> "I do not accept that there was a relationship of trust and confidence or anything resembling it either in the negotiation of the SHA or on the terms of the SHA as agreed. This was a commercial arrangement."

Discussion

93. The ground of appeal in part suggests that the pre-existing relationship between the individuals involved ought to have been taken into account, but was not, in the *construction* of the SHA. It seems to me, however, that the thrust of Mr Kulkarni's case is to the effect that the relationship was relevant to whether the various breaches were "capable of remedy" *on the facts*. At any rate, I have not identified any way in which the relationship could have affected the construction of the contract in a way that would have been relevant to these proceedings.

94. I also, and more importantly, consider that the Judge was justified in concluding, for the reasons he gave, that the "background relationship between some or all of the parties" was "irrelevant to remediation". While Mr Lewis may have become involved with the Hospital as a result of friendship with Mr Kulkarni, the SHA was in the end, on the Judge's findings, the product of a "business negotiation" in which Mr Lewis had acted "as a commercial investor" "in his own commercial interests" and, in so doing, "secured control of the board, a reduction in Gwent's capital investment and the majority of the A shares". Further, the SHA took the form of a commercial agreement, included no obligation of good faith and was expected to apply to shareholders other than Mr Kulkarni and Gwent.

95. In the circumstances, the SHA had to be viewed as what it was, a commercial agreement, when assessing remediability. I agree with the Judge that the pre-existing relationship between Mr Kulkarni, Mr Lewis and Mrs Lewis did not matter.

Issue (v): Remediability

96. This issue is raised by grounds 6 and 7 of the grounds of appeal.

The Judgment

97. The Judge concluded in paragraph 459 of the Judgment that, "[b]oth as a matter of practicality and as a matter of principle, in my view the A and B Shares breaches were remediable". The Judge had said in paragraph 455:

> "As I have noted, the test is a practical one – could the breach be put right for the future – and so the practicalities are significant. Here, as a practical matter it plainly was straightforward to reverse the allotment and issue of both the A and B Shares. Reversing an erroneous allotment and issue of shares to Gwent could not, in my view, reasonably be said to give rise to a conflict of interest for Gwent's appointed director, Andrew Lewis. In such circumstances, Gwent controlled the board under clause 14.5, such that the board of [the Company] could move swiftly. Gwent also held the overwhelming majority of the shares in [the Company] and could pass the necessary resolutions without cooperation from other shareholders. This is not judging the situation with hindsight; that was obvious at the time of the breach."

98. With regard to the Termination Breach, the Judge said in paragraph 462 of the Judgment:

> "The issue for Mr Kulkarni is that the SHA did continue in force. Put another way, the Termination Breach did nothing at all; on Mr Kulkarni's case it did not even give him a right to accept the renunciation that it represented. Even if that is wrong and the breach could have been accepted, Mr Kulkarni did not do so and so under the elective theory nothing changed with the SHA. Of course, the breach gave Mr Kulkarni a right to claim damages, but he has not done so and in any event, a breach that sounds in damages is by definition remediated by an award of those damages. Certainly the breach was a serious one, given its repudiatory nature, but even serious breaches can be remedied, especially those that have changed nothing. It was not so much a question of putting the genie back in the bottle; the genie never truly left."

99. As for the Hussain Breach, the Judge said this:

> "464. I have noted above that exclusion from management may well be irremediable. The difficulty for Mr Kulkarni on the facts, however, is that the breach of clause 13.2 is not what excluded Mr Kulkarni from the management of [the Company]. He ceded management control to Gwent in principle on 7 February 2020 and legally on executing the SHA on 13 February 2020. The exclusion of Mr Kulkarni from the entire process of management was plainly still wrongful and a breach of the SHA. If he suffered loss he would be entitled to

> damages; it may be that he would be entitled to an injunction to remedy the situation going forward, and indeed at one point he sought such relief in these proceedings. But at no stage could he exercise control over the affairs of the company for reasons wholly unrelated to any breach by Gwent.
>
> 465. Mr Butler suggested that the denial of access to information was itself sufficient prejudice to show the breach was irremediable. Again, I accept that the denial of access to information on the management and affairs of [the Company] was wrongful. I further accept that at least some prejudice is likely to flow from that breach. But the test is not prejudice looking back but, rather, whether the situation can be remedied going forward. It is not suggested, even with Mr Hussain having been a director for over a year, that anything has come out that Mr Kulkarni now wishes he had known sooner. Moreover, it would have made no difference to the running of [the Company], whatever Mr Kulkarni might have gleaned, because Andrew Lewis by the time of the breach had formed a clear view that Mr Kulkarni had nothing of value to add and I am certain would simply have ignored him; by virtue of clause 14.5 of the SHA, there was nothing that Mr Kulkarni could do about that. He repeatedly tried to lobby Mr Lewis and failed, and I see no reason to think by the time of the Hussain Breach, that anything he might have learnt was either unknown to Mr Lewis or would have influenced him in any way.
>
> 466. By the time of the [Hussain] Breach, Mr Kulkarni was frozen out of management decisions by Gwent, which Gwent was able to do by virtue of clause 14.5 of the SHA. The [Hussain] Breach was wrongful, because it froze Mr Kulkarni out of the process as a whole, not simply the final decision-making, but it was also gratuitous; having Mr Hussain in place would not have changed the terms of the SHA and would not have given Mr Kulkarni any influence over [the Company]."

100. The Judge had said in paragraph 448 of the Judgment:

> "Mr Butler further submitted that the time period of 10 Business Days within which remediation was to be achieved is relevant to assessing whether a breach is remediable. Something that would take longer than 10 Business Days to remedy could not be considered remediable for the purposes of clause 7.1(d). It seems to me that as a simple matter of logic that must be correct."

Mr Kulkarni's case

101. While not disputing that the Judge had regard to the principal authorities on remediability, Mr Butler argued that he failed properly to have regard to the seriousness of the breaches, the motive with which they were committed and their broader impact. There is, Mr Butler submitted, much more to remediability than reversing the outcome alone. In any event, neither the A Shares Breach nor the B Shares Breach was, or could have been, remedied within the 10 business days set by clause 7.1(d) of the SHA; the supposed basis for the purported termination giving rise to the Termination Breach was spurious; and nothing could undo the failure to allow Mr Hussain to take up his directorship between May and November of 2021. Further, the longer that the breaches were persisted in, the more they departed from remediability.

Authorities

102. I have already cited a number of cases bearing on when a breach of contract will be "capable of remedy".

103. We were referred to two further authorities in this context. One of them was *Phoenix Media Ltd v Cobweb Information Ltd* (16 May 2000, unreported) ("*Phoenix Media*"). In that case, an agreement between Cobweb and Phoenix Media included, as clause 15, a provision requiring the parties to act in good faith in their dealings. It also contained a clause allowing for termination if a party was "in material breach … and shall have failed (where the breach is capable of remedy) to remedy the breach within 30 days of the receipt of a request in writing from the party not in breach, to remedy the breach": see paragraph 22. Cobweb tried to terminate the agreement pursuant to this provision, but Neuberger J held the attempt to have been ineffective. While he considered there to have been breaches, he was not satisfied that the breaches were material or that, even if they were, they were irremediable: see paragraph 72.

104. Neuberger J said in paragraph 60:

> "Materiality and irremediability are different concepts but there is a degree of overlap between them. Thus, if one considers the consequences of the breach, [counsel for Cobweb] contends that [Phoenix Media]'s breaches were deliberately committed and dishonestly concealed. It seems to me that, if that is right, it would be a factor which would go to both materiality and irremediability; materiality because it would make the breaches graver, and irremediability because it would be easier to argue that the breaches irrevocably and negatively impacted upon what would otherwise be an ongoing business relationship involving trust and confidence between the parties, as clause 15 reflects. Nonetheless, they are different concepts."

105. Neuberger J further said, in paragraph 72:

> "In one sense, irremediability of a breach is impossible. The example that is frequently given is this: if there is an obligation on a tenant to paint in the fifth year of the term and he fails to do so, that is irremediable because, even if he paints thereafter, he

> has not painted in the fifth year of the term. Yet failing to paint in the fifth year of the term is clearly remediable. To my mind, therefore, irremediability has to be interpreted in a common sense way."

106. We were also taken to *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] AC 361 ("*Suisse Atlantique*"). There were issues in that case as to whether there had been a repudiatory or "fundamental" breach of a contract and, if so, whether that prevented the guilty party from relying on a clause limiting liability. In the course of his speech, at 394, Viscount Dilhorne said:

> "Breach of a charterparty by the detention of the vessel beyond the laydays by the charterers may, in my view, take on the character of a fundamental breach. If, for instance, there was a delay of many weeks in the loading of the vessel the consequence would be that the voyages, though in fact consecutive, would be totally different from those contemplated by the contract. Further, if it was established that a breach, though of itself not of sufficient duration as to lead to the conclusion that the performance of the contract became totally different from that contemplated, was committed deliberately and wilfully with the object of reducing the number of voyages accomplished, the breach might, in my opinion, take on the character of a fundamental breach. It is only in this connection, in determining whether there has been repudiatory conduct, that, in my opinion, the wilfulness of the breach has any relevance."

107. In a similar vein, Lord Reid said at 397-398:

> "The appellants allege that the respondents caused these delays deliberately (i.e., with the wilful intention of limiting the number of contractual voyages). They do not allege fraud or bad faith. This allegation would appear to cover a case where the charterers decided that it would pay them better to delay loading and discharge and pay the resulting demurrage at the relatively low agreed rate, rather than load and discharge more speedily and then have to buy more coal and pay the relatively high agreed freight on the additional voyages which would then be possible. If facts of that kind could be proved I think that it would be open to the arbitrators to find that the respondents had committed a fundamental or repudiatory breach. One way of looking at the matter would be to ask whether the party in breach has by his breach produced a situation fundamentally different from anything which the parties could as reasonable men have contemplated when the contract was made. Then one would have to ask not only what had already happened but also what was likely to happen in future. and there the fact that the breach was deliberate might be of great importance."

108. Lord Upjohn also thought that wilfulness could be relevant to whether a breach was fundamental or repudiatory. He said at 429:

> "My Lords, in view of the introduction in the questions posed by the arbitrator of the impact of a presumed wilful default, for my part I think it is only necessary to say that it seems to me as a matter of general principle that wilful default in connection with the matters we are now considering is relevant and relevant only to one matter, that is to say, whether in fact the owners can establish a fundamental breach. In cases such as this, where there has been no breach of any fundamental term, the question as to whether there has been a fundamental breach must be a question of fact and degree in all the circumstances of the case, but one of the elements in reaching a conclusion upon that matter is necessarily the question as to whether there has been a wilful breach, for as a practical matter it cannot be doubted that it is easier to find as a fact, for such it primarily is, that the charterers are evincing an intention no longer to be bound by the terms of the contract and are therefore guilty of repudiatory conduct if it can be established that the breaches have been wilful and not innocent."

109. For his part, Lord Wilberforce pointed out at 431 that the expressions "fundamental breach" and breach going "to the root of the contract" were used to denote "two quite different things, namely, (i) a performance totally different from that which the contract contemplates, (ii) a breach of contract more serious than one which would entitle the other party merely to damages and which (at least) would entitle him to refuse performance or further performance under the contract". At 435, Lord Wilberforce said:

> "The 'deliberate' character of a breach cannot, in my opinion, of itself give to a breach of contract a 'fundamental' character, in either sense of that word. Some deliberate breaches there may be of a minor character which can appropriately be sanctioned by damages: some may be, on construction, within an exceptions clause (for example, a deliberate delay for one day in loading). This is not to say that 'deliberateness' may not be a relevant factor: depending on what the party in breach 'deliberately' intended to do, it may be possible to say that the parties never contemplated that such a breach would be excused or limited: and a deliberate breach may give rise to a right for the innocent party to refuse further performance because it indicates the other party's attitude towards future performance. All these arguments fit without difficulty into the general principle: to create a special rule for deliberate acts is unnecessary and may lead astray."

110. Finally, Lord Hodson focused on the clause limiting liability. He said at 414:

> "On the construction of this contract I am of opinion that the parties have agreed to limit the damages payable for detention at the agreed demurrage rate and that there is no reason for not so limiting them whether or not there was an intention on the part of the respondents wilfully to limit the number of voyages."

Legal principles

111. I have already said that the case law shows that, when determining whether a breach of contract is "capable of remedy" within the meaning of either a contractual provision or a comparable statutory one, a "practical rather than technical" approach is, at least normally, to be adopted. *Phoenix Media*, where Neuberger J spoke of irremediability being interpreted in a "common sense way" provides further support for that.

112. In *Schuler v Wickman*, Lord Reid explained that "remedy" meant "cure so that matters are put right for the future" rather than "obviate or nullify the effect of a breach so that any damage already done is in some way made good". In *Savva v Hussein*, Staughton LJ thought it "sufficient that the mischief resulting from a breach of covenant can be removed". In *Telchadder*, Lord Toulson (echoing Lord Wilson) equated the "practical approach" with asking "whether and how the mischief caused by the breach can be redressed". The fact that, in a sense, "[t]he moving finger writes and cannot be recalled" (to quote Staughton LJ) does not mean that either a failure to comply with an obligation on time or a past breach of a negative obligation will necessarily, or even normally, result in irremediability.

113. That is not, of course, to say that every breach of contract is "capable of remedy". In *Akici*, Neuberger LJ explained that landlord and tenant authorities indicated that subletting and illegal and immoral user are incapable of remedy. In *Telchadder*, Lord Wilson observed at paragraph 30 that in *Rugby School (Governors) v Tannahill* [1935] 1 KB 87, where premises had been used as a brothel, "the continuing stigma precluded remediability". In *Force India*, the breaches were irremediable because "the marketing genie cannot be put back into the bottle", and Rix LJ evidently considered that "the publication of confidential information or the publishing of advertising matter not containing a party's name" could be incapable of remedy. *Telchadder* illustrates that anti-social behaviour causing lasting harm, fear or anxiety could also be irremediable. The existence of enduring prejudice can plainly be important more generally to whether a breach is remediable.

114. *Phoenix Media* indicates that the fact that a breach was committed deliberately may be significant if that "irrevocably and negatively" impacts upon an "ongoing business relationship involving trust and confidence", at any rate where the contract includes a good faith provision. While that may be so, the wilfulness of a breach will not usually, I think, matter. There is no suggestion in the authorities that a tenant who has deliberately failed to paint as required or has deliberately used premises as a doctor's consulting room despite a covenant to use only for residential purposes (to take breaches postulated in *Akici*) will on that account have committed an irremediable breach. In *Telchadder*, Mr Telchadder will not have "jumped out at Miss Puncher" by accident, but his breach was still remediable. The focus being on whether, as a practical matter, things can be put right for the future, the motivation for the breach will not normally be important. Nor, in my view, does *Suisse Atlantique* suggest otherwise. The question there was whether the deliberate character of a breach could make it fundamental or repudiatory, not whether that could bear on whether the breach was remediable.

115. It is also relevant to note here that there are only limited circumstances in which this Court will interfere with either a finding of fact or an evaluative assessment: see e.g. *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600,

especially at paragraph 67, *R (R) v Chief Constable of Greater Manchester* [2018] UKSC 47, [2018] 1 WLR 4079, at paragraph 64, and *In re Sprintroom Ltd* [2019] EWCA Civ 932, [2019] 2 BCLC 617, at paragraphs 76 and 77. In *Telchadder*, Lord Wilson said as regards a breach of covenant against anti-social behaviour that the "practical inquiry whether and if so how … the mischief resulting from [the] breach could be redressed" "requires a value judgment on the part … of the court in determining whether the requirements of section 146(1) of the 1925 Act, or, as the case may be, of the paragraph 4 term have been satisfied": see paragraph 67 above. An issue as to whether a particular breach is "capable of remedy" may also often be appropriately characterised, to a great extent at least, as one of fact.

Discussion

116. Subject to the point which I address in paragraphs 122 to 125 below, it seems to me that the Judge was not only entitled, but right, to hold that the various breaches were "capable of remedy".

117. As the Judge said, it was obvious at the time that the A Shares Breach and the B Shares Breach could be reversed by returning the shares to the Company. Adopting the "practical rather than technical" approach which the authorities require, moreover, the return of the shares will have remedied the breaches. They ensured that "matters [were] put right for the future" and removed the "mischief" caused by the breaches.

118. So far as the Termination Breach is concerned, "the genie never truly left", as the Judge said. The Termination Breach had "changed nothing" in practical terms and all that can have been needed to remedy it was acceptance by Gwent that its notice to terminate was ineffective.

119. With regard to the Hussain Breach, Mr Hussain's ultimate appointment as a director will, for the future, have put Mr Kulkarni in the position that he should and would have been in if the appointment had been carried into effect promptly. The situation could thus be "remedied going forward", as the Judge said. The Judge recognised that, in principle, exclusion from management can have irremediable consequences, but he found, with good reason, that in the circumstances of this case it would have made no difference to the running of the Company if Mr Hussain had become a director earlier. As the Judge said, "having Mr Hussain in place would not have changed the terms of the SHA and would not have given Mr Kulkarni any influence over [the Company]".

120. As for the contention that the Judge failed properly to have regard to the seriousness of the breaches, he expressed the view in paragraph 435.3 of the Judgment that "[t]he more serious the breach, the harder it will be to remedy". Plainly, therefore, the Judge was proceeding on the basis that the seriousness of a breach could matter. Mr Kulkarni's complaint has to be about the *weight* that the Judge attached to seriousness *on the facts as he found them*. As I have noted, however, this Court is slow to interfere with such assessments and findings, and we would not be justified in doing so here.

121. Turning to motivation, I have said that, in my view, the motivation for a breach will not normally be important. In the present context, moreover, the Judge concluded that Mr Andrew Lewis's actions were not motivated by personal animus. The Judge said:

> "280. To achieve his goal of financial stability Andrew Lewis needed to pin matters down, including Mr Kulkarni. But Mr Kulkarni did not want to be pinned down; he hoped that something would turn up to resolve matters, that Mr Lewis would come through on the agreement that Mr Kulkarni thought they had reached. Initially Andrew Lewis knew of no such agreement and found Mr Kulkarni evasive, someone who did not honour his significant debts. Mr Kulkarni offered no clarity when it would have been easy for him to do so. Over time Andrew Lewis came to understand that something had been agreed, but that something was unclear and, I think he genuinely (and rightly) believed, unenforceable ….
>
> 281. … A sense of mistrust built on both sides. That spilled over in June 2020 when Andrew Lewis, tired of what he saw as Mr Kulkarni's constant evasion and prevarication and concerned by his imminent return to the Hospital, decided to force matters.
>
> 282. He unquestionably went about that in entirely the wrong way, but the question is not so much his methods as what they reveal. I accept that by this stage he wanted Mr Kulkarni out of the business, but not because of some visceral dislike of Mr Kulkarni, less still because of unfortunate first impressions. Andrew Lewis took a business view that whatever Mr Kulkarni added to the business could be readily replaced. He did not rate him as a director ….
>
> 283. Andrew Lewis concluded something needed to be done, and he was the one to do it. One does not have to accept that Andrew Lewis was right on all or any of those points to see that they were within the range of decisions that the management of a business frequently has to consider. Where Andrew Lewis went wrong, and I accept he went badly wrong, was in the way he chose to implement his view, but that showed poor management and judgement, rather than some personal animus. In my view this was purely the breakdown of a business relationship."

122. There remains to be considered the contention that the A Shares Breach and the B Shares Breach were not "capable of remedy" for the purposes of clause 7.1(d) because, supposing that they could be remedied at all, they could not be remedied "within 10 Business Days". In that connection, Mr Butler stressed that the Judge had accepted that "[s]omething that would take longer than 10 Business Days to remedy could not be considered remediable for the purposes of clause 7.1(d)" and that Gwent had not challenged that conclusion in this Court.

123. Mr Butler relied in support of his argument on what actually happened. The Company's solicitors proposed the return of the relevant shares on 24 September 2021, Gwent agreed on 27 September and a written shareholders' resolution was passed on 29 September, but the buy-back of the shares still was not completed until 26 October and the stamped SH03 relating to stamp duty was still awaited on 9 November. The process thus took more than 10 business days, Mr Butler pointed out.

124. The short answer here is, I think, that it is not apparent that the buy-back was not *capable* of being achieved in 10 days. No particular period had to pass between the shareholders' resolution and completion. Nor was there any necessity for the submission of the SH03 and appropriate payment to be delayed beyond 10 business days. Even if (as may well be the case) it could be foreseen that HM Revenue and Customs would not process the SH03 all that speedily, that seems to me immaterial. The allotments to Gwent will already have been reversed.

125. There is a further point. Even on the assumption that the Judge was correct to accept that "[s]omething that would take longer than 10 Business Days to remedy could not be considered remediable for the purposes of clause 7.1(d)", the 10-day period would, as it seems to me, run from service of a notice to remedy. It is good enough, I think, that the breach can be remedied within 10 business days by the time any notice to remedy is served. No such notice having been served in the present case, the 10 business days limit must be immaterial.

Overall conclusion

126. I would dismiss the appeal.

Lady Justice Asplin:

127. I agree.

Lord Justice Lewis:

128. I also agree.