Neutral Citation Number: [2024] EWHC 1357 (Ch D)

Case No: BL-2021-001842

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building
Fetter Lane
London EC4A 1NL

Date: 5 June 2024

Before :

Richard Farnhill
(sitting as a Deputy Judge of the Chancery Division)

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Between :

DR ROHIT KULKARNI

Claimant

- and -

(1) GWENT HOLDINGS LIMITED
(2) ST JOSEPH'S INDEPENDENT HOSPITAL LIMITED

Defendants

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Andrew Butler KC and Hugh Rowan (instructed by **Acuity Law Ltd**) for the Claimant
Justin Higgo KC and Thomas Braithwaite (instructed by **Veale Wasbrough Vizards LLP**) for the First Defendant
Andrew Thompson KC (instructed by **Clarke Willmott**) for the Second Defendant

Hearing dates: 9-12, 15-17 and 22-23 April 2024

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JUDGMENT

Richard Farnhill (sitting as a Deputy High Court Judge of the Chancery Division):

1. This case involves St Joseph's Independent Hospital (the **Hospital**) in Newport, South Wales, which is now owned by the Second Defendant (**SJIH**). The dispute arises out of a Shareholders' Agreement dated 13 February 2020 (the **SHA**), in connection with which the First Defendant (**Gwent**) took 51% of the A Shares in SJIH, and the Claimant (**Mr Kulkarni**) took 49%. Gwent's directing mind and will is David Lewis (**Mr Lewis**), although he is neither a director nor a shareholder of Gwent.

2. Four breaches of the SHA are alleged by Mr Kulkarni, of which three are admitted by Gwent and SJIH:

    2.1. Gwent wrongfully procured SJIH to allot to Gwent, and register it as owner of, 1,651 A Shares in SJIH to which Mr Kulkarni was entitled (the **A Shares Breach**). Gwent and SJIH admit both the A Shares Breach and that it was repudiatory in nature; the repudiation was not accepted by Mr Kulkarni.

    2.2. Gwent wrongfully procured SJIH to allot to Gwent, and register it as the owner of, 2,000 B Shares without offering Mr Kulkarni a proportion of those shares as required by section 561 of the Companies Act 2006 (the **B Shares Breach**). Gwent and SJIH admit the B Shares Breach but deny it was a repudiation. Again, to the extent that the B Shares Breach was repudiatory, the repudiation was not accepted by Mr Kulkarni.

    2.3. Gwent wrongfully purported to terminate the SHA by letter dated 28 August 2020 (the **Termination Breach**). Gwent and SJIH admit that the Termination Breach occurred and was repudiatory; again, the repudiation was not accepted by Mr Kulkarni.

3. The fourth alleged breach is that the defendants failed to recognise Mr Kulkarni's appointment of Mr Shelim Hussain (**Mr Hussain**) in breach of the SHA (the **Hussain Breach**). The Hussain Breach is denied by both Defendants.

4. Mr Kulkarni relies on the various breaches for the purposes of clause 7.1 of the SHA, which provides that:

> 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).

5. The effect of a Transfer Notice is, broadly, that Mr Kulkarni could acquire Gwent's shares in SJIH for the lower of the subscription price paid by Gwent

and the Fair Value of those shares as determined using the valuation mechanism in the SHA.

The issues for determination

6. Counsel very helpfully were able to agree the issues before me for determination. I am conscious that this is a lengthy judgment, and that it may assist the parties if I set out my conclusions on them in brief at the outset:

   6.1. Is it possible for the defaulting party to remedy a material and/or persistent breach of the SHA under clause 7(1)(d) is the absence of a notice to remedy? **Yes.**

   6.2. Are repudiatory breaches of the SHA capable, as a class, of being remedied within the meaning of clause 7.1(d)? **Yes.**

   6.3. What was discussed and (if anything) agreed at the Pre-Meeting on 7 February 2020, and on behalf of whom? **It was agreed that Gwent was to have control of the board of SJIH. Mr Lewis agreed, on behalf of Gwent, that SJIH would look to repay sums owed to Mr Kulkarni by the Hospital if Mr Kulkarni could evidence those debts and SJIH was profitable. Mr Lewis further agreed in general terms, again on behalf of Gwent, that Mr Kulkarni should have his shares in SJIH but the terms on which this was to happen were not agreed in anything like a legally enforceable form.**

   6.4. What was discussed and (if anything) agreed at the Main Meeting on 7 February 2020, and on behalf of whom? **Various matters were agreed, but in connection with the issues in dispute in this case no substantive progress was made on the three key matters addressed at the Pre-Meeting.**

   6.5. What was discussed and (if anything) agreed at the SJIH Board Meeting on 12 or 13 February 2020, and on behalf of whom? Specifically, was a contract of allotment under which shares would be issued conditional on payment of £80,000 concluded between SJIH and Mr Kulkarni at that meeting? **Again, various points were discussed and agreed, most importantly for the purposes of these proceedings a contract of allotment was entered into under which Mr Kulkarni would receive 1,651 A Shares in SJIH conditional on payment being made to SJIH of £80,000.**

   6.6. What is the true construction and effect of Recitals (A) and (B) of the SHA, and does the doctrine of estoppel by deed operate to prevent Gwent or SJIH from challenging what is stated? If the doctrine of estoppel by deed does apply, what is the effect of that doctrine? **The recitals record that Mr Kulkarni was, at the date of the SHA, the holder of 1,652 A shares. However, that recital was not intended to form the basis of the parties' agreement and the doctrine of estoppel by deed does not apply in connection with it.**

   6.7. Was the Board of Gwent required to accept the appointment of Mr Hussain as a director of SJIH immediately on service of Mr Kulkarni's notice of appointment? If so, did Gwent or SJIH breach the SHA in failing to acknowledge or accept the directorship of Mr

Hussain as a director of SJIH until 11 November 2021? **The appointment might properly have been subject to a short delay to allow for the necessary formalities to be completed under article 9 of SJIH's articles, but that was measured in days, not weeks and most certainly not months. The delay in accepting Mr Hussain's notice of appointment was accordingly a breach of the SHA.**

6.8. Did the Hussain Breach, if made out, amount to a material or persistent breach of the SHA? **It was both material and persistent.**

6.9. Did any of the other three breaches relied on by Mr Kulkarni in the Re-Re-Amended Particulars of Claim amount to a persistent breach of the SHA? **All three were persistent.**

6.10. Were any of the four specific breaches of the SHA relied on by Mr Kulkarni incapable of being remedied within the meaning of clause 7.1(d)? **All four breaches were both capable of being remedied and were remedied.**

6.11. Alternatively, even if capable of remedy when first committed, did they cease to be capable of remedy because of their persistence or for any other pleaded reason? **No.**

6.12. Does Clause 7.1(d) engage the court's equitable jurisdiction to grant relief from forfeiture? **This does not arise.**

6.13. If so, should the court grant Gwent relief from forfeiture? **This does not arise.**

6.14. Is Mr Kulkarni entitled to declarations as a result of the Court's findings on any of the above issues? In particular is Mr Kulkarni entitled to a declaration that Gwent is deemed to have served a Transfer Notice, and is SJIH obliged to appoint Valuers pursuant to clause 8 of the SHA? **Mr Kulkarni is entitled to a declaration that the Hussain Breach was a material and persistent breach of the SHA. He is not entitled to declarations in respect of the service of a deemed Transfer Notice or the appointment of valuers.**

6.15. Is Mr Kulkarni entitled to the sum of £80,000 from Gwent in respect of the 1,651 A Shares? Is Mr Kulkarni entitled to interest on the same? **In both cases, no.**

6.16. Is Mr Kulkarni entitled to rectification of the Register to show him as the registered shareholder of the 1,651 A Shares with effect from 13 February 2020? **No.**

The witnesses

7. Certain aspects of this case turn heavily on the witness evidence, particularly the evidence of Mr Kulkarni, Mr Lewis and Mr Davies.

8. I was referred by Mr Higgo KC to the line of cases flowing from *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm). The cases are well known and do not require extensive quotation: witness recollection is fallible and can be heavily influenced by subsequent events, including in particular the linked processes of the dispute and preparing for the trial itself. In *Gestmin*, Leggatt J, as he then was, concluded, at paragraph [22]: "*the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance on witnesses' recollections of what was said in*

meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts." I have had that very much in mind in considering the evidence in this case.

9. I also had in mind an observation that is, I suspect, less frequently cited in proceedings, from Professor Cane's article Taking Disagreement Seriously: Courts, Legislatures and the Reform of Tort Law (2005) 25 OJLS 393 at 409:

> In many situations in life, people can agree to disagree. The very act of submitting a dispute to a court indicates that the parties cannot agree to disagree; and it is not open to the court to tell them to live with their disagreement. On the other hand, while going to court may resolve the immediate dispute, it provides no guarantee that the disagreement that gave rise to the dispute will be resolved. Courts provide machinery for resolving disputes and, in this way, for managing, without necessarily resolving, the disagreement that gave rise to the dispute. Dispute-resolution by courts provides a mechanism for preventing disagreement getting out of hand, not for removing it.

10. The parties here are a long way from agreeing to disagree. The initial difference that gave rise to these proceedings has spawned multiple other claims. There has been a complaint by Mr Lewis to the GMC (dismissed); a complaint by Mr Lewis to the SRA (dismissed); and multiple complaints to the police (which, so far as I am aware, have not led to charges but there may be ongoing investigations). There are proceedings on related issues ongoing in the County Court. In the course of these proceedings I was referred to a conviction of Mr Lewis in 2003 (now spent and of no apparent relevance to the claims in this case) and a police caution of Mr Kulkarni in 2012 (also spent and of relevance only as background).

11. This seems to me significant in two ways. First, it is important constantly to keep in mind both what this claim is, which is a breach of contract claim, and what it is not, which is everything else that goes to make up the differences that now exist between Mr Lewis and Mr Kulkarni. To paraphrase Professor Cane, I can resolve the dispute but not the disagreement that gave rise to that dispute. Secondly, such a wide ranging and hard-fought disagreement inevitably affects the recollection of witnesses. All of the factors identified by Leggatt J are here writ large, and his guidance is all the more valuable in such a case.

12. Turning to the witnesses, Mr Kulkarni was the central figure in the Hospital from at least 2014 until 2020. He was one of the senior consultants who worked at the Hospital and was also central to its management. It was obvious to me that he had a strong emotional attachment to the Hospital and wanted it to succeed, but it is also fair to note that throughout the relevant period he has had a significant financial interest in that success.

13. Mr Kulkarni was clearly knowledgeable about and spoke with considerable authority on the operation of the Hospital during the time he was there. As to his own affairs he was much vaguer. He often paused, at times at some length,

in giving his evidence. He would advance positions, for example as to the directorships he held, that he almost immediately had to withdraw when confronted with documents or even simple prompting.

14. His evidence was also unclear, and being frank unsatisfactory, when addressing what was agreed with Mr Lewis in the critical period of January and February 2020. He strongly believes that he put a great deal into the Hospital, which was not contested and which I readily accept, but when the ownership changed he felt he was left as the only person not being taken care of. As he put it in his cross-examination:

> I think the company is most important, yes, I do, but I also think one person should not suffer for the sake of the company. I personally feel over the whole period I was the only one who suffered for all that. I know that throughout this whole journey all other debts were paid, all the consultants got paid. I never got paid. So I do agree. But I do consider the company is more important, but one should not ignore someone minor and small, they should also be respected and given what is due.

15. Mr Kulkarni believes equally strongly that he has been let down by Mr Lewis and that Mr Lewis should have stood by the agreement in principle that Mr Kulkarni sincerely believes had been reached between them. In his witness statement he went as far as to describe this as feeling betrayed by Mr Lewis. That deep sense of grievance and injustice has, in my view, strongly coloured his recollection. Again, this is illustrated in his witness statement. He now looks back on the early stages of his relationship with Mr Lewis , whom at the time he considered a friend, in a very different light: "*In hindsight I can now see that* [Mr Lewis] *was manipulating me for personal gain.*" But it is unclear what gain Mr Lewis could possibly have seen in a period long before investment in SJIH became a possibility. Mr Kulkarni helped Mr Lewis and Mr Lewis returned the favour; the fact that the relationship has now broken down does not come close to demonstrating that Mr Lewis had some sinister motive in doing so from the outset.

16. The position is compounded because the transfer of the Hospital happened immediately before the Covid-19 pandemic. Mr Kulkarni had to shield during the early stages of the pandemic and the combination of a change in management at the Hospital and the fact that he was not physically going to work there gave rise to a sense in his mind that he was being excluded. That sense of exclusion has also coloured his recollection of events at that critical time.

17. In saying this I do not seek to suggest in any way that Mr Kulkarni was dishonest or shaded his evidence to me. On the contrary, I found him to be an honest witness who was genuinely confused when the discrepancies between his recollection and the contemporaneous record were pointed out to him. In key respects I found him to be unreliable, however.

18. Robert Davies (**Mr Davies**) was a partner at RDP Law (**RDP**), the firm which advised both the original owner of the Hospital (**Oldco**) and its new owner,

SJIH. However, Mr Davies was not involved in any of the events in question in his professional capacity but, rather, as a director of Oldco and, after the sale, SJIH.

19. Mr Davies appeared as a witness pursuant to a witness summons and it is important to record in this judgment why that was. Mr Davies had offered to prepare, and indeed had prepared, a draft witness statement that he was open to sharing with both parties. His objective was to assist the court and such a course, had it been pursued, would doubtless have saved significant time and effort.

20. Instead, the Chief Executive of SJIH (**Mr Hammond**) questioned why Mr Davies would adopt such a course and Mr Davies agreed not to do so. He was subsequently the subject of various emails sent by Mr Lewis. Mr Davies' understanding was that the purpose of those emails was to "*intimidate*" him. It goes without saying that an attempt to intimidate a witness is a serious matter, whose very seriousness means that one must avoid jumping to conclusions. I fully recognise that Mr Lewis is not a party to these proceedings, was not separately represented before me and so did not have the opportunity fully to contextualise those emails. From what I saw, however, I accept that Mr Davies' conclusion that a neutral statement would be impossible was a wholly reasonable one; there can be no criticism of Mr Davies for having appeared pursuant to a witness summons and not volunteering his evidence in the form of a written statement.

21. Mr Davies was a helpful, measured witness. He is a solicitor of considerable experience and came across as the archetypal trusted advisor, a model professional. His evidence was balanced and fair and when he could not recall points he was wholly transparent in recognising that. I had very considerable confidence in accepting his evidence as being accurate allowing, as Mr Davies very properly did himself, for the passage of time and the fact that his evidence in chief was given for the first time, orally, before me.

22. James Davies was one of the solicitors at RPD who handled the sale of the assets of Oldco to SJIH, focussing particularly on the property aspects of the transaction. Ms Mills handled the corporate aspects of the sale, including the SHA that is at the heart of this dispute.

23. James Davies gave clear answers, properly accepting where his recollection was unclear or added nothing to the documents. Understandably, however, since his focus was not on the SHA he was able to offer relatively limited assistance in respect of it.

24. Jayne Lewis (**Mrs Lewis**) is the shareholder and a director of Gwent, but as she and Mr Lewis both recognised the real control rests with Mr Lewis. Mrs Lewis accepted that she did not follow the detail of the transaction and that while she recalled events she did not always recall dates with much, if any, certainty. Her evidence was given honestly and with a view to assisting the court but other than explaining the internal dynamics of Gwent, where her

evidence was very helpful, she was not able to add very much to the documents.

25. Mr Lewis is, as I have indicated, the directing mind and will of Gwent. While he does not have a shareholding and is not a director he takes the decisions; certainly he did in this case.

26. Mr Lewis is a self-made man. His early life was spent in children's homes and he accepted in his evidence that he had little by way of a formal education. He started his working life operating a JCB and from that has built a significant property and business portfolio. Mr Davies described Mr Lewis as an astute businessman and that was reflected in this transaction. Mr Davies also described Mr Lewis as ruthless, and I would accept that if provoked that would likely be the case. Mr Lewis is not a man to shy away from the fight; on the contrary, my impression was that he would relish it.

27. Mr Kulkarni's claim has represented such a provocation. By his own admission, when Mr Lewis read the letter of claim he "*saw red*". In connection with a complaint he made to the GMC immediately after that letter, which I deal with in due course, he explained:

> Yes, my Lord, I did over-react. But the minute he started accusing my wife, I bit back.

28. It is worth adding at this point that the statement in the letter to which Mr Lewis seems to have reacted was a reservation of rights against Mrs Lewis. When it was pointed out to Mr Lewis that in arranging for Mrs Lewis to act as a director of Gwent he had put his wife "*in the firing line*", to use Mr Butler KC's term, Mr Lewis refused to recognise that her role as a director had any relevance.

29. In fact it goes significantly further than that. Mr Lewis sent various emails relevant to this dispute in Mrs Lewis' name. There was some issue as to how active a role Mrs Lewis played in drafting or approving those emails, but for current purposes that does not matter. Anybody reviewing those emails would, entirely reasonably, have understood that they were written by Mrs Lewis. It was Mr Lewis' own actions that placed Mrs Lewis at the heart of this dispute such that a reservation of rights in respect of her actions was not in the least unusual. Mr Lewis' reaction demonstrates both how he can shut out such considerations from his thinking and how personally he has taken this dispute from the outset.

30. I believe Mr Lewis gave his evidence honestly, but he was often more advocate than witness. Moreover, in my view his strong reaction to the claim has significantly affected his recollection. For those reasons I had to treat his evidence with a significant measure of caution. He obviously had a strong grasp of the commercial rationale of the transaction. He has not achieved his success simply by being combative; he is an intelligent and capable operator who well understood his commercial priorities at the time. There were

significant areas where he was not focussed at the time, however, and where his memory of events was unreliable.

31. Andrew Lewis is a director of both Gwent and SJIH. He is highly experienced in management and his focus was to protect Gwent's investment in the Hospital and to turn around what he considered, with some basis, to have been a failing business.

32. Like his brother, Andrew Lewis is obviously a very capable man, as his success in making SJIH profitable demonstrates. While he is less openly combative than Mr Lewis it seemed to me that in giving his evidence he was more conscious of the Defendants' respective interests. At times his answers were defensive and on occasion evasive. At other times he volunteered evidence that was not in his witness statement and had nothing to do with the question asked. Indeed, on one occasion he was simply referred to a document as background and started to offer a commentary on it before any questions had been asked.

33. Moreover, as his evidence made clear, he came to have a very dim view of Mr Kulkarni. As I have noted, this judgment cannot sensibly resolve every difference between the parties and unless it is necessary for me to do so I make no comment on the correctness or otherwise of Andrew Lewis' conclusions regarding Mr Kulkarni. It was obvious, however, that his view of Mr Kulkarni coloured both his actions at the time and his evidence before me.

34. Finally, Andrew Lewis' focus on the business was quite singular. There were incidents, as Gwent now admits, where in advancing what he perceived to be the best interests of the business (more specifically, the best interests of Gwent, which were not always the same thing) he shut out concerns that he should have addressed. Again, that coloured his perception, and in some cases failure to perceive, events at the time and so inevitably affected his evidence before me.

35. Mr Hammond was and is the Chief Executive of SJIH; before that he was the Chief Executive of Oldco from November 2018. Mr Hammond's evidence was mixed. There were events where he was very clear in his recollection and provided considerable assistance. At other times, however, he insisted he had no recollection of key events or documents. Mr Butler, in closing, suggested that Mr Hammond had used the phrase, "*I do not recall*," or something very similar a total of 53 times in the course of a one day cross-examination. Mr Thompson KC said that 36 was a more accurate number.

36. Mr Higgo cautioned against an over-simplistic approach based on the number of times a witness could not recall matters. That, of course, is entirely correct. If a witness cannot recall they should not be criticised for accepting that, and little is gained by witnesses simply speculating. It is, however, fair to say that Mr Hammond's recollection of key matters was patchy and that affects the weight that can be attached to it.

37. I was also very struck by Mr Hammond's reaction to Mr Kulkarni's absence from the Hospital during the early stages of the Covid-19 pandemic.

> I think Mr Kulkarni had been absent from the hospital for a considerable period, absent both in his physical presence but also his engagement with the hospital during the time of Covid-19 which was an extremely busy period for all the senior management within the hospital. I felt that Mr Kulkarni had abandoned the hospital.

38. A reference to abandonment is a strong one, and it was delivered by Mr Hammond with considerable force. He had obviously worked with Mr Kulkarni for some time by this stage and through a tumultuous period for the Hospital. There was no suggestion of any issue in the working relationship up to March 2020. It was obvious that this therefore represented a significant breakdown in that relationship. That inevitably impacted on Mr Hammond's perception of events at the time, and in turn the evidence he gave before me.

The previous ownership of the Hospital

39. In late 2018 Mr Kulkarni was closely involved with the Hospital and had been for some time. He worked there as a consultant and was both a senior employee and a director of Oldco. Along with around 40 of the other consultants working there, he was a shareholder in Oldco. The consultants had acquired their shareholdings in Oldco under an Enterprise Investment Scheme (**EIS**), which provided two forms of tax relief that are relevant to this claim:

    39.1. On acquiring the shares, the taxpayer was entitled to immediate income tax relief to the value of 30% of the investment.
    39.2. If a loss was made on the investment that loss net of the 30% initial tax relief could be claimed as income tax or capital gains tax relief.

40. Mr Butler helpfully illustrated this with an example. If a taxpayer with a marginal rate of income tax of 45% (which I was told was Mr Kulkarni's marginal rate of tax at all relevant times) invested £100,000 they would be entitled to immediate tax relief of £30,000. In the event of a total insolvency of the investment they would become entitled to further income or capital gains relief of 45% of the net investment, i.e. of £70,000, meaning further relief of £31,500.

41. Investment under an EIS prohibits paid employment for a period of three years after the investment. There was some confusion over how this operated, which is relevant to subsequent events. On opening Mr Butler informed me that after the three year period ended the employee could be paid for the time that he or she had worked and still benefit from EIS relief. So if the salary was £50,000 p.a. then the employee who survived three years could be paid £150,000 in backpay and claim EIS relief. He was not able to assist me on whether the unfortunate employee who only made it to two years and 364 days would have to elect between the backpay of very slightly under £150,000 and EIS relief or whether, after the three year period from the date of their investment had elapsed, they could have both.

42. In the course of the trial Mr Higgo provided a somewhat different explanation. He referred me to section 157 of the Income Tax Act 2007, which deals with eligibility for EIS relief and requires that the investor be a qualifying investor. Under section 163 a qualifying investor cannot be "connected" to the issuing company for a period of three years after the issue of shares; sections 167-168 make clear that a director is not considered to be "connected" unless they receive or are entitled to receive payment for the period set out in section 163. Put simply, an employee could never have the benefit both of the salary and of the EIS relief for all or any part of the initial three year period.

43. This issue had not arisen for Mr Kulkarni when he became an employee of Oldco because he had held his shares in that company for more than three years when his employment commenced. It was to become an issue going forward.

44. Mr Kulkarni's shareholding in Oldco differed from those of the other consultants in two significant ways. First, the value of his shareholding was significantly greater than that of any other consultant; by 2019 he owned around 22.5% of the shares and the other consultants in total owned around 35-40%. Secondly, he was a holder of A shares, which carried voting rights; the other consultants held B and C shares, which did not.

45. Mr Kulkarni also had more of a management role in the Hospital. He was its Medical Director and also its Responsible Officer, a role stipulated by the General Medical Council (**GMC**), responsible for clinical governance processes.

46. As I have noted, Mr Kulkarni was also a director of Oldco. In 2018 there was a dispute involving Mr Kulkarni and two other directors, Brian Staples (**Mr Staples**) and Paul Jenkins (**Mr Jenkins**), both of whom were also A shareholders. In the course of that dispute Mr Staples wrote to the GMC regarding an earlier investigation into Mr Kulkarni. In 2012 Mr Kulkarni had accepted a police caution for fraudulent prescribing and as a consequence had been made the subject of a GMC warning. The latter lasted for five years, so by 2018 was spent (as, obviously, was the police caution itself). In the course of their dispute, Mr Staples sought to have the investigation into Mr Kulkarni reopened. Ultimately the GMC did reopen the investigation, which concluded in September 2020 with no further action taken against Mr Kulkarni. It was therefore a live investigation throughout the period relevant to these proceedings.

47. The dispute with Mr Staples exposed a complication in Dr Kulkarni's relationship with the Hospital and Oldco. In 2014 the Competition and Markets Authority (the **CMA**) had investigated the private healthcare market and following that investigation had issued the Private Healthcare Market Investigation Order 2014 (the **PHMIO**). This provided, in material part, that a referring clinician was not permitted to hold direct or indirect interests in the equity of any private hospital at which they held practising privileges (article 18.1). A carve-out existed where the referring clinician had made full payment at the fair market value for that interest and it represented 5% or less of any

class of shares (article 18.3). Mr Kulkarni was a referring physician at the Hospital and so his shareholding in Oldco breached article 18 of the PHMIO as he ultimately, after some quibbling, came to accept on cross-examination. Mr Staples raised the breach with the CMA in the course of his dispute with Mr Kulkarni.

48. The PHMIO issue was ultimately resolved essentially in Mr Kulkarni's favour. His initial approach was to seek a dispensation but that was not pursued. Instead, the CMA drew attention to article 14.5 of the PHMIO, which had the effect of removing employees from the scope of the article 18 prohibition and that was the course that Mr Kulkarni and Oldco adopted, entering into a contract of employment (the **Employment Contract**) on 19 October 2018. That resolved the PHMIO issue and did not create an EIS problem because, as I have explained above, the prohibition on employment for those purposes only applied for the first three years after acquisition of the shares and Mr Kulkarni had been a shareholder in Oldco since 2014.

49. At least in part as a consequence of the dispute involving Mr Kulkarni, Mr Staples and Mr Jenkins, Oldco was in serious financial difficulty. On 16 July 2019 Oldco appointed Begbies Traynor (London) LLP (**BGT**) to provide advice in relation to Oldco's financial difficulties, attempt to facilitate negotiations to settle the dispute and to provide contingency options.

50. Settlement proved impossible without further investment and Mr Lewis, at least, was not prepared to invest to fund a settlement with Mr Staples. A CVA was explored but quickly rejected because Mr Jenkins and Mr Staples (who had been ousted by Mr Kulkani from the management of Oldco in 2018 but who retained their shares) held, between them, a sufficient interest to mean that the necessary 75% majority could not be achieved.

51. The result was that Oldco filed a notice of intention to appoint administrators on 29 January 2020 and a further such notice (as a precaution with a view to keeping the moratorium on claims in place) on 10 February 2020. Gary Shankland (**Mr Shankland**) and Mark Fry (**Mr Fry**, together with Mr Shankland for the period on and after 14 February 2020, the **Administrators**) of BGT were appointed as administrators of Oldco on 14 February 2020.

52. Mr Kulkarni was, himself, a significant creditor of Oldco, with the sums owed to him claimed by Mr Kulkarni to total around £750,000. Other consultants at the Hospital were also owed sums, but Mr Kulkarni's exposure was significantly greater because he had for a number of years not drawn a salary or consulting fees.

The involvement of Mr Lewis

53. As Oldco's difficulties mounted from mid-late 2019, Mr Kulkarni sought the assistance of Mr Lewis, whom he knew from their involvement with the local rugby club, Newport Gwent Dragons. Mr Kulkarni was, as he described himself, "*the main conduit of communication between the Hospital, its board, BGT*" and Mr Lewis until shortly before the administration.

54. Mr Lewis' position shifted quite significantly over time:

    54.1. In October 2019 he proposed an interest-free five year loan to Mr Kulkarni secured on the Hospital's assets, with no shareholding for Mr Lewis or anyone connected with him.
    54.2. In December 2019 Mr Lewis repeated the offer of an interest-free five year loan but with provision made as to the recoverability of interest from year six. Mr Kulkarni said in his witness statement that the offer was made to "*us*", which may have been a reference to SJIH or may have been a reference to Mr Kulkarni and the broader consultant body.
    54.3. Mr Kulkarni's evidence was that by 15 or 16 January 2020, and possibly much earlier in January, Mr Lewis proposed a personal investment in return for a 26% shareholding, which Mr Kulkarni would have the option to buy back.
    54.4. On 21 January 2020 Mr Lewis explained to Mr Kulkarni that the investment would be made through Gwent, rather than by him personally.
    54.5. On 3 February 2020 Mr Lewis raised concerns about protecting his investment and Mr Kulkarni suggested that Andrew Lewis could be appointed to the board of SJIH. Mr Lewis' recollection was that Mr Kulkarni wanted Andrew Lewis involved from the outset because of his experience with distressed companies. However, Andrew Lewis' evidence was that Mr Lewis first raised this with him in February 2020, suggesting that Mr Kulkarni's recollection is correct.
    54.6. On 6 February 2020 Mr Lewis proposed a £2.5m loan at 3% interest with a further £1m in exchange for equity. There was no suggestion that the equity would be held for Mr Kulkarni's benefit or that Mr Kulkarni would have the right to purchase those shares in the future.

55. That sequence of proposals obviously represents a radical shift in position from Mr Lewis over a four-month period. Mr Higgo in his written closing suggested that there was never any suggestion that Mr Lewis would lend on wholly uncommercial terms. I reject that. A loan that was interest free for five years is plainly not a commercial loan. It is, literally, money for nothing. Yet Mr Lewis accepted in cross-examination that he had made such a proposal and that he did it to help Mr Kulkarni. However, as Mr Lewis focussed more on the deal, his commerciality took over. Mr Lewis' evidence before me was that as time went on, more issues became apparent to him and he became more concerned about what he was being asked to take on. I accept that up to a point, but I think he also came to see this more as an investment opportunity, as the shift from a straight loan to a debt and equity position illustrates.

56. From Mr Davies' perspective it was entirely predictable:

    Q. Had you expected [Mr Lewis] to have shares in SJIH?
    A. I always knew he would ask for it, yes.
    Q. Because he is putting in a very substantial investment?

> A. He is a businessman, he is not going to give an interest free loan for £3 million.

57. Moreover, Mr Davies warned Mr Kulkarni what he was getting into:

> Q. What did you think when [Mr Kulkarni] told you that [Mr Lewis] was there to help on this?
> A. I told him to be careful. [Mr Lewis] is a very astute businessman. I asked [Mr Kulkarni] on what basis he was going to put the money: "When you say he is there to help, what do you mean?" "He will lend me whatever I need." "But, Ro, that is not going to happen, that does not happen, that is not what will happen here either so if you are moving forward on this basis, basically be realistic."

It was sage advice.

58. In his witness statement Mr Kulkarni made no reference to Mr Davies' warning. Rather, he maintained that he believed up until 6 February 2020 that Mr Lewis would be making a loan with no interest in the equity of SJIH.

59. With respect to Mr Kulkarni, while I accept that represents his recollection now, I do not think he believed that at the time. First, I believe that Mr Davies did advise Mr Kulkarni in the terms that Mr Davies describes. Mr Kulkarni obviously trusts and respects Mr Davies; he would not simply have dismissed such a warning. Secondly, the proposals shifted significantly, and always to more commercial terms, always to Mr Lewis' advantage. That cannot have been lost on Mr Kulkarni. Finally, Mr Kulkarni was unable to explain the documentary evidence, which shows the move to an equity interest as early as 8 January 2020, when Mr Kulkarni circulated a draft response to questions from BGT in which he accepted: "*Conversations are continuing with our investor on the level of equity and debt.*"

60. The confusion in Mr Kulkarni's evidence was exemplified by his recollection of an email on 5 February 2020 from Mr Hammond, to which Mr Kulkarni was copied, informing BGT that Gwent would acquire 37% of the shares in SJIH:

> I am pretty certain I can explain this. My memory is very clear about this. The fact of the matter is that [BGT] said that the bank needed to be absolutely assured that only the consultants would not get shares because – I am sorry, I have got to think about this. (Pause) In fact, I would say this was not after a discussion with [Mrs] or [Mr] Lewis.

61. This continued for some time. Despite his initial confidence in the clarity of his recollection Mr Kulkarni admitted at different points that it was "*not very clear*", "*there is something in my mind, but I am not very clear*" and "*It was not about being dishonest, but there was a reason it was being done and I cannot really remember that*." He was insistent it did not involve a discussion with Mr or Mrs Lewis.

62. Making full allowance for the strain of giving evidence, Mr Kulkarni was obviously mistaken in his initial recollection that a non-equity investment was still on the table by mid-January and, when confronted with clear evidence of his mistake, was unable to recognise it. I accept there was no dishonesty in the dealings with the lenders of Oldco at this time, but that necessarily means that there was a discussion with Mr and Mrs Lewis (and, realistically, with Mr Lewis alone, since Mrs Lewis was clear throughout that he was the decision maker) in which Mr Lewis wanted an equity position well before 6 February 2020.

63. The sequence of proposals also highlights that by 6 February no commercial consensus, and certainly no final agreement, had been reached on the shape of the deal. Mr Kulkarni's witness statement recognised as much: assurances were "*still needed*"; there was "*nothing formally in writing committing Gwent*"; a "*lengthy conversation*" was needed to try to "*bottom out the issues*".

64. As a consequence, Oldco was in a very weak position. Again, it is worth quoting Mr Kulkarni's witness statement:

> [Mr Davis] also added that it was very late in the day and unless we found another funder we had to either accept the offer or the Hospital would fail. Therefore we had no choice as [Mr Lewis] was the only funder that we had and I still trusted him at this stage.

65. I accept that. Going into the 7 February 2020 meetings there was no certainty that a deal would be done or, if so, on what terms. What was certain was that Mr Lewis held by far the better negotiating position.

The 7 February meetings

66. On 6 February 2020 James Davies of RDP wrote to Mr Lewis suggesting a meeting the following day (which was Friday) at 12:30pm at the Hospital. The meeting was to involve James Davies, Mr Lewis, Mr Kulkarni, Mr Hammond and Delyth Evans (**Ms Evans**), an associate at RDP. The meeting was to allow the parties to work through the shareholders' agreement, loan agreement and security. James Davies noted that "*this*" needed to be finalised on 7 February, presumably referring to agreeing the terms, since he proposed that he and Ms Evans would work over the weekend to produce the documentation for signature the following Monday (10 February).

67. James Davies noted that the deal as explained to him by Mr Kulkarni was for "*you*", which could be a reference to Mr Lewis personally or to Gwent, to have 26% of SJIH and Mr Kulkarni to have 25% of the total share capital (which equated to a 51/49% split of the A shares), granting them control. Deadlock was to be referred to a third party, and James Davies proposed Mr Davies for the role.

68. Mr Kulkarni explained in his witness statement that the deadlock provision was his suggestion and that he subsequently discussed it with Mr Lewis on a telephone call and Mr Lewis agreed to it. Mr Lewis was vehement in his

evidence before me that he would not accept this and that effectively ceding control to Mr Davies, which is how he saw it, was entirely unacceptable to him. Again, I believe that Mr Kulkarni's recollection that Mr Lewis ever agreed to his suggestion is flawed. Mr Lewis would not have compromised on control of SJIH one day only to demand it the next. It was an issue of paramount importance to him and his evidence before me on the point was very clear. It was supported by Mr Davies who explained, both in subsequent email exchanges with Mr Lewis and in his evidence before me, that he did not want the role.

69. I believe that the deadlock proposal was purely the work of Mr Kulkarni. Mr Lewis' demands had become more aggressive over time and Mr Kulkarni had seen and must have understood that. In my view, Mr Kulkarni was seeking to put safeguards in place to protect his position. There is some significance in that. He now recalls the relationship in February 2020 as being one of trust and confidence; I do not believe he was anywhere near so confident at the time, as Mr Davies' warning and the attempt to put controls on Mr Lewis go to show.

70. Mr Kulkarni's evidence was that on the same call he suggested to Mr Lewis a pre-meeting (the **Pre-Meeting**) "*to iron out any final issues*", to which again Mr Lewis agreed. Mr Lewis disputed this, saying he had no notice of the meeting until he was "*ushered into the side room*" by Mr Kulkarni when Mr Lewis arrived for the Main Meeting. Again, Mr Lewis' version of events is much more credible and I accept his evidence. As I have noted, Mr Lewis is an astute and experienced negotiator; this was obviously a critical phase in discussions. I do not believe that he would agree to a meeting with the other principal shareholder in the proposed structure without having any idea what it was about, but Mr Kulkarni accepted that he gave no indication of any agenda other than to talk about the deal in general terms. It seems to me unlikely that Mr Lewis, who was pinning matters down, would be interested in such a vague discussion that simply risked opening them up. I accept that the first he knew of such a discussion was when he arrived for the Main Meeting.

71. The Pre-Meeting involved Mr Kulkarni, Mr Lewis and Mr Davies. It was short – estimates varied but somewhere in the region of 15-20 minutes seems probable. Mr Davies made a very outline note of what was discussed. Mr Kulkarni's pleaded case is that "*many*" matters were addressed at the Pre-Meeting. His witness statement used that phrase in connection with the all parties meeting that immediately followed (the **Main Meeting**), however, and it may be that there is some confusion in Mr Kulkarni's recollection as to precisely how much was covered in the Pre-Meeting. What is clear is that given the time available, whatever was addressed would have been dealt with in only limited detail. It is also clear from the evidence that that some form of agreement was reached on at least three points.

72. The first is uncontroversial, although as Mr Kulkarni explained during his cross-examination, "*that was the main thing we talked about, board control.*". Mr Lewis insisted on Gwent having that control and Mr Kulkarni agreed. Mr Davies' evidence was that he always expected Mr Lewis to insist on control,

and given that he was taking the risk it was a reasonable request. Mr Kulkarni's evidence on this point was again somewhat contradictory. He consistently accepted that he ceded control of SJIH to Mr Lewis. In his witness statement he said that he was unhappy with the change, but "[Mr Lewis] *knew that I had little option but to accept his terms.*" By contrast, in his evidence before me he said it was "*absolutely no problem*". Given that he had proposed the day before that the casting vote rest with Mr Davies, which as I have noted seems to me an attempt to protect his position, I regard Mr Kulkarni's witness statement as the more accurate reflection of how he felt at the time; he only accepted the change because he was forced to, and he was unhappy about it.

73. Secondly, Mr Kulkarni raised debts totalling around £750,000 that he said were owing from Oldco to him. Mr Davies explained that Mr Lewis' immediate response was that the debts of Oldco were nothing to do with SJIH. I accept that is likely. Mr Kulkarni said that he then threatened to walk out and had to be persuaded by Mr Davies not to do so. This raises two important questions: was the threat made, and was it made in the context of the £750,000?

74. In his evidence before me Mr Lewis strongly disputed that Mr Kulkarni threatened to walk out at all. I believe that he is mistaken in that recollection. The evidence of both Mr Kulkarni and Mr Davies was that Mr Kulkarni threatened to walk away. Mr Lewis, who is a much more experienced negotiator than Mr Kulkarni and did not have the same concerns as either Mr Kulkarni or Mr Davies over the looming insolvency of Oldco, may have seen the threat as theatrics on the part of Mr Kulkarni and dismissed it, such that it formed no real impression on him.

75. In terms of when in the Pre-Meeting the threat happened, Mr Lewis obviously had no evidence to give, since he could not recall the threat at all. Mr Davies' evidence here was somewhat vague as to how the discussion of the £750,000 that Mr Kulkarni said was owed to him by Oldco related to the third question discussed at the Pre-Meeting of whether Mr Lewis or Gwent would in some way ensure that Mr Kulkarni did not have to pay for his shares in SJIH. Mr Kulkarni, however, remembered them being separate. As he explained in his witness statement:

> I told [Mr Lewis] again that the figure was £750,000. He said that [SJIH] could not afford to take on such a debt and repay me that money. I was furious and I stood up and walked to the door and said to [Mr Lewis] that the deal was off because I was not prepared to proceed without being paid the money I was owed.

The reference to "*the money I was owed*" could only be to the £750,000. An agreement was reached on the issue and the discussion then "*moved on*". I accept that as a probable sequence of events.

76. In terms of what agreement was reached, Mr Lewis' evidence was that he accepted that an arrangement could be structured whereby if SJIH was profitable it could pay Mr Kulkarni through an increase to his salary. Mr Lewis was adamant, in his evidence before me, that the agreement was subject

to Mr Kulkarni evidencing his debts: "*What I definitely said to him was, 'if the Hospital is made profitable and you prove the debt we will look at it.'"* As Mr Butler fairly pointed out, the professed strength of Mr Lewis' recollection was not always a good guide to its accuracy, but on this point I accept that he insisted on proof that sums were properly owing and profitability of SJIH. Mr Davies referred to the amount as "*750-ish*" but understood it "*probably had to be firmed down to an accurate figure*". Moreover, it is inconceivable to me that a businessman of Mr Lewis' considerable experience and ability would simply agree to the payment of unevidenced debts, less still ones that were owed by a company about to enter administration, a point that everyone present at the Pre-Meeting agreed Mr Lewis had just made. Even if one accepts Mr Kulkarni's point that he had discussed the figure with Mr Lewis previously, repetition proves nothing. Anyone in Mr Lewis' position would be reasonable in requiring more than just Mr Kulkarni's word on so large a sum and I believe that Mr Lewis did so.

77. I also believe Mr Lewis' evidence that he would have wanted SJIH to be profitable before any payment was made, even of evidenced debts. There was no commercial sense in going through administration only for SJIH immediately to assume a substantial portion of the debts of Oldco. Mr Lewis' evidence is also reflected in the discussions that happened immediately after in the Main Meeting. An agreement was reached in respect of the £750,000, but it was highly contingent.

78. There is a further question of whether any agreement was intended to be legally binding. Gwent relies on three points to show that Mr Kulkarni recognised that only a non-binding agreement was reached at the Pre-Meeting.

    78.1. Mr Kulkarni sent a WhatsApp message to other consultants on 30 January 2020 acknowledging that SJIH would have no liability for Oldco's debts and that the consultants had therefore lost the entirety of their investment in Oldco. To my mind that goes nowhere. I recognise that it shows that Mr Kulkarni understood on 30 January that he had no legal claim against SJIH. The evidence shows that the same thing was explained to him at the Pre-Meeting by both Mr Davies and Mr Lewis. I also accept that Mr Kulkarni's explanation of this message – which amounted to denying that it meant what it said – was unconvincing. But the fact that he did not have a legal claim against SJIH before the Pre-Meeting does not mean that the position could not have changed at that meeting.

    78.2. Mr Kulkarni gave a presentation to non-shareholder consultants on 17 February in which he explained that SJIH was only under a "*Gentleman's Agreement*" to pay. I accept Mr Higgo's submission that Mr Kulkarni's attempt to explain why he had used that term – that it was "*the same thing as a promise to pay you later*" – was implausible. A contract typically involves a promise to perform in the future as well; the difference is whether that promise is legally binding, and I believe that Mr Kulkarni knew (and to be clear knows) that difference. It was also Mr Kulkarni's evidence before me (when addressing the disclosures he made at the 13 February board meeting

of SJIH, which I address below) that he thought he was being treated in the same way as the other consultants. There was no suggestion by anyone that the different elements that went to make up Mr Kulkarni's estimate of £750,000 were to be treated differently. However, the consultant loan element was on stronger evidential ground than some other aspects of it. Given that Mr Kulkarni understood that the obligation on SJIH to repay the consultant loans generally was binding in honour only, he must have understood that the obligation to pay his consultant loan (since he was being treated, so far as he was aware, no better than anyone else) was also binding in honour only. In the circumstances, it is hard to see how he could have thought that the other aspects of his claim for £750,000 were legally enforceable.

78.3. Mr Hammond believed there was no legal obligation on SJIH to pay the debts of Oldco. I accept Mr Hammond's evidence, but that goes to his belief, not that of Mr Kulkarni. He was not present at the Pre-Meeting, and while aspects of what were discussed there were repeated in the Main Meeting his evidence is necessarily second-hand.

79. I therefore conclude that Mr Kulkarni believed that the agreement to repay the consultant loans was binding in honour only. In my view he would have realised that this would logically be the case for his consultant loan and so also the case for the balance of his £750,000 claim. That would also be consistent with Mr Lewis promising only that "*we will look at it*". Finally, it would be consistent with the fact that there was nothing to suggest that Mr Lewis could at that stage bind SJIH; he represented Gwent, but neither he nor Gwent had a shareholding or any other role with SJIH. The most that Mr Kulkarni could reasonably have believed was that he was getting comfort, rather than a contract.

80. The third issue that was discussed at the Pre-Meeting was the difficulty that Mr Kulkarni faced in respect of the operation of the EIS rules and the PHMIO. Some of the consultants, including Mr Kulkarni, had intended to use their EIS tax relief from the losses on their Oldco shares to fund the acquisition of shares in SJIH. Each consultant would have to raise the funds to pay for the shares upfront but then could claim the tax relief in due course, leaving them effectively cash neutral but also holding shares in SJIH. Mr Kulkarni's tax relief was a little over £79,000 and that was rounded to £80,000, which is how the purchase price for his SJIH shares was calculated.

81. The plan was that the SJIH shares could, in turn, be acquired by the consultants through an EIS, although that was uncertain at this stage. What was certain was that Mr Kulkarni could not be an employee of SJIH for three years if he was to participate in any EIS. But given the size of his shareholding the only way that Mr Kulkarni could retain his practising privileges at the Hospital and not breach the PHMIO was as an employee. Mr Kulkarni's case is that the solution proposed by Mr Lewis was that Gwent would in some way ensure that Mr Kulkarni did not have to pay for his SJIH shares.

82. Mr Kulkarni's evidence was that he and Mr Davies took Mr Lewis through the issue. He concluded:

> I told [Mr Lewis] that the other Consultants would therefore benefit from EIS relief and I would not. [Mr Lewis] immediately offered that instead of paying £80,000 for my 1,651 new 'A' Shares, Gwent would instead gift me my 1,651 'A' Shares. [Mr Lewis] said that the £80,000 which I saved could in effect be me receiving my EIS relief early, i.e. at the beginning of my investment in [SJIH] rather than at the end when I came to sell my shares in [SJIH].
>
> Initially I was not satisfied with this proposal. I would be financially better off with the tax relief at exit. However, both [Mr Davies] and [Mr Lewis] convinced me that in the circumstances this was the best option.

83. On cross-examination, Mr Kulkarni's position seemed to me to shift:

> Which is when [Mr Lewis] said, that was towards the end that was one of the last things, he said, that is simple, so [Mrs Lewis] can gift you the shares. And to be honest, even then I was not happy because gifting the shares meant that he said then you can have your 80K tax relief as your eventual tax relief now. I said that is fine I get 80K but when the hospital is sold the tax relief I get would be much more, so I am actually losing out. To which [Mr Davies] said, "Come on, Ro, you have to be realistic you cannot, just accept it, it is a good deal". I said fine. That was the last thing we spoke about and then we walked out of the room to the next meeting.

84. Notably, in that version nothing was said by Mr Lewis after he made the offer to gift the shares. Any convincing of Mr Kulkarni was done by Mr Davies.

85. Mr Davies agreed that Mr Kulkarni raised the issue right at the end of the pre-meeting and that Mr Lewis agreed, saying something to the effect of, "*He can have the shares.*" Mr Davies further explained that the discussion regarding the £80,000 was very brief and immediately after Mr Lewis had agreed, Mr Kulkarni left:

> Then, right at the end, [Mr Lewis] said "You can have the shares", well, [Mr Kulkarni] was gone, that was it. I remember it, that is it.

86. Obviously, that differs from Mr Kulkarni's evidence, in particular over what happened after Mr Lewis is said to have told Mr Kulkarni he could have the shares. However, Mr Davies is much closer to what Mr Kulkarni said in cross-examination than the version of events in Mr Kulkarni's witness statement.

87. Following the discussion Mr Davies was not clear about precisely what had been agreed and, in particular, how Mr Kulkarni's requests regarding the £80,000 and the £750,000 related to one another:

> At that, well, everyone is up, [Mr Kulkarni] is up heading to the next meeting and I was left, I was not quite sure how the shares fitted into what

> we just talked about, because we had seemed to identify a figure of £750,000. Right at the end, okay, you can have your shares. The shares seemed to be 80,000, and where did the 80,000 come into the 750,000? That is the lawyer in me thinking, hang on a minute, what is happening here? But everyone is off to the next meeting and, frankly, I thought, well, we are still going, and that is the purpose of the next meeting to sort all this out.

88. In his evidence before me Mr Lewis flatly denied that such a discussion happened. Gwent's position in closing was that "*the preponderance of evidence suggests that question of* [Mr Kulkarni] *being gifted his shares did come up at the pre-meeting.*" Again, though, this is not a point on which Mr Lewis' evidence adds anything; I accept he was honest, but he plainly does not now recall the discussion that Gwent accepts took place.

89. In my view, Mr Davies' evidence best reflects what happened.

89.1. The problem that Mr Kulkarni faced in complying with the PHMIO and benefitting from EIS was plainly discussed, as Gwent accepts.

89.2. Mr Kulkarni and Mr Davies both stated that Mr Davies gave some explanation of the employment workaround that had previously been agreed and that had solved that problem for Mr Kulkarni when the Hospital was owned by Oldco. I doubt that meant a great deal to Mr Lewis; even a lawyer who is not involved in this field would need time to understand the detail, and all parties agree that little time was spent on the point. But I believe the explanation was given.

89.3. I accept that Mr Lewis would have been open in principle to an £80,000 solution to the problem; certainly, that was the case by 13 March 2020, when Andrew Lewis proposed an offer of £80,000 worth of shares to Mr Kulkarni. By then, of course, Mr Lewis was invested, somewhat changing the dynamic, but if that sort of amount was a deal-breaker, I doubt he would have considered such an offer in March.

89.4. Finally, I accept Mr Davies' recollection that Mr Lewis said something very much to the effect that, "You can have the shares." I do not believe that he used the word gift as Mr Kulkarni states. That is the way a lawyer might frame it but does not seem to me the way that Mr Lewis would put it. I also reject Mr Kulkarni's evidence that there was any express reference to Mrs Lewis. Had such a reference been made the distinction between the £750,000 and the £80,000 would have been obvious – the former would have been an issue for SJIH (if anyone) and the latter would have been coming from Mrs Lewis or Gwent. Mr Davies question to himself of how the £80,000 fit into the £750,000 would not have arisen.

90. In terms of the conclusion of the discussion, I again accept the evidence of Mr Davies and reject the evidence of Mr Kulkarni. First, Mr Davies was, as I have noted, a strong witness and Mr Kulkarni was not. I believe that Mr Davies has a better and less clouded recollection. Secondly, it is more consistent with the quality of the Pre-Meeting – a short, rather impromptu meeting with no formal

agenda which discussed, principally, the issue of board control. Finally, it is consistent with Mr Davies making no note at all of this part of the discussion; as he explained, there was simply no time, everyone was leaving for the Main Meeting. If matters had progressed as Mr Kulkarni suggested in his witness statement, one would expect Mr Davies to make at least some note of it. Even if one were to accept what Mr Kulkarni said on cross-examination, it would not involve Mr Lewis making any attempt to persuade Mr Kulkarni. That makes perfect sense. He had just proposed that Mr Kulkarni should have something for nothing; if Mr Kulkarni was unhappy with what he was offered, Mr Lewis did not strike me as the sort of man who would have felt any need to justify it.

91. Mr Davies further described his thinking at the conclusion of the Pre-Meeting in these terms:

> And I was thinking, hang on a minute, where does the, where is that £80,000 fitting into the 750? If it had been a formal legal meeting which I was conducting as a lawyer I would have said, "Hang on, everyone sit down a minute, where are we going here? Where does the 80,000 go into the 750?" I was there literally thinking, where are we going here.

92. Mr Lewis, Mr Kulkarni and Mr Davies then joined the Main Meeting.

93. Again, accounts of what were discussed here differ, but in addition to the recollection of those in attendance I have the benefit of contemporaneous notes taken by James Davies and Ms Evans.

94. Mr Kulkarni said that all the agreements discussed at the Pre-Meeting were repeated. He must be correct about the discussion around control, since that made it into the next draft of the SHA. The other aspects of the Pre-Meeting are more controversial, however.

95. Ms Evans' note of the meeting records:

> £700k from Oldco.
> Forget EIS – gets £80k from Oldco. Gets higher salary.
> Cashflow balances £400k paid to RK over time.

96. This suggests that the EIS issue was discussed in the context of Mr Kulkarni's broader claims against Oldco. A reference to £80,000 coming from Oldco does not make literal sense – it was insolvent. Ms Evans did not give evidence so could not clarify what she meant by the term, but of course Mr Kulkarni was due to receive tax relief of around £80,000 from the collapse of Oldco, which may be what was discussed. In any event, what is notable from that language, and indeed from the note as a whole, is that there is no suggestion that £80,000 would come from Gwent. On the contrary, on 10 March 2020 Ms Evans wrote to Mr Hammond addressing post-completion matters and noting: "*My understanding was that David was paying £526,987.82 for the issue of 1,717 (one share was transferred for £1.00 from Andrew to make a total of 1,718 shares held by Gwent Holdings) and* [Mr Kulkarni] *was paying*

£80,000 for his 1,651 (he already owned one share) as per the attached." She could not conceivably have formed such a view had she heard Mr Kulkarni say at the Main Meeting that either his shares or the payment for his shares was coming from Gwent.

97. As James Davies recognised, the lawyers were not present for the whole of the Main Meeting. However, it is not a case of Ms Evans not hearing something – both her contemporaneous note and her near contemporaneous email record her hearing something which was inconsistent with Mr Kulkarni's recollection.

98. Mr Davies explained in his evidence that during the Main Meeting he was still focussed on the Pre-Meeting and how close the whole deal had come to collapse. He therefore did not pay close attention to what was said during the Main Meeting. He had some recollection that tax advice had been sought on what would happen if Mr Kulkarni were to be gifted his shares. That seems to me consistent with what James Davies said about Mr Kulkarni saying he would not or should not have to pay for his shares; to the extent Mr Davies' evidence goes further than that then I have reservations about it, given that he was focussed on other things at the time.

99. James Davies' clear recollection was that Mr Kulkarni said that he should not have to pay for his shares but he did not say that Gwent should have to pay. He believed that Mr Hammond had said that Mr Kulkarni would have to pay like all the other consultants. James Davies' note of the meeting records a similar exchange to that noted by Ms Evans:

> Ro has £700k owed. Need to figure this out. Getting back EIS. Salary continues here. Cash flow neutral. £400k passes through as additional salary.

100. Again it seems that the discussion of EIS, and so the £80,000, was in some way linked to Mr Kulkarni's broader claims for £750,000. One solution to the issue was the idea of a higher salary in due course. There was no mention of Gwent paying or transferring anything. As I have noted, James Davies left the meeting before it concluded, but as with Ms Evans, what he records in his note is at odds with Mr Kulkarni's recollection. For Mr Kulkarni to be right, it would mean that the meeting returned to the question after the lawyers had left and something quite different was said. That is unlikely, but even had it happened one would expect that the lawyers would have been told because they would need to document the arrangement. There was no such communication.

101. Mr Hammond was clear in his witness statement that Mr Kulkarni had said he should not have to pay for his shares because he was owed money by Oldco and that Mr Hammond told him that was not possible and he would have to pay for his shares in the same way as the other consultants. That is, of course, consistent with the evidence of James Davies but goes further than either of the attendance notes. I have reservations as to Mr Hammond's recollection where it goes beyond the documents. I do not think that Mr Kulkarni's

concerns as to EIS were so categorically dismissed as Mr Hammond suggested. At the same time, for the reasons I have given, I do not believe there was any reference to Gwent as a solution at the Main Meeting.

102. In my view the only one of the three points from the Pre-Meeting conclusively addressed at the Main Meeting was control: it was to rest with Gwent. Mr Kulkarni's claims for £750,000 were discussed and it was recognised by the participants that it was an issue that should be addressed – "*Need to figure this out*" in the words of James Davies. The issue of Mr Kulkarni's EIS position and his unwillingness to pay for his shares were raised, most likely by him, but there was no reference to Gwent providing a solution.

103. That conclusion is, in my view, supported by events that immediately followed. Importantly, the minutes of a board meeting of SJIH on 12 or 13 February 2020 to approve aspects of the transaction (the **Minutes**) make no record of Mr Kulkarni declaring any payment arrangement with Gwent, yet plainly had such an arrangement existed then as a director of SJIH he should have done so because it represented a significant benefit that would accrue to him from the transaction being entered into by SJIH. The Minutes were prepared by RDP and seen by Mr Kulkarni, Mr Davies and Mr Hammond. All of those people were at the Main Meeting and all could have been expected to highlight the obvious conflict and the need for it to be declared and addressed. Nobody did, in my view because nobody at the Main Meeting suggested that Gwent would be responsible for the cost of Mr Kulkarni's shares.

104. A revised draft of the SHA was circulated on 8 February 2020. Gwent was to have control of SJIH. Nothing was said about Gwent paying for Mr Kulkarni's shares or about SJIH assuming in any way the debts that Mr Kulkarni said were due to him from Oldco. Again, it is worth recording Mr Davies' evidence:

> Ideally it [the discussion at the Pre-Meeting regarding the SJIH shares] wanted to be put in a document, which is why that had been arranged. If they had both walked away and got on with things and not bothered to do anything else, that is as close as you are ever going to get to an agreement I suppose. There is no doubt that the intention was to go from that room, the outcome of the [Pre-Meeting] was there was a consensus of agreement, just about, get on into the [Main Meeting] and get on with it. Yes, that was the intention, it needed to go into an agreement.

It had not done so.

105. Achieving control did not resolve matters for Mr Lewis or, therefore, Gwent. MIP, a business owned by Mr Staples and Mr Jenkins, owned critical equipment that was leased to the Hospital and upon which its operation depended. In light of that dispute, Mr Lewis reduced Gwent's offer to a total of £2 million. James Davies communicated this to Mr Kulkarni, Mr Hammond and Mr Davies on 9 February 2020, suggesting that Mr Kulkarni might try to exert his influence with Mr Lewis and also use his contacts to see if alternative funding could be secured. Neither proposal came to anything.

106. It appears that Mr Kulkarni may have discussed with his tax advisor, Andrew Isaacs (**Mr Isaacs**), the implications of a gift of shares on 12 February 2020. The evidence around this is unsatisfactory. Mr Kulkarni first asked Mr Isaacs to set out his recollection of their discussion in July 2021 and in connection with these proceedings. The passage of time, alone, is a reason to be cautious about the accuracy of Mr Isaacs' recollection. It was unclear what documents Mr Isaacs considered in responding to Mr Kulkarni, and when Mr Kulkarni suggested an alternative response, specifically naming Mr Lewis as the party making the gift, Mr Isaacs accepted the change, apparently without any discussion. Mr Isaacs was summonsed to appear as a witness before me but did not attend, I understand because he claimed he had not been served with the summons. His recollection could not therefore be tested on cross-examination.

107. Taking Mr Isaacs' unedited recollection in his first email to Mr Kulkarni (although I note that even that email opens, "*I can confirm*") I accept that:

107.1. There was a conversation between Mr Isaacs and Mr Kulkarni on 12 February 2020.
107.2. Mr Kulkarni asked about the possibility of a gift of shares.

108. That is consistent with the evidence I have already addressed. The discussion had been about a transfer of shares, not the payment for shares, and was simply a possibility; there was no suggestion that a final, binding agreement had been reached.

109. It is not clear whether the transaction completed on 12 or 13 February 2020. The SHA and the Minutes are both dated 13 February 2020 but Mr Hammond's diary apparently shows no meetings on that day and that all meetings took place the previous day, 12 February 2020. Mr Hammond believed that the documents may have been dated ahead of time on the assumption that the administration would happen on 13 February but due to a last-minute hitch it only happened on 14 February. Nothing turns on the point, but the Minutes, including their date, are presumed to be accurate under section 249 of the Companies Act 2006. The only evidence to rebut that presumption is Mr Hammond's non-recollection and the lack of an entry in his diary, which seems to me insufficient. Moreover Mr Edwards, another director of SJIH, recalls that there were meetings both on 12 and 13 February; that evidence is unchallenged. I have therefore concluded that the relevant events most likely took place on 13 February.

110. At the time the parties seem to have attached relatively little importance to the 13 February meeting. Mr Hammond explained that the focus at the time was on the administration of Oldco. He had been informed by BGT, who are experienced in the private healthcare market, that they were unaware of an administration of a hospital having ever happened before and there were significant hurdles to overcome. I accept that evidence.

111. Mr Hammond further suggested that the Minutes were not an accurate record of what happened at the 13 February meeting. Specifically he noted that no application for shares from either Mr Kulkarni or Gwent had been located and he did not believe that such documents had ever existed or, therefore, been considered by the meeting. Mr Thompson drew my attention to the fact that the Minutes were prepared by Ms Evans and largely tracked a standard form precedent.

112. While I agree that it is unusual that no applications for shares have been located, the transaction was being carried out under considerable time pressure given the looming insolvency of Oldco and, as Mr Hammond noted, nobody was focussing on this aspect of it; without condoning in any way what happened, the fact that documents were not properly collated is, in such circumstances, less surprising than it might otherwise be. It is equally unsurprising that the applications, which were superseded very quickly, were less likely to receive the filing attention they deserved than other records. The fact that the Minutes were based on a standard form is also unsurprising and not especially significant – lawyers often work from standard forms but that does not mean that the non-standard text that they insert is in any way less accurate. Finally, the Minutes appear to be signed by Mr Hammond; I strongly prefer his contemporaneous evidence that they were accurate to his evidence before me that they were not.

113. Mr Thompson noted that the minutes reference a written resolution being executed by Mrs Lewis, which cannot be the case because Mrs Lewis was not present at the meeting. I accept that, but the fact the Minutes are not entirely accurate in one respect does not mean they are inaccurate in other respects. Moreover, Mrs Lewis' unchallenged evidence was that she executed a number of documents at a meeting with RDP on the morning of 13 February 2020. Mrs Lewis did not read those documents and signed where requested, but it seems they included the written resolution. Neither Mr nor Mrs Lewis recall any meaningful discussion at the meeting with RDP, but at the time Gwent held no shares in SJIH. The written resolution that Mrs Lewis signed therefore could not have immediate effect and could only have been effective if the broader transaction proceeded later that day. In my view RDP held the signed resolution in escrow releasing it as agreed, whether expressly or by implication, at the board meeting later that day.

114. Finally, Mr Thompson observed that it was unlikely that Mr Kulkarni would have agreed to subscribe for shares in the terms recorded because he lacked the means to pay for them. Mr Kulkarni's case is that he did have the means to pay, but I accept that his ability to do so was at the very least questionable. As Mr Davies observed in relation to the discussions at the 7 February Pre-Meeting:

> Q. Can you be clear which shares were under discussion when you refer to the shares being gifted?
> A. It was the shares in [SJIH] because – well, what [Mr Kulkarni] was really saying, "I have not got any money because I have been, you know, I have not been paid for years, I have not got any money, I have

> got to have some money back", effectively, "the whole hospital is coming over, we can make money out of this, I want my money back".

115. Even on the basis that was correct, it would not mean that Mr Kulkarni would be concerned about subscribing for shares on terms that he would pay; on the contrary, it is consistent with him having received reassurance from Mr Lewis, in whom Mr Kulkarni had confidence at this time, that he would in some way be taken care of. Moreover, Oldco was at this point right on the edge of insolvency. Mr Kulkarni was under pressure to act or the opportunity would pass him by and I think he did act, believing that matters would all come out in the wash soon thereafter.

116. The 13 February meeting is a critical part of the factual backdrop to the SHA in two linked respects.

117. First, as I have noted, the only declaration of interest that Mr Kulkarni made was in the following terms:

> Each director present declared the nature and extent of their interest in the proposed transaction and other arrangements to be considered at the meeting in accordance with the requirements of section 177 of the Companies Act 2006 and [SJIH's] articles of association as follows:
> …
> [Mr Kulkarni] declared that he is also a shareholder of [SJIH] whose share is proposed to be reclassified in the Share Reclassification and he will receive new shares in the proposed Share issue, he will also be a party to the Shareholders Agreement.

118. The description of Mr Kulkarni's proposed new shareholding was:

> Rohit Kulkarni for 1651 Ordinary A Shares of £1.00 each for £80,000 aggregate subscription monies.

119. Section 177 of the Companies Act provides, so far as is relevant:

> (1) If a director of a company is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, he must declare the nature and extent of that interest to the other directors.
>
> …
>
> (6) A director need not declare an interest –
> (a) if it cannot reasonably be regarded as likely to give rise to a conflict of interest;
> (b) if or to the extent that the other directors are aware of it…

120. If Mr Kulkarni's shares were being paid for by Gwent, the disclosure made in the Minutes was blatantly wholly inadequate. The description of the

transaction does not suggest that anyone other than Mr Kulkarni would pay for the 1,651 A shares he was to receive. If someone else were paying it would be highly material in ascertaining the nature and extent of Mr Kulkarni's interest in the transaction. An £80,000 inducement to enter an arrangement is obviously a conflict of interest. I have found that the arrangement was not disclosed at the Main Meeting on 7 February, such that the other directors did not know of it and section 177(6)(b) does not apply.

121. The Minutes were prepared by Ms Evans, who days before had attended the Main Meeting. I do not believe that any competent solicitor would have drafted the Minutes in that form had they been told that Mr Kulkarni was not paying for his shares or that payment was to be made by another party. I have no reason to believe that Ms Evans was anything other than competent. The Minutes therefore reflect what she had understood coming out of the Main Meeting a matter of days before.

122. The Minutes also cast light on Mr Kulkarni's understanding at the time. As I come to address, that understanding is relevant evidence in ascertaining the nature and scope of the oral agreement said to have been reached at the 7 February Pre-Meeting.

123. Mr Kulkarni's evidence regarding the 13 February meeting was weak in the extreme. He did not deal with it at all in his witness statement, despite the fact that, according to his Response to a Part 18 Request, he relies on the Minutes as the foundation of his case that there was an agreement to allot and issue to him the 1,651 A shares. His cross examination was quite striking:

> Q. Can I ask you this. Your case is that you obtained benefits, I am going to put a rough value on them of about £1 million as a consequence of the meetings on 7th February, so that when you, as the company [SJIH], were voting to enter into the Shareholders' Agreement, those are benefits which would be connected, would they not, to the reorganisation of the company? Because the deal was that Mr Lewis would come into the company under this Shareholders' Agreement, the two shares, the two A Shares would be reclassified into the different shares to enable the reorganisation of the company to take place.
> A. Uh-huh.
> Q. You would get ultimately a number of A Shares and Gwent would get a number of A Shares, B shareholders would be coming into the picture later. You would also be getting, on your case, some £1 million worth of benefits from that, because that is all your debts which you say were agreed to be paid and the fact you would not have to pay the consideration for those shares under the Shareholders' Agreement; you understand that?
> A. Yes.
> Q. Did you declare those conflicts to the board of [SJIH] when you authorised [SJIH] to enter into the Shareholders' Agreement?
> A. I do not recall having officially declared that, in a board meeting.
> Q. Do you want me to take you to the minute?

A. No, I did not.
Q. You did not?
A. No.
Q. And is it fair to say that understanding – why do you not tell the court why you did not declare those interests, do you understand that you ought to have done?
A. I do not know the legality for this, but I was under the impression it was a known fact that the whole process of this was happening because we were getting shares and all that, so I did not think it was anything extra just for me, it was for the consultants also, it was for everyone, so I did not think at the time it was a conflict.
Q. What did you not think was a conflict, you getting personal benefits of £1 million?
A. I did not look at it as benefitted, I looked at it as getting my dues, so I did not think of that as a conflict.

124. Both the suggestion that Mr Kulkarni thought he was being treated like the other consultants and that he was being paid what was due to him would not be easy to follow if the Pre-Meeting agreements were binding.

125. It may have been the case that £750,000 was legally due to Mr Kulkarni, but it was due to him only from Oldco. Mr Kulkarni accepted in his witness statement that he was aware of this from early October 2019 at the latest. His issue was that Oldco could not pay, so what he was due, at least legally, would be reduced by way of the usual dividend in an insolvency. That much was true for all the consultants. As Mr Kulkarni recognised in his 17 February 2020 presentation to the non-shareholder consultants, they would only get paid by SJIH pursuant to a "gentleman's agreement". I have already found that this was a reference to a non-legally binding agreement, and that Mr Kulkarni knew that it was. If he was getting nothing extra compared to the other consultants, he also benefitted only from a non-binding agreement. I believe that he was honest in his presentation to his fellow consultants and honest in his dealings with the SJIH board. He could not honestly have believed that he had a binding agreement, the other consultants had a non-binding agreement and he was being treated in the same way as them. The meetings happened so close together it could not sensibly have been the case that his views had changed in the interim.

126. The £80,000 was due to him as tax relief on the failed investment in Oldco, which he could set off against future income or capital gains, and in that sense he was in exactly the same boat as the other consultants. His issue was that he would not receive tax relief on exit from SJIH assuming that SJIH qualified as an EIS (which was uncertain at the time). But the only reason for that was that Mr Kulkarni wanted a significant shareholding in SJIH and the only way he could do so and comply with the PHMIO was if he was an employee, which excluded him from any EIS. If he wanted a significant shareholding, the tax relief from any future EIS would not be due to him.

127. The operation of EIS and the PHMIO meant that Mr Kulkarni could not hold 25% of the A shares in SJIH and be treated equally with the other consultants.

They were paying for their shares upfront and if SJIH could be registered as an EIS they might enjoy tax benefits in the future. They faced a certain cost now in return for possible benefits in the future. By contrast, Mr Kulkarni would, on his case, have faced no immediate cost and enjoyed no contingent future benefit. Those are different things.

128. Accurately valuing which deal was better was not possible at the time; one would need to know at the very least whether SJIH would be registered as an EIS. Mr Kulkarni never suggested in his evidence that he ever attempted that exercise. What is unquestionably the case is that what Mr Kulkarni was getting was not the same as the other consultants. In my view he would have been aware of that. I have rejected Mr Kulkarni's evidence that he entered into some sort of negotiation with Mr Lewis and Mr Davies at the Pre-Meeting due to his concerns that what Mr Lewis was offering was less good than having EIS relief. Plainly, however, he was alive to the difference in his treatment under EIS compared to the other consultants; that was why he raised the point with Mr Lewis in the first place. He cannot have forgotten the issue by 13 February. His evidence as to why he did not disclose makes sense, and really only makes sense, if he believed that what he had at that stage was demonstrably not as good as the proposal to the other consultants. If he had thought himself entitled to a binding up-front payment of £80,000 or the free transfer of 1,651 A shares from Gwent, he could not honestly have believed that.

129. The point is not simply one of a failure to disclose. The description of the transaction directly suggests that Mr Kulkarni will pay for his A shares; it is positively misleading if someone else is to pay for Mr Kulkarni's shares. I believe Mr Kulkarni was an honest witness before me and was honest in his dealings at this time. He could not honestly have believed that he accurately described the transaction if he failed to disclose that it included a binding side agreement that he would never pay for his A shares.

130. The second significant aspect of the 13 February meeting is that it agreed the terms on which Mr Kulkarni was to be allotted shares. The terms, as I have noted, are limited in the extreme – the number of shares and the price. Of course, that agreement does not stand alone. The Articles of Association of SJIH incorporated the Model Articles, article 21 of which provides that "*no share is to be issued for less than the aggregate of its nominal value and any premium to be paid to the company in consideration for its issue*". I accept Mr Thompson's submission, which is now also Mr Kulkarni's case, that this meant issue was conditional on payment. That also accords with Mr Kulkarni's evidence that he was being treated in the same way as the other consultants, who were expected to pay before their shares were issued to them. The agreement recorded in the Minutes does not say anything about SJIH needing to make a demand for payment, whether to Gwent or to Mr Kulkarni.

131. On 14 February 2020, Oldco was placed into administration. It is worth noting the Administrators' reasons for Oldco's failure:

In summary, the principal reasons for the Company's insolvency is [sic] as follows:

- Capital payment obligations to the Bank, the Consultants and the Sisters in aggregate were substantially greater than the free cash being generated by the Hospital;
- Poor performing NHS contracts, some of which were resulting in losses, together with an over-use of agency staff and in general, poor operating efficiency; and
- The Dispute [with Mr Staples] in terms of (i) the impact on the business's profitability and balance sheet (ii) the real uncertainty as to whether the Company was capable of continuing its business in the short to medium term if payments subject to the dispute [sic] were made in the ordinary course of business and, (iii) the significant management time spent dealing with the Dispute which has otherwise distracted the New Management Team from pursuing a turnaround of the business.

Ultimately, the Company's survival was largely dependent upon reaching a mutually satisfactory consensual settlement of the Dispute. Regrettably a settlement did not come to fruition. As a result of a lack of sufficient working capital, the Company could not continue to operate and was obliged to appoint Administrators for the purposes of achieving a better return for its creditors as a whole than would be likely if the Company were wound up (without first being in administration).

As they further noted, Oldco had traded at a loss throughout its trading history.

The SHA

132. The SHA is at the heart of this dispute. It provides, so far as is relevant:

> **BACKGROUND**
>
> (A) [SJIH] 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.

133. Schedule 1 recorded that Gwent held 1,718 A shares and Mr Kulkarni held 1,652 A shares. That was factually incorrect, as all parties now recognise. At the time that the SHA was executed, those shares had not been allotted and issued to either Gwent or Mr Kulkarni. It is part of Mr Kulkarni's case that recital B gives rise to an estoppel by deed, however, such that Gwent cannot now say (for the purposes of any claim under the SHA) that he was not a holder of 1,652 A shares from the date of the SHA.

> **2. BUSINESS OF THE COMPANY**
>
> 2.2 Each shareholder shall use his reasonable endeavours to promote (so far as is lawfully possible in the exercise of his rights and powers as a shareholder of the Company) the success of and, subject to clause

3, clause 4 and paragraph 5 of Schedule 2, develop the Business, in each case for the benefit of the Company's shareholders as a whole.

3. COMPANY OBLIGATIONS

The Company shall not, take any of the actions set out in Schedule 2 without Shareholder Consent.

4. SHAREHOLDER OBLIGATIONS

4.1 Each Shareholder shall use his reasonable endeavours to procure (so far as is lawfully possible in the exercise of his rights and powers as a shareholder of the Company) that the Company shall not take any of the actions set out in Schedule 2 without Shareholder Consent.

134. Relevantly for these proceedings one of the things in Schedule 2 requiring Shareholder Consent is permitting the registration, upon subscription or transfer, of members of SJIH other than pursuant to an allotment or transfer permitted or required by the SHA or the articles. Shareholder Consent is defined as: "*the prior consent of a majority of holder(s) for the time being of the A Shareholders, excluding, where relevant, any shares held by an Excluded Shareholder.*" An Excluded Shareholder is: "*each Shareholder whose proposed course of action is the subject of the relevant Shareholder Consent*".

7. COMPULSORY TRANSFERS

7.1 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).

135. In this case, as the breaching Shareholder Gwent is an Excluded Shareholder. In practice this means that Shareholder Consent is Mr Kulkarni's consent, since he is the only other A Shareholder. As Mr Butler noted in closing, however, that is not the end of the analysis. Mr Kulkarni's control is negative only: if the board wishes to serve a remediation notice it can only do so with his consent; but if the board did not wish to serve such a notice, Mr Kulkarni could not force it to do so.

13. APPOINTMENT OF DIRECTORS

13.2 Each shareholder 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 [to] remove and replace any directors appointed in accordance with this clause 13.2.

> 13.3 The holder(s) of the B Shares shall by way of a majority vote have the exclusive right to appoint one director as a B Director, at all times during the continuance of this agreement. The holder(s) of the B Shares shall also have the exclusive right by notice to the Company [to] remove and replace any directors appointed in accordance with this clause 13.3.
>
> 13.4 An appointment or removal in accordance with clause 13.2 and 13.3 shall be made by giving notice in writing to [SJIH], to each Shareholder and, in the case of removal of a director, to the director being removed. The appointment or removal takes effect on the date on which the notice is received by [SJIH] or, if a later date is given in the notice, on that date.

136. This provision is relevant to two aspects of the dispute. Most obviously, clause 13.2 is the provision on which Mr Kulkarni relies in asserting the Hussain Breach.

137. Clause 13.3 is also relevant, however, because it goes to the broader nature of the parties' relationship. In the Re-Re-Amended Particulars of Claim Mr Kulkarni asserts that: "*the relationship between the parties was one of quasi-partnership and depended for its success on the maintenance of good relations between* [Mr Kulkarni]*, SJIH, Gwent,* [Mr Lewis] *and* [Andrew Lewis]*, all underpinned by the mutual trust and confidence which necessarily existed between the parties.*" Both Defendants deny that assertion.

138. It is therefore not alleged that the SHA contained express or implied obligations of partnership or of trust and confidence. Rather, the relationship of trust and confidence or quasi-partnership is to be gleaned from the wider relationship and that is said to influence the reading of the SHA and, importantly, the remediability of the breaches of it.

139. I deal with that argument in due course, but simply note here that it is relevant to it that under clause 13.3 the parties always contemplated that the B Shareholders, parties outside the alleged relationship of trust and confidence, should have at least some role in the management of SJIH.

140. Clause 13.4 is relevant to the date on which Mr Hussain's appointment as a director was to take effect.

> **14. DIRECTORS' MEETINGS**
>
> 14.5 In relation to any transaction of the Company which requires a decision of the Board of Directors, the Controlling Shareholder 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.

141. The Controlling Shareholder is Gwent. This was the solution to the deadlock issue, intended, effectively, to give Gwent control of the Company. Again this is relevant to the trust and confidence said to exist between the parties.

> **16. STATUS OF THIS AGREEMENT**
>
> 16.1 Each Shareholder shall, to the extent that he is able to do so, exercise his voting rights and other powers of control lawfully available to him as a shareholder of the Company 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.

142. This also is said to go to the nature of the relationship between the parties.

143. Finally, I should note that the SHA contains an entire agreement clause and provisions by which new B shareholders had to execute deeds of adherence making them parties to the SHA before their shares could be issued to them.

The new regime

144. Gwent appointed Andrew Lewis to the board of SJIH on 17 February 2020. The other directors at that time were Mr Hammond, Mr Kulkarni, Mr Davies, Mr Edwards and Mr Rogers, all of whom had been the directors of Oldco.

145. Initially Andrew Lewis was very positive about working with Mr Kulkarni. As he put it in his cross-examination: "*Ostensibly it was a marriage made in heaven.*" Mr Kulkarni expressed a similar view:

> I certainly did not have a personality clash with him [Andrew Lewis] at all. He was very pleasant to me.

146. The difficulty was that they had very different views about the future direction of the Hospital and SJIH. Andrew Lewis had been warned by Mr Lewis that the Hospital faced significant financial pressure and was "*a basket case*". Andrew Lewis explained in his statement that he quickly formed the view that:

> …Oldco had been run for the convenience of the consultants, rather than the good of the business in general. I was determined that this was to change.
>
> …While [Mr Kulkarni] was initially polite and courteous, I very quickly got the impression that he did not welcome my involvement in the running of the Hospital. He appeared to resent the fact that I was involved in day-to-day decisions and that I was attempting to bring more rigour to the Hospital's operation.

147. Mr Kulkarni's witness statement said nothing about this early period. He did accept in cross examination that when Mr Lewis invested in SJIH he had insisted on and obtained control but it was obvious that at the time he did not see it that way:

> Q. Anyone who previously played a role in the management of the hospital might change. That was the power that Gwent had, was it not?
> A. Let me think about this. So my feeling was that OldCo were just going to become NewCo, the management would remain the same, that is where it started, and when control came, I still felt that the people in the old management team would continue, with Andrew Lewis there to help us make it better.
> Q. I understand that. I think that was everyone's expectation at the outset. I do not disagree with that. I think what I am putting to you is that you must have accepted that if, for example, Mr Lewis, having come into the business and taken a view of what was in the best interests of the business, if he thought that a change in the management structure was actually necessary for the business, he would be able to do that. He must have understood that?
> A. I did not think of it that way because I thought the management structure was good, the people all coming to it, so I did not actually think of that point.
> Q. I am not asking whether you expected it to happen. I am asking whether you understood that it might happen that Andrew Lewis had the power to do that.
> A. To be honest, I did not delve into that detail. I knew he had control or Gwent had control, but I did not think of the individual things that could happen. You are right, with that control, they could do what they wanted. I did not actually think about individual things.

148. That reflected what Mr Kulkarni said in his witness statement about why he suggested to Mr Lewis in early February that Andrew Lewis be appointed to the board: as Mr Lewis' "*eyes*" on the management and to offer financial advice, but not actually to run things himself. From his perspective, Oldco's problems had been Mr Staples and Mr Jenkins and the financial issues Mr Kulkarni felt they, and they alone, had caused. By removing them from the operation of the Hospital and securing investment from Mr Lewis he saw those problems as solved. He expected things to continue largely as they had before. By contrast, Andrew Lewis considered the problems to be deeper rooted and to require fundamental change, and he further considered that he was the person to bring that about.

149. On these points, Andrew Lewis was right and Mr Kulkarni was wrong. However much Mr Kulkarni believed that the problems were caused by Mr Staples and Mr Jenkins, and I recognise that Mr Davies strongly agreed that they were, the administrators had identified multiple factors behind the demise of Oldco. The dispute with Mr Staples and Mr Jenkins may have been what ultimately brought about the crisis, but Andrew Lewis was right to believe that the problems ran deeper than that. As to control, that was precisely what Mr Lewis had insisted on and achieved at the 7 February Pre-Meeting and that, at least, was reflected in the SHA.

150. The clash of perspectives was aggravated by a clash of styles, exemplified by an early meeting between Andrew Lewis and Mr Hammond to discuss cashflow. Jenny Butler, SJIH's finance director, may also have been there. Mr Lewis gave evidence that he was also present, but his account is at odds those of Mr Hammond and Andrew Lewis, neither of whom recall him being there, and I believe that Mr Lewis has either confused the meeting with another meeting or has adopted what he has heard as his honestly held but mistaken recollection.

151. Mr Kulkarni was not invited to the meeting but entered mid-way through. His evidence was that he wanted to offer any assistance that he could. Mr Hammond said Mr Kulkarni was angry at feeling excluded and swore. Andrew Lewis described Mr Kulkarni as having "*a face like thunder*" but did not reference any swearing. Plainly there was a meeting to which Mr Kulkarni was not invited but which Mr Kulkarni wanted to be involved in anyway. It seems to me likely that Mr Kulkarni felt excluded (indeed, was excluded) and was accordingly at least somewhat upset. Whether he swore or not is largely irrelevant; far more important, it seems to me, is Andrew Lewis' reaction to Mr Kulkarni's involvement:

> What I wanted was solid, hard facts, not broad statements of gesture and waving arms in the air saying things like, "You will definitely – don't worry about Canon. Don't worry about Striker. Don't worry about Olcon. I will sort them out, and they will give us credit." I mean, it was just ridiculous.

152. I have noted my reservations about Andrew Lewis' evidence but in this respect I believe that it represented his view at the time, largely uncoloured by subsequent events. He is an experienced manager who deals in facts rather than hopes or opinions; Mr Kulkarni is not, and I can well believe that Andrew Lewis felt from an early stage that Mr Kulkarni's approach had failed Oldco and would do the same for SJIH. Almost from the outset, Andrew Lewis began to question what value Mr Kulkarni added to the management of SJIH, but that was his professional appraisal, not the consequence of some personal dislike.

153. Mr Kulkarni's reaction to this simply made matters worse. Rather than seek to address matters directly with Andrew Lewis he took the matter up with Mr Lewis, with whom he had a longer standing relationship. In doing so he damaged the nascent relationship with Andrew Lewis, who explained in his witness statement that: "*…I know that he tried on more than one occasion to go behind my back to speak to David directly so as to undermine me.*"

154. Precisely when Mr Kulkarni started to approach Mr Lewis, asking him to intervene, is somewhat unclear. Andrew Lewis' statement suggests it happened almost immediately. Mr Kulkarni did not really address the point in his trial witness statement, but his witness statement for the summary judgment application previously brought in these proceedings (which was admitted in evidence before me) suggests around early March. Mr Lewis in his witness statement said that Mr Kulkarni wanted him more involved in the running of SJIH but that he told Mr Kulkarni "*early on*" that he had entrusted management of the Hospital to Andrew Lewis and did not want to be involved.

In my view, Mr Kulkarni's approaches to Mr Lewis asking that he intervene happened in late February or early March and served only to damage the relationship between Andrew Lewis and Mr Kulkarni further.

155. Mr Kulkarni attributes the breakdown to a different factor. The dispute with Mr Staples had not ended with the administration of Oldco. The Hospital still leased equipment from him that was vital to its operation and Mr Lewis and Andrew Lewis were keen to see the matter resolved. Mr Davies was able to arrange a meeting with Mr Staples on 21 February 2020.

156. The meeting did not achieve resolution of the dispute, but following it Mr Staples sent to Mr Lewis an email headed "Some Unasked for Advice". The "advice" was in the following terms:

> [The Hospital] has been run over the last two years quite blatantly in the interests of the Consultants with [Mr Kulkarni] supported by [Mr] Davies pulling the strings. The evidence is plain to see in the trading records, and the insolvency was a next step in that consolidation of consultant power. Consultants unfortunately do not make good business men [sic] … generally they have a track record of their ego leading them to believe they can do so, but almost invariably they fail. There is an obvious reason why that is so.
>
> Your consultants are not employees but they need a hospital to enable them to earn their income. …Their private income is not paid by [the Hospital] but the patients they treat, and they have only one interest in the hospital because they need it to stay open so they can make their private earnings. Ro Kulkarni is slightly different since he wants to make a lot of money when the hospital is sold, as well as his private treatment income, but he sold his sole [sic] to his consultant colleagues to take control in Spring 2018.
>
> …It is also notable that what the Consultants were owed was converted to loans, without any offset for what they owed the hospital. In the case of Ro Kulkarni he is attributed to have loaned the hospital £158,692 but the £58,999 he owed the hospital has miraculously disappeared.
>
> These are all matters for you to ponder upon, but I would suggest that unless you break the consultant power wielded by Ro Kulkarni, supported by Davies and Rogers, the hospital will never be run as a commercial enterprise in your best interests.

157. Mr Lewis forwarded the email to Mr Davies and his colleague at RDP Law, Mr Evans.

158. In this exchange, Mr Kulkarni came to see the seeds of betrayal. As he put the point in his witness statement:

> I now realise that more happened at that meeting than I had been made aware of and that it led to a friendship developing between [Mr Staples] and

> [Mr Lewis]. This allowed [Mr Lewis] to know more about [Mr Staples] and his GMC complaint against me that was thrown out. …I also believe that this made him decide to get rid of me and gave him ideas how to intimidate me.

159. These conclusions are simply without foundation and illustrate a concern that I have with Mr Kulkarni's evidence. The "advice" was not sought by Mr Lewis, as is obvious from the heading to the email. There is nothing to suggest that any of it was discussed during the meeting, and indeed it seems unlikely since Mr Staples would have no need to send an email if he had already conveyed his message in person. It was Mr Lewis who had alerted Mr Kulkarni to the possible damage that Mr Staples' spending was causing to Oldco; the suggestion that Mr Lewis, off the back of one meeting at a motorway service area in Warwickshire, would suddenly regard Mr Staples as a trusted friend is fanciful. There is nothing to suggest that the GMC complaint against Mr Kulkarni was discussed at the meeting and it is not referenced in the email. It is far more likely that Mr Lewis became aware of the complaint through Andrew Lewis and Mr Hammond, quite properly since the existence of such a complaint, which as I have noted had been reopened and was ongoing at the time, was an important issue for SJIH and its major shareholder. I do accept that Mr Staples' email may have made Mr Lewis and Andrew Lewis more cautious about the amounts Mr Kulkarni claimed were owed to him by Oldco, but I have already found that Mr Lewis would have been cautious about unevidenced claims in any event.

160. Equally to the point, it suggests that Mr Kulkarni was wholly unaware of what Andrew Lewis perceived to be his management shortcomings. In his witness statement Mr Kulkarni gave his view of those skills in the context of the acquisition of the Hospital by Oldco in 2014:

> Knowing me well he [Martin Stone, another consultant] suggested I take on the mantle of leadership to make [the acquisition] happen. I believe he suggested this as I was known for my leadership and management qualities and experience in many national NHS organisations. I hope it is not immodest to say that I was also recognised as an extremely hard-working team player who had a track record of successfully completing any project that I took on. I was happy to assume this role.

Nothing in these proceedings suggested that Mr Kulkarni had changed his view by early 2020. On the contrary, as I have already noted, as late as June 2020 in his "What I Want" email to Mr Davies he still thought he should be running the Hospital.

161. This contrasts with the views of Andrew Lewis from the early meeting that Mr Kulkarni entered midway through, which I have noted above. They also contrast with the views of Mr Davies:

> [Mr Kulkarni] is an incredibly caring doctor, an incredibly competent surgeon, but basically, he has no experience of running a business, which is an entirely different thing. So, and I notice it in other medical people,

> [Mr Kulkarni] spends his professional life in the operating theatre where he does incredibly skilful things. When he is in that operating theatre, he is in charge, but when he walks out of that operating theatre and he is walking down the corridor, he has got to have an entirely different mindset running the hospital. He is not running the theatre; he is now running the hospital, and you have all the complexities of staff issues and all the building blocks you have got to put together to get any business to run properly.
>
> I was able to assist [Mr Kulkarni] through those areas to a large extent and, putting it nicely, he would escape occasionally and someone would say he should not have said what he said. He did not mean any harm, but you cannot speak to staff like that. You might be able to say it in the operating theatre, but you cannot say it in the corridor. So it was a question of actually helping [Mr Kulkarni] through that time and probably the most important thing to achieve, because we so needed a good CEO and we found one in [Mr Hammond], we got [Mr Hammond] on board and it was so important to let [Mr Hammond] get on with his job and for [Mr Kulkarni] not to interfere with him.

162. Mr Davies was and is a friend of Mr Kulkarni, but in no sense did I feel that his friendship clouded his judgement or his evidence. Unlike others, including Mr Kulkarni himself, Mr Davies could see Mr Kulkarni warts and all.

163. Andrew Lewis and Mr Hammond both gave evidence to the effect that Mr Kulkarni was a bully. Both those witnesses were prone to confirmation bias, and so while I accept that evidence as showing that incidents did occur, I would not draw from that a pattern of behaviour outside those instances. In my view, Mr Davies' evidence, which did accept Mr Kulkarni's tendency to "*escape occasionally*" was more balanced and reliable. Importantly, though, Mr Kulkarni seems not to have recognised any issues with his management style, including his tendency to "*escape*". He therefore looks for other reasons why Andrew Lewis did not value him, such as the Staples email.

164. This was reflected in Andrew Lewis' cross-examination. It was put to him that he must have seen Mr Staples' email and that as a result of that email and Andrew Lewis' early experience of Mr Kulkarni he decided that Mr Kulkarni should have nothing to do with the Hospital. Andrew Lewis denied that was the case and I accept his evidence in at least two important respects. First, I very much doubt that he would have been especially influenced by Mr Staples' email or some combination of that email and their meeting. Andrew Lewis is a man perfectly able to form his own views. Secondly, all the evidence suggests that Andrew Lewis was still investigating the shareholding position at this stage and was keen to secure cash from the shareholders, including Mr Kulkarni. He had no interest in getting rid of shareholders. To the extent he was looking at Mr Kulkarni's role as a consultant, Mr Kulkarni's evidence on cross-examination was that he was very successful in that role and an asset to the Hospital, and I have no reason to believe that Andrew Lewis saw things differently.

165. What I do accept is that from an early stage Andrew Lewis considered that Mr Kulkarni was someone who should not be managing the Hospital. That was a professional, not a personal, assessment, however. Nor was it in any way illegitimate; it was what Mr Lewis had secured in negotiations with Mr Kulkarni at the 7 February Pre-Meeting and was embodied in clause 14.5 of the SHA.

Mr Kulkarni's shares

166. It will be recalled that the meeting to which Mr Kulkarni had not been invited, one of Andrew Lewis' first meetings at SJIH, was to discuss cashflow. It is not controversial that this was a key issue for SJIH immediately after its acquisition of the Hospital. Suppliers had not been paid on the administration of Oldco and were unwilling to extend credit; Mr Lewis had halved Gwent's originally contemplated capital contribution at a late stage of the negotiations; bank lending to what was, effectively, the same team that had managed Oldco at the time of its administration was tight.

167. Andrew Lewis' evidence, which was largely unchallenged and which I accept, was that improving the capital position was something he regarded as an immediate priority. One source of capital was the consultants who had agreed to acquire shares in SJIH. Mr Kulkarni accepted in cross-examination that at the time of the sale of the Hospital SJIH wanted as many consultants as possible to invest because, bluntly, it needed the money. On the face of it, chief among those was Mr Kulkarni, since he had agreed to subscribe for shares, which other consultants had not at that stage done, and was by far the largest shareholder among the consultants.

168. Andrew Lewis' evidence on this specific point was very helpful. His starting point was to ask Mr Lewis, but as he noted: "*David could not help me on this: he had no idea what had been agreed and simply explained that all he wanted was a controlling interest in SJIH to reflect Gwent's significant investment.*" That observation appears to have been made specifically in the context of the B shareholders, but I think it reflects Mr Lewis' position more generally – he had not been focussed on issues other than control, including Mr Kulkarni's A shares, and given the vagueness of what was discussed in that regard at the 7 February Pre-Meeting it is unsurprising that he did not recall it as significant.

169. Andrew Lewis' starting assumption was that all subscribing shareholders would pay for their shares. That was a wholly logical and sensible starting point: it makes obvious commercial sense and was recorded in the board minutes of the 13 February. For the reasons I will address in due course it was also the end point – there was no binding legal agreement under which Gwent would pay for Mr Kulkarni's shares, meaning that Mr Kulkarni was obliged to pay for them in accordance with the agreement recorded in the Minutes.

170. The difficulty was that Mr Kulkarni strongly believed (and, I accept, still believes) that he should not have to pay. On 28 February he was writing to his tax advisors, Baldwins, to ask about "*the tax consequences of the external investor gifting you 25% of the ordinary share capital*".

171. Andrew Lewis soon became aware of this. On 6 March 2020 he wrote to Mr Hammond noting: "*I guess there was no mention in the legal agreements that* [Mr Kulkarni] *would not pay but he seems to think this was gifted to him by David?*" It is not clear from that email whether the "*this*" that was gifted refers to the shares or the purchase price, but that was clarified later that day in an email from Andrew Lewis to Mr Lewis and Mr Hammond setting out the position "*as I see it*": "[Mr Kulkarni] *has 1652 shares and theoretically should pay £480,798 but he was saying these were gifted to him*." That can only be a reference to the shares themselves. He then addressed the B shareholders and concluded: "*Stuart is that a fair summary?*"

172. This was followed up by an email on 9 March 2020 from Andrew Lewis to Mr Hammond that was also sent to Mr Lewis:

> As I continue to get the shareholding matter straight in my mind and further to my email below I note that in the minutes of the [SJIH] BOD minutes [sic] dated 13 February clause 11.1(c)(ii) it is stated that [Mr Kulkarni] pays £80k for his 1651 A shares. Do you know where this came from?

173. The following day, as I have noted, Ms Evans of RDP wrote to Mr Hammond at 12:16pm noting:

> Further to completion, we need to file the issue of new A shares by this Friday. I have the completed form, however I need confirmation of how the share premium will be split. My understanding was that [Mr Lewis] was paying £526,987.82 for the issue of 1,717 (one share was transferred for £1.00 from [Mr Rogers] to make a total of 1,718 shares held by Gwent Holdings) and Mr Kulkarni was paying £80,000 for his 1,651 (he already owned one share) as per the attached.

174. This is, of course, consistent with her note of the 7 February Main Meeting and the terms in which she prepared the 13 February Minutes. It does not appear that this email was prompted by any request from Mr Hammond; it was simply Ms Evans tidying matters up from completion. It is likely to have informed his view, however.

175. Mr Hammond had not shared that email with Andrew Lewis when the latter wrote to Mr Lewis, Mr Hammond and Mr Kulkarni that evening:

> So this is my understanding for discussion when we meet.
>
> Gwent have 1718 A shares @ £291.04 each = £500,000 fully paid.
>
> Ro has 1652 shares how were these valued and what is the payment agreement?

176. In closing Mr Butler suggested that it was significant that Andrew Lewis described Mr Kulkarni's ownership of the shares in the present, not the conditional tense. I do not accept that takes matters any further. Andrew

Lewis was plainly trying to piece things together from unhelpfully limited information. He was asking questions, not stating conclusions.

177. In reply, Mr Hammond forwarded Ms Evans' email. The following morning Andrew Lewis noted, again copying Mr Kulkarni and Mr Lewis, that the situation was "*quite confusing*". He further noted: "*With regard to* [Mr Kulkarni's] *shares we need to clarify how these were valued and what is the payment agreement.*" It is not clear from the version disclosed whether Mr Hammond's email was copied to Mr Kulkarni, but Andrew Lewis' email plainly was and it included in quite a short chain of messages Ms Evans' email setting out her understanding of who was to pay what.

178. By 12 March Andrew Lewis was clearly keen to resolve the situation. Again, he wrote to Mr Lewis and Mr Kulkarni, copied to Mr Hammond: "*Quite frankly this whole subject of who is having shares and what they are paying needs to be set so that we can move on and forget about it.*" There is a tone of frustration to that email, but if Andrew Lewis was frustrated I have considerable sympathy with him. The situation was a problem for SJIH, was not of his making, was a mess and those who had created that mess, Mr Kulkarni and Mr Lewis, were not shedding much light on it.

179. Moreover, at around the same time that this was going on a related issue had arisen with AXA. They had seen the original shareholding structure of SJIH, in which Mr Kulkarni and Mr Rogers were the only shareholders, and had concluded that this put SJIH in breach of the PHMIO. They therefore refused to novate their contract with Oldco to SJIH. This was highly significant for SJIH because AXA represented 35% of the insurance work done by the Hospital. As such, the need to resolve the capital position was increasingly pressing.

180. Mr Kulkarni did reply to Andrew Lewis' email later the same day: "*I agree it is very confusing abd* [sic] *it is better done when we meet.*" He said he would try to arrange a meeting for the following day. Andrew Lewis circulated an update to the whole share subscription position that evening, noting the uncertainty in respect of Mr Kulkarni, and stressing: "*I hope we can meet soon to get this agreed and then we can move on as clearly the business needs cash.*"

181. In his witness statement, Andrew Lewis suggested that Mr Kulkarni was avoiding a meeting so as to avoid paying for his shares. In closing Mr Butler submitted that it was more likely that Mr Kulkarni was preparing for the Covid-19 pandemic. That, though, does not fit with the chronology: the seriousness of the looming pandemic and its impact on the Hospital only became apparent immediately after these exchanges. Moreover, on Mr Kulkarni's case there was nothing "*confusing*" about his situation at all; had he believed at the time that Gwent was obliged to step in I see no reason why he would not simply have said so, most obviously in response to the email forwarding to him Ms Evans' message. I think it is much more likely that Andrew Lewis is broadly right: Mr Kulkarni believed that at some stage Mr Lewis would step in and confirm that it was Gwent's issue but he was not

confident that he could force him to do so. It was easier to stall, which is what Mr Kulkarni did.

182. Later still that evening Mr Kulkarni sent an email to the board of SJIH and Mr Lewis updating them on calls he had had that evening with the NHS regarding the by then imminent Covid-19 pandemic. He stressed, among other things, the need for SJIH to "*Be better prepared to face the financial challenges*" and emphasised the need to act "*urgently*". A call was held on this the following day; it seems no call happened in respect of payment for Mr Kulkarni's shares.

183. It is against this backdrop that Mr Lewis' email to Mr Kulkarni regarding payment for his shares must be assessed. On 13 March 2020, Andrew Lewis wrote to Mr Lewis in the following terms:

> By reference to the attached [which was the document that Andrew Lewis had circulated previously setting out the subscriptions for shares] and for the sake of absolute clarity.
>
> A shares are priced at £291.00 each as paid by Gwent Holdings ie £500k for 1718 shares.
>
> B shares are priced at £158 each as per the offer to the consultants.
>
> The exception is that [Mr Kulkarni] will receive £80k of shares ie 275 A shares free of charge.
>
> All other shares will need to be paid for in full by the end of April 2020 and if that offer is not taken up then the shares will rest with [SJIH].

184. Less than 30 minutes later, Mr Lewis sent an email in almost identical terms to the board of SJIH. The change was to add the words "*as previously agreed*" in respect of the £80,000 of shares. On cross examination Andrew Lewis could not remember why he had prepared the email but thought it might have been an attempt at compromise. Mr Lewis thought that he had added the word "*as previously agreed*" to reflect a discussion he had with Mr Kulkarni at around that time in which they discussed giving Mr Kulkarni £80,000 of shares following which he suggested to Andrew Lewis that this should be offered to Mr Kulkarni.

185. In closing Mr Butler described Mr Lewis' email as "*a blatant attempt to pull the wool over* [Mr Kulkarni's] *eyes*". I entirely reject that submission.

186. First, it simply does not reflect the efforts that Andrew Lewis had made up to that point to ascertain what the correct position was, throughout which time he had been wholly transparent with Mr Kulkarni about the difficulty he was facing and Mr Kulkarni had accepted that the matter was "*very confusing*".

187. Secondly, Andrew Lewis was right to say that the matter needed resolution. SJIH had a weak capital base, faced losing 35% of its income from health insurers and in light of the Covid-19 situation needed to address its financial

position, to use the word of Mr Kulkarni, urgently. Andrew Lewis had tried to do so repeatedly through discussions and had failed, through no fault of his. It would have been a reckless disregard of his duties as a director of SJIH to let the matter drift in those circumstances. While I have doubts about his actions later on, I do not see that he can be criticised for trying to force this issue at this stage. On the contrary, he was thoroughly professional in trying to resolve such a critical uncertainty.

188. Thirdly, it seems to me on balance probable that Mr Lewis was suggesting something that he thought may have been agreed. What was actually agreed at the 7 February Pre-Meeting was vague and inchoate; Mr Kulkarni had sprung it on Mr Lewis at the end of a short meeting, the point was technical and Mr Lewis was not focussed on it. I very much doubt that Mr Lewis had a subsequent meeting with Mr Kulkarni at which Mr Kulkarni agreed to take £80,000 of shares at the price paid by Gwent: I accept that on 7 February Mr Kulkarni thought he should have all of his shares without paying for them. I therefore reject that aspect of Mr Lewis' evidence. But it seems to me likely that Andrew Lewis' regular chasing had jogged some memory of telling Mr Kulkarni he could "*have the shares*". From there it is a short step, and a step that can readily be taken in good faith, to reverse engineer a solution where Mr Kulkarni was offered £80,000 worth of shares calculated by reference to the price paid by Gwent.

189. Fourthly, had Andrew Lewis or Mr Lewis actually wanted to hoodwink Mr Kulkarni, Ms Evans' email represented the ideal opportunity. They could simply have forwarded that and told Mr Kulkarni that he had to pay the full £80,000 and Gwent would not be paying anything. They did nothing of the sort.

190. Finally, whatever Mr Kulkarni's case might have been before me, that was not his belief when he signed his witness statement for this trial in late February this year. There, he said he thought this was Mr Lewis "*acknowledging the agreement he had reached with me at the Pre-Meeting*". He characterised Mr Lewis' email as "*in part correct*" in stating that Mr Kulkarni was to have his shares but he thought that Mr Lewis "*had mistakenly used the price per share paid by Gwent as a basis for assessing that I had only 275 shares*". He did not for a moment suggest that Mr Lewis or Andrew Lewis had sought to mislead him or had acted in any way in bad faith. The only contemporaneous documentary evidence of Mr Kulkarni's reaction is an email to Mr Davies in which he stated: "*This is mad – from 25% I am down to less than 4%*" but that is not inconsistent with the mistake hypothesis advanced in his witness statement. It was apparent to me from his evidence that Mr Kulkarni can respond emotionally at times and he sent his email to Mr Davies soon after he received the email from Mr Lewis.

191. In short, there is no evidential basis for a suggestion that Mr Lewis or Andrew Lewis acted in any way improperly. At worst, Mr Lewis had misremembered his discussions at the 7 February Pre-Meeting and Andrew Lewis had, quite understandably, accepted his brother's version of events. If Mr Kulkarni had

sat down to discuss the point, as Andrew Lewis had repeatedly requested, the whole episode would have been avoided.

Covid-19

192. Immediately after these exchanges, the health landscape was transformed by the Covid-19 pandemic. The Hospital became part of the broader NHS plan to deal with the pandemic for which SJIH was reimbursed, easing its immediate cashflow concerns. However, elective surgery was suspended, effectively ending Mr Kulkarni's surgical work for the time being.

193. On 25 March 2020 Mr Kulkarni was advised that both due to certain co-morbidity factors from which he suffered and because he was a frontline worker he was considered at high risk if he contracted Covid-19 and should shield. He started doing so immediately.

194. Both Andrew Lewis and Mr Hammond said that they were unaware that Mr Kulkarni was shielding and only became aware of the fact later and not through Mr Kulkarni. Andrew Lewis said that Mr Kulkarni should have notified the Hospital of his absence under his employment contract but did not do so and had not followed the Hospital's shielding protocols. He accepted that he did not call Mr Kulkarni to find out where he was. He sought to explain that on the basis: "*I was the new kid on the block, and I felt that I should show some respect for him*". That was a difficult answer to accept. He could have asked Mr Hammond if he knew, but accepted that he did not do that, either. Whatever sensitivities he felt about being the "*new kid on the block*" did not get in the way of Andrew Lewis attempting (wrongfully) to dismiss Mr Kulkarni, a process that started quite soon thereafter. In any event, it was my impression of Andrew Lewis that he would not shrink from a difficult call if he felt it necessary. The simple fact is that he did not feel it to be necessary. He did not rate Mr Kulkarni as a manager by this stage, and considered that SJIH could be better run at this critical time without Mr Kulkarni around. That is not to say that he was happy with Mr Kulkarni's conduct; he stressed before me that others who were shielding were still working, the direct implication being that Mr Kulkarni was not pulling his weight. He did not, though, believe that the Hospital was any the worse off for that.

195. Mr Hammond also referenced Mr Kulkarni's failure to follow the correct protocols. He, also, did not look to contact Mr Kulkarni about why he was not attending and became aware through a third party some time after Mr Kulkarni had started shielding. Like Andrew Lewis, he stressed that shielding meant not attending; it did not excuse someone from working. Lest there be any doubt about his feelings, it is worth referring to an answer of Mr Hammond's that I referred to above in assessing his evidence as a whole:

> I think Mr Kulkarni had been absent from the Hospital for a considerable period, absent both in his physical presence but also his engagement with the Hospital during the time of Covid-19 which was an extremely busy period for all the senior management within the Hospital. I felt that Mr Kulkarni had abandoned the Hospital.

196. I have noted that I found Mr Hammond to be, at times, unclear in his evidence. This was not one of those times. Not only was he entirely firm in delivering that answer, it was only tangentially connected to the question put to him. In saying that I do not suggest that Mr Hammond was being evasive, but it demonstrated the strength of his feeling on this point that he understood the question in the way he apparently did.

197. On 23 April 2020 Andrew Lewis asked Mr Hammond for a copy of Mr Kulkarni's employment contract. In cross-examination Andrew Lewis was asked five times why he wanted to see this contract. His answers were:

197.1. "*I suppose I wanted to look at his contract.*"
197.2. "*I don't think there's any problem with me asking for that*".
197.3. "*I wanted to see it.*"
197.4. "*I've got a right to see it. I've got a right to see anybody's contract.*"
197.5. "*I wanted to see what the contents were.*"

198. Mr Butler invited me to infer from those answers that the reason Andrew Lewis wanted to see Mr Kulkarni's employment contract was that he was looking, by this time, at how to get rid of him. I readily draw that inference. Not only were the answers plainly evasive, Andrew Lewis' fourth answer – that he had a right to see any contract – simply highlighted the fact that with all that choice he settled on the contract of Mr Kulkarni, one of the Hospital's higher paid employees and one whom Andrew Lewis by this stage considered superfluous, at least in a management role. SJIH was cash poor and at some stage the income from the NHS would cease; Mr Kulkarni was an obvious target.

199. It does not follow from that inference, as the Claimant sought to suggest, that there was any connection between Andrew Lewis' request to see Mr Kulkarni's contract of employment and Mr Kulkarni's sense of feeling excluded from the running of the Hospital. As Mr Kulkarni recognised, he was copied in on all emails at the time and could have contributed had he chosen to do so. Mr Kulkarni explained during his cross-examination that he prefers talking to people and I accept that is his preference. When he started shielding the day-to-day contact that he was used to and that was important to him stopped. That cannot be blamed on Andrew Lewis or Mr Hammond; it was an unfortunate consequence of the lockdown, and one which affected many people. Undoubtedly decisions were taken as to the operation of the Hospital in which Mr Kulkarni was not involved, but this was a public health crisis of unprecedented scale and decisions had to be taken quickly. SJIH could not properly put lives at risk simply to make Mr Kulkarni feel more involved. The lockdown also meant that Mr Kulkarni's clinical work, which again was very important to him, quickly diminished and ultimately ceased. That, also, undoubtedly created a sense of isolation but was not the responsibility of anyone at Gwent or SJIH. Mr Kulkarni found it harder to see Mr and Mrs Lewis, but as Mrs Lewis explained they were also shielding because Mr Lewis was also classed as highly vulnerable. Given his own situation, Mr Kulkarni should have understood that.

200. In saying all this I do not doubt that Andrew Lewis, from the point when Mr Kulkarni started to shield, and Mr Hammond, over time as his sense grew that Mr Kulkarni was ignoring emails and abandoning the Hospital, were not overly concerned about Mr Kulkarni being more distant from the management of the Hospital. Changing the management was something Gwent was entitled to do – it was the control upon which Mr Lewis had insisted at the 7 February meeting. Unquestionably, Mr Kulkarni did not like it. He had only given in because, as he put it in his witness statement, "*I had little option but to accept his terms.*" As I have noted, he appears to have persuaded himself that things would not change, or if they did it would be over a period of time. The Covid-19 pandemic forced the issue on Mr Kulkarni much sooner than he had imagined or wanted.

201. While I therefore accept that Mr Kulkarni felt excluded and, in the sense of the personal interaction which he so values, was excluded, I do not accept it was directly tied to Andrew Lewis' desire at this time to remove Mr Kulkarni as an employee. It was a consequence of a change in working practices forced on all parties by the pandemic, the collapse in Mr Kulkarni's clinical work, which was also a consequence of the pandemic, and Gwent exercising its control in the management of SJIH and, in turn, the running of the Hospital, to which Mr Kulkarni had agreed in February 2020. It all happened very quickly and was, I accept, deeply unpleasant for Mr Kulkarni, but Gwent cannot properly be criticised for any of it.

The end of the beginning

202. Mr Kulkarni raised his sense of marginalisation with Mrs Lewis in late April, which in turn seems to have been communicated to Andrew Lewis, who wrote to Mr Kulkarni on 29 April 2020 asking, "*Anyway, how do we address matters with you?*"

203. This, I believe, was a good faith attempt by Andrew Lewis and Gwent to put matters on a sounder footing going forward, but it was not well executed. In setting out the background, Andrew Lewis stated "*without dwelling on the past too much this business was in a total mess that almost beggars belief*". Any business that enters administration, almost by definition, has issues, but given that Mr Kulkarni had been central to that business, such a statement was always going to be difficult for him to accept. Andrew Lewis continued (in the same sentence): "*let me assure you this will not happen again, it will be run from a business perspective and as I decide best.*" On one level this simply confirmed what was agreed in the SHA – Gwent had control – but Mr Kulkarni's sense of marginalisation at the time was unlikely to be improved by reminding him of this. Andrew Lewis then observed what he perceived his role to be: "*to protect our families* [sic] *investments first and foremost and I will not allow anybody or anything to stand in the way of that objective plain and simple*". Given Mr Kulkarni's emotional attachment to the Hospital, which Andrew Lewis had recognised earlier in his email, this again was never going to put Mr Kulkarni at his ease. Andrew Lewis concluded his opening salvo: "*if I decide that it is not possible to operate the hospital in an efficient*

and profitable manner then I will close it; in other words it will not become a financial burden to us." Again, Mr Kulkarni on one level knew this was a possibility; his evidence was that when discussing Gwent's investment Mr Lewis had wanted to know the land value of the Hospital for redevelopment, since that was effectively its base security value. But again, spelling it out in this way was only ever going to make Mr Kulkarni feel defensive.

204. All of what Andrew Lewis said was correct and reflected Gwent's rights, but it was the antithesis of the approach that Mr Davies explained he used with Mr Kulkarni to get the best out of him. In my view this email would have amplified, not reduced, Mr Kulkarni's sense of marginalisation. Andrew Lewis and Mr Kulkarni were simply very different personalities and even in the best of circumstances would have struggled to work together. These, obviously, were not the best of circumstances, and by his own admission Andrew Lewis was by this stage "*not especially well disposed*" to Mr Kulkarni and "*wanted as little to do with him as possible*".

205. Andrew Lewis then posed three questions:

1. You are of course a Director of [SJIH] and I assume that you want to remain as a Director?
2. You are currently an employee of the company with a salary of £120k, and I assume you also want this to continue?
3. What are your reasonable expectations about any equity investments you want to make? Currently you have one A share do you want to buy any more and if so how many and what price are you expecting to pay? As you know Gwent has paid £500k for 1718 shares ie £291 each.

206. Andrew Lewis was therefore clearly separating Mr Kulkarni's different roles. The only one he was questioning was Mr Kulkarni's role as a shareholder, and those questions were simply a continuation of questions he had been asking since early March. He was now seeking to impose an agenda on the discussion, but in circumstances where the matter had dragged for two and a half months with no resolution in sight, that was a reasonable thing for him to do.

207. Mr Kulkarni drafted a lengthy response, which he sent to Mr Davies for comment before sending to Andrew Lewis. This simply served to highlight the scale of the disconnect between him and Andrew Lewis.

208. Mr Kulkarni started by setting out what he thought would bring success for the business – a combination of financial acumen from Mr Lewis and Andrew Lewis and his experience in patient care and clinical excellence. He then set out his version of the history of the transaction. In this he noted, "[Mr] *Staples has created a number of problems for me and* [Mr Lewis] *knows them all.*" He drew particular attention to the GMC investigation and the difficulties he faced with the PHMIO. I pause simply to note that this is directly at odds with the evidence Mr Kulkarni now gives that Mr Lewis became aware of the issues Dr Kulkarni had with Mr Staples at or following his meeting with Mr Staples in late February 2020. The only sensible conclusion to draw from this email

is that Mr Lewis knew of Mr Kulkarni's problems in this regard directly from Mr Kulkarni himself.

209. Mr Kulkarni then addressed the issues he faced arising from the requirements of the PHMIO and his ability to benefit from EIS:

> So a real catch 22 situation where once again David very generously stepped in to save the day and suggested to us that I should ignore EIS and that Jayne would gift me my shares. As per the discounted consultant rate I would have to pay 80K and not paying that would offset against the tax loss at the end.

210. Again, it is worth pausing here to look at what Mr Kulkarni thought had been agreed with Mr Lewis at the Pre-Meeting. The subject matter of the discussion was the 1,651 shares. The effect would be that Mr Kulkarni did not have to pay anything, but because he would receive the shares from Gwent, who presumably would have to pay to acquire them. For reasons I have given I do not believe that Mr Lewis used the term "gift" and I put no weight on Mr Kulkarni's paraphrasing here. There is a concept of exchange, but what Mr Kulkarni describes as being what he agreed to give up was the possible benefits of EIS. That is not his pleaded case in which, as I have noted, he alleges that he agreed to reclassify his ordinary share into an A share and to continue work at the Hospital. For reasons I have given, I do not accept it accurately reflected the conclusion of the Pre-Meeting on 7 February.

211. He then set out in eleven bullet points what he did for the Hospital. This section highlights the lack of understanding on both sides. Having been told by Andrew Lewis that he considered the Hospital "*a total mess that almost beggars belief*", Mr Kulkarni told Andrew Lewis, "*From a personal point of view I have given nearly 6 years of dedicated effort to make this hospital work*". They approached the situation from fundamentally different points of view.

212. Mr Kulkarni then answered Andrew Lewis' questions. Again, it is notable that having been asked three numbered questions, described as "*simple questions so there is absolutely no further confusion*", Mr Kulkarni gave five numbered answers. Two are significant:

> 2) Re me being a director: I was hoping that David and Jayne would consider me a partner in the venture with all that I have invested in the hospital. As I said before between your financial skills and my forte of clinical excellence we would make a formidable team. So to be honest if that is what both David and Jayne in agreement [sic] then I cannot but be a Director.
>
> …
>
> 4) Re my shares. The 25% is the A share holding [sic] (1652 shares) and part of what I get by paying up the agreed discounted rate. This was also documented in the signed agreement. So I was originally expecting to pay

> 80K for these shares until David's kind offer. Stuart spoke to our accountants and they have advised re the tax position. They suggested I pay a nominal sum for each share (£1) and this was justifiable. So the choice I have is to go ahead with this or if David has changed his mind (I will understand) then I will need to raise 80K.

213. Gwent makes much of the reference to "*if David has changed his mind (I will understand)*" as showing that Mr Kulkarni did not believe he had a binding agreement. I agree. A non-binding agreement in principle is consistent with this email and also with Mr Kulkarni's actions at the 13 February board meeting, when he saw no need to disclose the offer from Gwent, a conclusion he could not honestly have reached had he thought he had a binding side-agreement for payment of his shares that was not offered to anyone else.

214. Andrew Lewis forwarded the email to Mr Lewis with a one-word message: "*Wow*". It was put to Andrew Lewis that Mr Kulkarni was simply setting out the history of the business but I have considerable sympathy for Andrew Lewis' reaction. He had asked three quite closed questions and Mr Kulkarni had responded with a page and a half email, much of which did not address Andrew Lewis' questions at all. In his witness statement Andrew Lewis described Mr Kulkarni's reply as "*entirely self-serving and divorced from reality in terms of his own understanding as to his contribution to the current business.*" I think that goes too far – much of Andrew Lewis' email was taking a particular view on the history of the business, and he could hardly complain if Mr Kulkarni responded in kind. He was, it seems to me, more justified in his frustration that the question regarding payment for the A shares remained unresolved.

215. Andrew Lewis then took a step which he could not explain: he sent an edited version of Mr Kulkarni's email to Mr Hammond. This was odd on a number of levels. First, it would have been simpler to forward Mr Kulkarni's whole response, as he did to Mr Lewis. He must have undertaken the additional work for a reason but he could offer none. Secondly, he edited rather than summarised Mr Kulkarni's email. So it became Mr Kulkarni's words but not his message. Thirdly, he told Mr Hammond that what he was sending was edited. He was not misleading Mr Hammond in that sense, but the risk of Mr Hammond being misled was obvious. Fourthly, some of the material he removed went to the alleged agreement by Gwent to gift the shares to Mr Kulkarni. That was highly relevant to Mr Hammond both because (as Andrew Lewis himself recognised) if there was an agreement for Gwent to pay then SJIH needed to chase Gwent rather than Mr Kulkarni and because if Gwent was to gift shares then those shares needed to be allotted and issued to Gwent, not Mr Kulkarni. It was not in the interests of SJIH to be kept in the dark over this. The very best that can be said for this is that it was a significant failure of judgement on the part of Andrew Lewis for which he could offer no innocent explanation.

216. On 7 May Andrew Lewis sent a draft reply for discussion to Mr Hammond. That reply was never sent to Mr Kulkarni, but Andrew Lewis accepted that it reflected his thinking at the time. In it he raised three points: that the local

health board had a rule preventing consultants from owning more than 5% of the shares in SJIH; that AXA had a substantively identical rule for insurance work; and that it was hoped that the GMC/CMA investigation was resolved in Mr Kulkarni's favour. In the draft Andrew Lewis suggested:

> …it would be prudent for you to step down as a Director and your [sic] associated responsibilities. You would remain as an employee with a revised job title.

217. As I have said, the reply was never sent to Mr Kulkarni, but by this stage it seems that Andrew Lewis felt that of Mr Kulkarni's three roles – shareholder, director and employee – two were not sustainable. As to the shareholding, his references to consultants holding no more than 5% of the shares in SJIH was not a reference to payment or to raising capital; it was to restricting Mr Kulkarni to a more limited shareholding than had previously been agreed. As to him stepping down as a director, as Mr Hammond rightly recognised during cross-examination the ongoing GMC investigation was no basis for such a request.

218. In my view these exchanges marked a significant change in the relationship. Andrew Lewis had never taken to Mr Kulkarni, whom he considered to be a drag on the business and who he thought owed it a significant sum of money, money that he had avoided paying. He had, however, tried to work with him to reach a solution. From 7 May, prompted by the exchange at the end of April, he ceased trying to work with Mr Kulkarni and sought to resolve the situation, so far as he could, unilaterally.

The beginning of the end

219. On 12 May 2020 Ms Butler, SJIH's finance director, approached Matthew Denney (**Mr Denney**) of Bevan Buckland, who were SJIH's tax advisors. She wanted a call to discuss the shareholding structure of SJIH given difficulties that were created by some consultants holding more than 5% of the shares and Mr Kulkarni's continued non-payment of the purchase price for his A shares. She explained to Mr Denney:

> Basically, I'm not sure, when looking at % holding, what this should be based on – the full 6605, the amount allocated (ie including [Mr Kulkarni's] unpaid shares if these would be classed as allocated) 4850, or just the amount paid up, 2928? Once we know what this is we can judge the %s and make decisions based on that. We also need to consider Gwent taking the remaining 2025 B shares and whether we could do this as a Debt for Equity swap (assuming we didn't require the cash) and what would be most beneficial for the hospital and the balance sheet.

220. The call obviously progressed SJIH's thinking. Mr Denney circulated a steps plan and on 13 May 2020 Andrew Lewis stated:

> Essentially we ie Gwent agree with the debt to equity approach for the A shares (£32,460) and B shares (£237,000) and providing [Mr Kulkarni] with

> options for the 525 shares as you have laid out. If necessary could we increase the share option offer to [Mr Kulkarni] from 525?

221. The following day Andrew Lewis emailed Loosemores, a firm of solicitors, asking whether SJIH could implement the Bevan Buckland proposal. He noted the following drivers:

> - Satisfy the CMA ref consultants shareholding mx 5%.
> - Satisfy AXA ref consultants shareholding mx 5%.
> - Satisfy the NHS ref consultants shareholding mx 5%
> - Moderate the perception that Aneurin Bevan [the local NHS hospital] have regarding the consultants running the [Hospital] for their own gain.
> - Try to be sympathetic to [Mr Kulkarni's] involvement by being realistic.

222. He then noted:

> With regard to hopefully placating [Mr Kulkarni]:-
> - He would receive share options from Gwent for 525 shares ie 8% of the total share capital value £41,475.
> - He would only need to pay for those shares if the hospital is sold.
> - Given the current situation with the GMC and in consideration of this offer we would require [Mr Kulkarni] to stand down as a Director of [SJIH] and vary his duties under his contract of employment to exclude the Medical Director role.
> - The agreement ref the shares would also include a "bad leavers" clause so that in that situation the share options would be cancelled.
> - If [Mr Kulkarni] is struck off he would also have his employment terminated.

223. Ms Butler emailed Andrew Lewis and Mr Hammond on 15 May 2020 attaching the Minutes from the 13 February board meeting and noting that this was the source of the £80,000 price for Mr Kulkarni's shares. It seems that this was a revelation for Ms Butler, although as I have noted Andrew Lewis had been aware of the Minutes since at least 9 March 2020. In any event, it was presumably this discovery, or rather rediscovery, that prompted a further email from Andrew Lewis to Loosemores on 21 May 2020:

> In the BOD meeting on the 13th February 2020 it was stated that [Mr Kulkarni] could have 1651 A shares for £80K. Is that irrevocable? If so then he has of course not paid so is there some sort of deadline by which he has to pay or can this drag on for ever?

224. Andrew Lewis agreed that this was him asking Loosemores how to "*force the issue*", but I believe that he was right to seek to do so. I accept Andrew Lewis' characterisation that the matter had been "dragging on", by this stage for three months. In a further three months the deal with the NHS would expire and SJIH still needed capital. Andrew Lewis had worked hard to resolve this, with

no assistance from Mr Kulkarni. It was repeatedly put to Andrew Lewis that he did not ask Mr Kulkarni for the money. That, it seems to me, is misconceived. Mr Kulkarni knew the money was due, as recorded in the Minutes from the 13 February board meeting of SJIH he had subscribed on the basis that it would be paid and he knew it had not been paid. The onus was on him to arrange payment, not on Andrew Lewis to resolve the matter for him.

225. Nor do I accept that Andrew Lewis was seeking to "*force the issue*" entirely to Mr Kulkarni's detriment. On the same day he asked Bevan Buckland whether Mr Kulkarni could be granted options over 1,652 shares. At this stage he was still considering multiple potential solutions.

226. Loosemores replied the next day asking if there was anything in writing between Gwent, Mr Kulkarni and SJIH. They described this as *"key"*. Mr Lewis replied:

> There was nothing in writing between Gwent and [Mr Kulkarni] for sure. Anyway we are going to sound him out on what realistically we can agree as we would prefer this to be done amicably to avoid any potential damage to the hospital. [Mr Kulkarni] has a big ego!

227. Again, Andrew Lewis is criticised for this email, specifically for focussing on the absence of any written agreement and not referring to Mr Kulkarni's reference to his discussion with Mr Lewis. Again, I reject that criticism. That is not based on my finding that there was no legally binding agreement – obviously, Andrew Lewis could not know at the time how any claim on such an agreement would ultimately play out. I also recognise that it is obviously preferable, when seeking legal advice, to provide as full a picture as possible. However, there was considerable uncertainty over precisely what had been discussed and Mr Kulkarni had himself suggested that any agreement was one from which he would accept that Gwent could withdraw ("*if David has changed his mind (I will understand)*"). Moreover, despite repeated emails at no stage had Mr Kulkarni taken any steps to ask Gwent to pay, which one would expect if he genuinely did have a binding agreement. At this time Mr Kulkarni was still a director of SJIH and should have been just as concerned about its capital position as Mr Hammond and Andrew Lewis. He was following up to some extent with the other consultants about subscribing for B shares. There was no good reason, if he had an arrangement with Mr Lewis, why he would not be chasing him and letting Andrew Lewis know about it. Finally, Andrew Lewis' reference to "*for sure*" would properly be read as being limited to written agreements, leaving open the position with oral agreements. With the benefit of hindsight Andrew Lewis may well have written his email differently, but emails are often drafted and sent quickly and his response was within the range of sensible answers to the question posed.

228. That is not true of his subsequent instructions. While there is no written record of these, something must have been said to Loosemores because on 22 May 2020 they wrote to Andrew Lewis: "*it seems a crazy situation if he is not pulling his weight as an employee, and/or he is carrying on other work in breach of his contract, particularly given his large salary.*" Andrew Lewis

accepted on cross-examination that Mr Kulkarni was not carrying on other work in breach of his contract with SJIH. He could offer no explanation of how Loosemores had drawn this conclusion, and while he could not recall telling them this he was the principal contact with Loosemores and so was the most likely source of it. There is no evidence of Andrew Lewis correcting the point, which one would have expected had it been an erroneous conclusion drawn by Loosemores without instructions.

229. At this point the email record becomes patchy. By early June communication between Andrew Lewis and Mr Kulkarni was going via Mr Davies but Andrew Lewis could not recall the sequence of events or the precise exchanges. It seems that by 3 June 2020 some proposal had been communicated to Mr Davies, since Andrew Lewis wrote to Mr Hammond that day, noting: "*I chased* [Mr Davies] *earlier and he told me that* [Mr Kulkarni] *is calling him after 3:30pm today*." Mr Kulkarni made no reference to any such proposal in his witness statement but did note that he was depressed and suffering the effects of the lockdown at this time, which is both understandable and supported by an email he sent to Mr Davies.

230. Mr Davies suggested that Mr Kulkarni should set out his expectations in writing, which Mr Kulkarni did in an email on 3 June 2020 headed "What I Want":

> 1. 25% of A shares – as in the agreement. I was to originally get these by paying back my tax refund of about 80K (loss of shares from old co) just as every other consultant. To do so I wanted to get EIS to protect my tax status when we exit. But to get EIS I cannot be employed by the hospital or else I would fall foul of the CMA. So [Mr] Lewis told me when I was with you in the little conference room that [Mrs Lewis] would gift me the shares for nothing so I could ignore EIS. In fact we told James and the other [sic] about this immediately after in Stuarts [sic] office
> 2. My consultant fees and expenses that have not been paid – Just as every other consultant
> 3. My unpaid directors salary other overdue non consultant payments Old co owe me- This is the one [Mr] Lewis agreed in the same meeting as above that I can take that as a dividend once we broke even
> 4. For me to continue as Medical director and Responsible officer and have my salary – 120K – which again he confirmed was OK
> 5. For me to remain on the board and to run the hospital
> 6. The articles state that shares not taken up by the consultants and other unallocated shares (above [Mr] Lewis' 26%) should be first offered to the A share holder. I want that option to buy these just as [Mr] Lewis

231. This email is notable in a number of respects.

232. First, points 1, 3 and 5 are wrong. I accept that Mr Kulkarni sincerely believed that 1 and 3 were correct, but in cross-examination he accepted that the whole purpose of clause 14.5 of the SHA was to allow Mr Lewis to run the Hospital through his appointee on the board Andrew Lewis. He knew this was

important for Mr Lewis and had only given in because he had no choice. It is wholly unrealistic to suggest, if indeed it is suggested, that he had forgotten the exchange at this time.

233. Secondly, by this stage it seems that some proposal had been made to Mr Kulkarni. In any event he had seen Andrew Lewis' email of 29 April 2020 asking him what his "*reasonable expectations*" were. He knew he was in a negotiation. Yet far from putting forward a realistic proposal of his own he started to look for more – in terms of running the Hospital – than he could realistically have believed he was entitled to or would ever receive.

234. Thirdly, this is still further evidence that what Mr Kulkarni thought was agreed at the pre-meeting concerned shares in SJIH, not the payment for shares.

235. Finally, it is notable that Mr Kulkarni referred to Mr Lewis simply as "*Lewis*". This marked a breakdown in the relationship which he recognised in his oral evidence before me: "*...I had lost faith in the Lewises and I did not want to have shares in their hands for some future date and me have no control, so I really wanted my shares back.*" This was by reference to events later in June, but the language used in this email suggests that Mr Kulkarni had lost confidence by, at the latest, the beginning of June.

236. Further exchanges followed between Mr Kulkarni and Gwent, via Mr Davies. They culminated in the following terms, with Gwent's position in bold and Mr Kulkarni's response in italics:

> **1. Shares**
>
> **Suggested that** [Gwent] **acquire them by way of debt to equity transfer and in turn Gwent would offer** [Mr Kulkarni] **share options. On a sale by the hospital the option would be exercisable. Due regard has to be taken of the CMA position.**
>
> *Wishes to achieve the transfer over of his shares, and his entitlement to any excess shares not taken up by the consultants. Suggests that his accountants liaise with those of* [Gwent] *to achieve this outcome on terms that are best for both parties. CMA position to be complied with which is why there was an employment provision entered into.*
>
> **2. Employment**
>
> **This will continue but** [Gwent] **wants to review as it is an expense of £120,000 per annum. Suggesting the review should take place when the first two-year period is up – commencing with the date the contract was originally entered into. September (?).**
>
> *See 1 above. The payment commenced in November 2019 and accepts a review of the position in November 2021. The arrangement was partly to achieve CMA requirements and to provide a degree of compensation to* [Mr Kulkarni] *for non-payment of salary post 2014 or any compensation for the*

huge amount of work (non-paid) he did in keeping the hospital afloat and for the future benefit of all now concerned ([Mr Lewis] *had agreed that coupled with the above, when SJIH broke even, a balancing payment could be made. It would probably be appropriate to formalise this arrangement at this stage).*

3. GMC Enquiry

Suggestion that [Mr Kulkarni] **stands down as a director and medical director pending the outcome. Undertakings to re-instate** [sic] **if complaints are dismissed and carry no penalty.**

Suggests a system whereby he gives authority for the lawyers acting on his behalf in the GMC investigation to notify one month before a pending hearing and in the event of the chances of a finding against him being more than 50%, he will stand down as a director at that stage on the undertaking that he will be reinstated if he remains able to practice.

…

6. Duties

[Gwent] **anxious that** [Mr Kulkarni] **restrict himself to orthopaedic duties but wishes to have an announcement that he remains a director and is standing down from day to day management issues and duties in order to concentrate on rebuilding his orthopaedic practice and the backlog of patients.**

237. Mr Kulkarni's responses appear to have been sent to Andrew Lewis on 18 June 2020. In the interim, however, Andrew Lewis had been discussing more aggressive action with Loosemores. On 16 June 2020 he had asked about Gwent's ability to dismiss Mr Kulkarni as a director and as an employee. On 18 June they, too, emailed Andrew Lewis. They advised (with my emphasis in bold):

1. As you know, the [SHA] is flawed because it states that 3,370 A Shares of £1 each were then in issue (Gwent holding 1,718 and [Mr Kulkarni] holding 1,652), all of which are fully paid. However, we know that this is incorrect as [Mr Kulkarni] did not pay the required £80K for his new 1,651 shares. The Articles of Association of the same date also specify that shares can only be issued fully paid. We may need to return to these points later and consider whether to seek to have the mistake about the number of [Mr Kulkarni's] A shares (and possibly other mistakes) in the [SHA] corrected.
2. Assuming the SHA is in force, then Gwent <u>does</u> control voting on the board of directors by virtue of clause 14.5. Basically, you as Gwent's Controlling Shareholder Director effectively have as many votes as enable you to carry or defeat any motion at a directors' meeting.
3. This means you **can pass a directors' resolution to dismiss [Mr Kulkarni] as an employee**. **The directors would need to decide**

> **whether they have grounds for summary dismissal** (e.g. gross misconduct) or **otherwise [SJIH] would need to give him 3 months' notice**…
>
> 5. You may want [Mr Kulkarni] to transfer his 1 A share to Gwent. This would mean he ceases to be a shareholder (assuming for now that he does not actually own a further 1,651 A shares). **You cannot force him to transfer the share (for £1) unless he is in material breach of the [SHA]. I would need to look at this further,** particularly in relation to his failure to pay £80K for the 1,651 extra A shares he was supposed to be issued with. …
> 6. **Removing [Mr Kulkarni] from his position as a director is potentially more tricky.** As he owns at least 1 A share, under the terms of the [SHA], it appears (although it is not entirely clear) that **neither Gwent nor the Board can remove him**. However, you can **potentially remove him** by the shareholders passing an ordinary resolution at a general meeting, using a specific procedure under the Companies Act. **The procedure takes a few weeks to implement and is not straightforward.** …
>
> Andy, **these are my initial thoughts** based on the background information I have received to date. **Please review these carefully before you decide on next steps.**

238. On no conceivable analysis was this a clarion call to immediate action.

Andrew Lewis acts

239. On 21 June 2020 (a Sunday) at 5:23pm Mr Kulkarni emailed Mr Hammond to inform him that he was coming out of shielding and anticipated returning to work in the near future. It is unclear at what time Mr Hammond forwarded this to Andrew Lewis but it is obvious that he did; at 8:04pm, Andrew Lewis wrote to Mr Kulkarni, purporting to dismiss him for gross misconduct. That purported action was wholly misconceived:

    239.1. The first reason given was a failure to attend the Hospital for over four months without giving any reason for his absence. That was untrue. Andrew Lewis and Mr Hammond both knew by this time that Mr Kulkarni had been shielding, as they accepted in their respective cross-examinations before me.
    239.2. He then alleged a failure, by Mr Kulkarni, formally to inform the board of a GMC investigation. In fact he had informed Andrew Lewis of the investigation. During his cross-examination he focussed on the reference to "*formally*" in the letter but was forced to accept that he had not checked to see if Mr Kulkarni had made a formal notification.
    239.3. Andrew Lewis' email then referenced a police caution that resulted in a GMC warning. Both the caution and the warning were long since spent. Andrew Lewis sought in his cross-examination to justify relying on them on the basis that: "*You know it could be said, unfairly, that a leopard never changes its spots.*" I agree that would be unfair;

> it makes a mockery of the idea that a prior offence is considered spent. If that was his thinking at the time, which I strongly doubt, it was legally baseless.

240. Andrew Lewis went on to state that Gwent intended to remove Mr Kulkarni as a director.

241. He then turned to what he described, without any real basis, as an "*offer*" (more specifically, also without basis, a "*very generous*" "*offer*"):

> There was as you know a [SJIH] BOD meeting on the 13th February i.e. the day before [Gwent] took control by way of purchasing the allotment of 1717 A Shares. It was stated in that same meeting that you would purchase 1651 A shares for £80,000. There are two points here: firstly [Gwent] did not agree to you purchasing those shares at that price and they should have been offered to you at the same unit price per share that [Gwent] paid. In any case you have not paid the company for those shares and as that was four months ago the approval made on the 13th February is now withdrawn. Secondly as you know there would be a problem for [SJIH] if any consultant owns more than 5% of the shares so the whole premise for that proposed transaction was flawed. [Gwent] will now acquire those 1651 A shares (plus the one A share you already own) by way of a debt to equity transaction and then [Gwent] will provide you with an agreement that at no cost to yourself if ever the Hospital is sold as a going concern you would still receive the same % of the sale proceeds as was envisaged in the flawed share allotment agreement.

242. This was simply wrong on many levels. First, SJIH had not offered the shares to Mr Kulkarni; Mr Kulkarni had offered to purchase them from SJIH and SJIH had accepted that offer. It really did not matter what Gwent thought on the day before it took control of SJIH; provided SJIH was not in breach of the Companies Act in accepting Mr Kulkarni's offer (and it was not) it was bound by its acceptance. Equally to the point, however, as Mr Lewis had previously explained to Andrew Lewis Gwent knew of and accepted this at the time.

243. Secondly, Andrew Lewis' purported "*withdrawal*" of the "*approval made on the 13th February*" was equally baseless. Leaving aside the rather fundamental point that he was purporting to write on behalf of Gwent, not SJIH, an agreement had been reached on 13 February; it was not open to either party unilaterally to cancel it. Andrew Lewis is not, of course, a lawyer and on one level could not be expected to know the way that contract law operates, but he had consulted Loosemores on precisely this point and they had told him they needed to "*look at this further*". Having decided not to wait he is responsible if he gets the point wrong, as indeed he did.

244. Thirdly, there was no problem for SJIH in a consultant owning more than 5% of its shares. The problem was in a consultant who was not an employee owning more than 5% of SJIH's shares. In a rather grim irony, it was Andrew Lewis' own action in attempting to terminate Mr Kulkarni's employment that would have created the problem he purported to solve with the creation of

options. The position descends to the surreal, however, because the contract of employment he tried to destroy solved the problem that arose under the PHMIO, and the option contract he proffered as a solution did not.

245. Fourthly, Andrew Lewis knew from Loosemores that the debt-to-equity swap was not something he could force on Mr Kulkarni, certainly as regards the one A share that he already held. It was wholly disingenuous for him to suggest otherwise.

246. It is worth noting here the extent to which Andrew Lewis ignored or flew in the face of the legal advice he had received:

246.1. He was advised that the route to dismiss Mr Kulkarni was a directors' resolution. None was passed.
246.2. He was advised that the directors needed to consider whether there were grounds for gross misconduct. They did not.
246.3. In the absence of gross misconduct he knew that Mr Kulkarni was entitled to be paid at least his notice. He ignored this route, presumably because of the cost.
246.4. He knew that Mr Kulkarni could not be deprived of his one A share in the absence of material breach of the SHA and that Loosemores needed, at the very least, more time to consider the point. He chose not to give them that time and did not identify any breach of the SHA, let alone a material breach.
246.5. He knew that Gwent had no right to remove Mr Kulkarni as a director.
246.6. Loosemores had provided only their initial thoughts and had urged Andrew Lewis to review them carefully before deciding on next steps. He chose to ignore both the caveat and the advice.

247. In his oral evidence before me Andrew Lewis said he wished he had taken legal advice before sending his email. The difficulty with that evidence is that he had taken just such advice and had chosen to ignore it. This willingness to disregard legal advice of course raises the question of whether Andrew Lewis' later actions, which did coincide with the advice he received from Loosemores, were driven by that advice or whether, instead, it was simply convenient for him that the lawyers agreed with what he would have done in any event.

248. I have noted some sympathy for Andrew Lewis' position on a number of occasions in this judgment. I have none for this email. When cross-examined on the email Mr Hammond confirmed that Andrew Lewis did not consult him before sending the email and accepted that he would not have sent it. Rightly so. On every level it was deeply unimpressive. Mr Kulkarni was fully entitled to feel aggrieved upon receiving it.

249. It was put to Andrew Lewis that this letter was the culmination of a plan he had formulated almost from the outset in February 2020 to remove Mr Kulkarni from the Hospital. He denied that, and for the reasons I have already given I accept his evidence: the situation built over time and culminated in late June 2020 when Mr Kulkarni indicated he would be returning. At that point, as Andrew Lewis made clear during cross-examination, he decided to act:

"*More and more stuff came out the woodwork and then I decided it was not appropriate having Mr. Kulkarni work at the hospital*". He had no right to make that decision by himself and no right to attempt to implement it in the way that he did, but to backdate his intention to February seems to me unrealistic in light of the evidence.

250. As soon as others became aware of Andrew Lewis' actions they sought to row back from them. Having been forwarded the email the following morning, Loosemores very quickly raised doubts about whether it did in fact address the PHMIO issue. Doubtless they would have given the same advice had they been consulted before Andrew Lewis sent his email to Mr Kulkarni. Also on 22 June 2020 Mr Hammond contacted PSM HR to determine whether Mr Kulkarni could be dismissed for gross misconduct for the reasons proffered by Andrew Lewis. Presumably the advice was that he could not, since within a matter of hours SJIH had decided to go down the route of paying Mr Kulkarni out for his notice period.

Andrew Lewis acts again

251. Mr Kulkarni responded to Andrew Lewis' email on 24 June 2020, stating:

> As per our conversation and your clarification I will accept your offer. I await your notices.

252. Andrew Lewis' evidence was that he took this as agreement and started to act accordingly. Obviously, it was not agreement to his original proposal; rather, it was agreement to that proposal as clarified. The key question is the form of the clarification.

253. Andrew Lewis was unable to assist – he had no recollection of the conversation with Mr Kulkarni. Mr Kulkarni said that he spoke first to Mr Lewis, who agreed that Mr Kulkarni should receive his shares immediately and asked him to ring Andrew Lewis. Mr Kulkarni's evidence was that his call with Andrew Lewis was quite different:

> He was aggressive and threatening in his approach. [Andrew Lewis] said I should not really be getting anything and against his wishes Mr Lewis had agreed to give me my shares. He said that for me to get those shares I needed to step down as Medical Director and Responsible Officer. He would then organise a contract to sort the shares out. However, he warned me that if he did not hear from me in the next day or so his offer would be withdrawn and would sack me, and I would have no shares.

254. I readily accept that Andrew Lewis likely was aggressive and threatening in his approach – that would be consistent with his "*offer*" email and when cross examined on Mr Kulkarni's evidence Andrew Lewis rather dismissively observed, "*I don't know if I was aggressive or not but anyway*." I also have no difficulty believing that Mr Kulkarni was given a very short deadline in which to respond; again, that was consistent with the "*offer*" email.

255. What I do not accept is that the "clarification" involved Gwent transferring 1,651 A shares to Mr Kulkarni immediately. I say that for a number of reasons:

255.1. That is not a "*clarification*" of Andrew Lewis' offer; it is an entirely different transaction.

255.2. As I have noted, by early June Mr Kulkarni had lost faith in Mr Lewis. Mr Lewis, for his part, stated that by this time he was "*running out of patience with* [Mr Kulkarni's] *constant demands and felt let down*". Particularly where talk of transfer of Mr Kulkarni's shares had caused so much trouble in the past, I very much doubt that Mr Lewis reversed the offer that his brother had just made.

255.3. In similar vein, on 23 June 2020 Mr Davies wrote to Mr Kulkarni saying: "*The indication I have from* [Andrew Lewis] *this morning is that they stick to the deadline for you to accept the share offer and other terms of their letter.*" It seems to me improbable that Gwent having reaffirmed the offer to Mr Davies, Mr Lewis or Andrew Lewis would then change it a matter of hours later in a discussion with Mr Kulkarni.

256. In my view this was a case of ships passing in the night. The environment of a trial is an unusual one, but Mr Kulkarni, Mr Lewis and Andrew Lewis all came across as having quite dominating personalities. The most likely explanation was that they were all on transmit rather than receive, and each thought agreement had been reached on their own terms. They were all wrong.

257. Of course, the parties did not appreciate at the time that there was no agreement, and they started to act on the more immediate elements of their mistake. Mr Kulkarni resigned as an employee with pay in lieu of notice and as a director on 25 June 2020. Gwent, principally through Andrew Lewis, moved matters forward to acquire Mr Kulkarni's one A share.

258. On 15 July 2020, Loosemores identified a further issue. Soon after Mr Kulkarni's resignation Mr Davies, Mr Edwards and Mr Rogers had also resigned their directorships. That left Mr Hammond and Andrew Lewis as the only directors. However, as a director of Gwent in a transaction where Gwent was to acquire shares, Andrew Lewis had a conflict of interest, as indeed he recognised in the course of his evidence. That meant he could only form part of the quorum for board meetings if the conflict was declared and authorised. Authorisation could not come from the board, which could not muster a quorum on this point given that Andrew Lewis could not vote. Loosemores therefore advised obtaining authorisation by way of an ordinary resolution:

> In my view, this should be the preferred approach as it avoids any potential challenge in the future. The only issue is whether [Mr Kulkarni] will be co-operative in signing the resolution. However, as we will need him to sign and return the stock transfer form, signing an additional document should not be too much of an issue (in theory).

259. Andrew Lewis was asked about this advice. He explained: *"I understand that was the advice that was given but as far as I was concerned that was all*

superseded by the fact they I had an agreement with [Mr Kulkarni] *aside from this and that in my opinion negated all of the need to go down this road"*. That answer was, frankly, logically incomprehensible. Loosemores were advising on the basis that there was an agreement with Mr Kulkarni and had identified this as an issue in implementing that agreement. Their advice was not that the conflict would be avoided by virtue of the agreement with Mr Kulkarni; their advice was that the terms of the agreement with Mr Kulkarni gave rise to the conflict, and the solution required a further step.

260. Andrew Lewis instructed Loosemores to proceed on the basis of a board minute on the ground that: "*I think* [Mr Kulkarni] *is not going to cooperate in the transfer of the share although he had previously agreed to do so.*" Again, I find Andrew Lewis' reasoning incomprehensible. First, it is not at all clear what had happened to make him think that Mr Kulkarni had changed his mind. Secondly, if he did think that Mr Kulkarni had changed his mind it is wholly unclear how he thought he would get the stock transfer form signed, which Loosemores had advised repeatedly was also a necessary step. Finally, if Mr Kulkarni had changed his mind and any agreement that Andrew Lewis had reached with him was non-binding, which plainly he understood to be the case, his whole basis for why he could ignore Loosemores' advice in the first place – that he had an agreement with Mr Kulkarni – had fallen away.

261. Andrew Lewis was well aware that he had a problem:

> Q. So the conflict you have accepted existed went entirely undeclared?
> A. The conflict that I was advised that -- I ignored it, yes.
> Q. So you are basically just deciding to ignore legal advice again?
> A. When you say again, I ignored legal advice on that occasion, yes.

It was remarkable that Andrew Lewis quibbled over Mr Butler's use of "*again*" given that it was so plainly accurate; he had also ignored Loosemores' advice in sending his 21 June email to Mr Kulkarni that was the genesis of the transaction. This incident reinforces the sense that Andrew Lewis did not so much rely on legal advice as used it as cover when it coincided with what he has already decided to do.

262. Andrew Lewis told Loosemores to proceed on the basis of a board minute. Even that then seems to have been jettisoned as an approach, since no board minute was ever produced. Not only did Andrew Lewis take a significant risk in ignoring the advice to obtain an ordinary resolution, he then either doubled down on that risk by ignoring the advice once again or was exceedingly sloppy in not properly following through on the only legal alternative arguably open to him.

263. The lack of agreement came to a head soon after. On 16 July 2020, Andrew Lewis wrote to Mr Kulkarni enclosing a stock transfer form for him to sign, transferring his share to Gwent; on 23 July 2020 Baldwins, acting for Mr Kulkarni, replied asking about the mechanics of transferring shares to Mr Kulkarni.

264. Baldwins then drafted a proposed email for Mr Kulkarni, essentially accepting Andrew Lewis' terms and agreeing that Mr Kulkarni would sign the stock transfer form. Mr Kulkarni amended this, however, to say that he wanted to resolve the matter amicably, asking for a formal agreement and saying that Mr Kulkarni would sign the stock transfer form along with that agreement.

265. Mr Kulkarni could offer no explanation, in the course of his oral evidence, for how this meant anything other than what was said – that he would give up his one A share. To the contrary, it simply highlighted an issue that I had with his conduct stretching back to mid-March, when Andrew Lewis was investigating the payment arrangements for the A shares. He did not like the situation he was in; he hoped it would go away; even after his professed loss of faith in Mr Lewis, he still hoped that Mr Lewis would step in and do what Mr Kulkarni thought was the right thing, giving him the A shares for nothing or, as Mr Kulkarni put it to Andrew Lewis on 9 September 2020, "*you needed to offer me something as good*". He stalled, as I think he had often stalled in the past when confronted with a difficult situation. He has come to believe that he was always clear on the deal he now says was reached with Mr Lewis. But that deal, and his subsequent actions, were anything but clear.

266. Andrew Lewis and Loosemores took the message at face value, however, as they were entitled to do. They proceeded to prepare a draft agreement that was sent to Mr Kulkarni on 31 July 2020. Mr Kulkarni's reaction to this was predictable: he wrote to Mr Davies about its one-sided nature and, despite having said he had lost faith in Mr Lewis two months before, asked Mr Davies if he thought Mr Lewis should be asked to help. The agreement was one-sided, but it is hard to know what else Mr Kulkarni expected. It had been open to him to propose an agreement, but he asked Andrew Lewis, whom he knew was an aggressive negotiator, to prepare a draft; obviously Andrew Lewis would look to protect Gwent's interests.

267. Once again Mr Kulkarni was in a position he did not want and he hoped that Mr and Mrs Lewis would step in. On 10 August 2020 he wrote to Mr Davies:

> Been thinking. I am ready now
>
> Three choices
>
> 1) send a txt to [Mrs Lewis]
> 2) Send a txt to [Mrs and Mr Lewis]
> 3) You call [Mrs Lewis] , as you said ,about my mental state and then I send one to them after an hour

268. Put simply, the three routes he saw open to him boiled down to him sending a text to some combination of Mr and Mrs Lewis and them solving the problem for him. I recognise that Mr Kulkarni was struggling at this time, but this again reflected a pattern of conduct that had stretched back for some time. When Oldco was in difficulty he wanted someone to step in and help, preferably Mr Lewis; when faced with the decision between giving up the benefits of EIS, giving up his practice and giving up his shareholding in SJIH he wanted

someone to step in and help, preferably Mr Lewis; now he was under pressure from Andrew Lewis he wanted someone to step in and help, preferably Mr or Mrs Lewis. He constantly hoped that, given time, something might turn up.

269. Time, however, was running out. On 11 August 2020 Loosemores wrote to Andrew Lewis following the latest holding response from Mr Kulkarni:

> If [Mr] Kulkarni continues to prevaricate, we will need to reconsider giving him and SJIH notice to terminate the [SHA] immediately on the grounds [sic] that [Mr Kulkarni] never paid for the 1,651 shares he was supposed to subscribe for and therefore they were never issued to him, so the [SHA] was completed on a false pretence.

270. On 14 August 2020 Andrew Lewis chased Mr Kulkarni again and told him that the offer would be withdrawn on 19 August if no response was received. On the afternoon of 19 August, Mr Kulkarni asked if the deal was compliant with CMA requirements and to see any advice that SJIH had received on the point. This was a legitimate concern, as Loosemores confirmed to Andrew Lewis that day, but by raising it so late in the day Mr Kulkarni once again came across as prevaricating.

271. On one level, this rather lengthy analysis of the facts to this point is by way of preamble. Mr Kulkarni relies on it only as a means of showing what he describes as animus on the part of Gwent that he argues renders the later breaches of the SHA irremediable. It is therefore worth taking stock at this stage.

272. In my view, Mr Kulkarni went into this relationship with wholly unrealistic expectations. When Oldco encountered financial difficulties he thought that Mr Lewis would help him as a friend on preferential terms that would allow him to save the Hospital but then continue much as before. That was wrong on two levels.

273. First, while Mr Lewis undoubtedly encouraged Mr Kulkarni's beliefs by initially discussing a five-year interest free loan, a plainly uncommercial position, by the time that he did invest he did so on commercial terms, as Mr Davies had warned Mr Kulkarni would happen. Mr Lewis had control of the board, an equity position and a secured loan. It was a commercial deal, and Mr Kulkarni should have understood that it would be run on commercial terms. Instead he felt that nothing had changed: "*So my feeling was that OldCo were just going to become NewCo, the management would remain the same, that is where it started, and when control came, I still felt that the people in the old management team would continue, with Andrew Lewis there to help us make it better*." That was entirely unrealistic.

274. Secondly, the tension between the PHMIO and EIS regimes meant that Mr Kulkarni had a choice to make: he could not keep all three of his practice, his shareholding and his tax benefits. He hoped that Mr Lewis could cut the Gordian knot for him, and at the Pre-Meeting on 7 February dropped the problem on Mr Lewis, thinking he might solve it. Mr Lewis indicated a

willingness to help, but for reasons I go on to address the outcome of the discussion could not form the basis for a contract. Mr Kulkarni, however, had heard what he wanted to hear – that his problem would be solved – and never pinned matters down. Throughout this period he constantly sought to drag Mr Lewis back to that moment of apparent consensus, but Mr Lewis had not been as focussed as Mr Kulkarni on that aspect of their discussion and had no clear recollection of anything being agreed.

275. As to Mr Lewis, he is not a man who focusses on deals until the sharp end of negotiations. For him, an agreement in principle is the beginning, not the end, of the real discussion. It is an approach that has served him well. For months he floated ideas about funding the Hospital with Mr Kulkarni but I do not believe he really settled on an approach until January 2020. While Mr Kulkarni may regard that as not being the action of a friend, it is certainly the right of an investor.

276. When Mr Kulkarni raised his EIS issues at the 7 February Pre-Meeting Mr Lewis was more concerned with other issues; he wanted, and had achieved, board control. The issue was a technical one and he likely did not understand the detail, simply that it had to do with Mr Kulkarni's shares and his inability to claim tax relief. He offered Mr Kulkarni reassurance – that he could have his shares – but then the transaction moved on and he largely forgot about this aspect of it.

277. When Mr Kulkarni started to press Mr Lewis he was trying to enforce a bargain that seemed much clearer to him than it did to Mr Lewis. In doing so he irritated Mr Lewis. I accept that Mr Lewis over time preferred to avoid taking calls from Mr Kulkarni, but given that those calls increasingly involved attempts to bypass Andrew Lewis, which Mr Lewis disliked, and discussions about Mr Kulkarni's shares, which Mr Lewis genuinely thought were not his issue, that is unsurprising.

278. Andrew Lewis entered SJIH with a view to putting a failed business on a sounder financial footing. I believe that from the outset he had doubts about Mr Kulkarni, simply because he was central to that earlier failure. That was not unique to Andrew Lewis – the administrators had recorded concerns about the way Oldco was managed in their summary of the reasons for its failure. Moreover I believe that Andrew Lewis was sufficiently open-minded to overcome those doubts, as he did in the case of Mr Hammond and Ms Butler, both of whom were involved in Oldco but both of whom he recognised in his evidence as being excellent in their roles.

279. In the case of Mr Kulkarni, however, those doubts were almost immediately reinforced by early discussions that Andrew Lewis had with him. They are men of contrasting styles: Mr Kulkarni is a charismatic leader whose strength is people; Andrew Lewis deals in hard financial facts. Mr Davies and Mr Kulkarni had found a way to make their different styles work together; Andrew Lewis and Mr Kulkarni could not. Neither is uniquely to blame for that.

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. Mr Kulkarni encouraged that latter belief with his April email saying he would understand if Mr Lewis had changed his mind.

281. Mr Kulkarni increasingly came to feel that the Lewis brothers were out to get him and that Mr Lewis was reneging on his agreement now he had what he wanted. 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. Gwent had the right under clause 14.5 of the SHA to take management decisions, which included decisions relating to employees, and I think Andrew Lewis genuinely questioned what Mr Kulkarni contributed for his £120,000 p.a.. Finally, while he obviously did not like the fact that SJIH had agreed to issue Mr Kulkarni's A shares at a discount to the price paid by Gwent, the original and ongoing source of friction was that Mr Kulkarni was not paying even the discounted rate. That was creating issues for SJIH, both because of cashflow and because of the impact it had on other consultants potentially breaching the PHMIO.

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.

The breaches

284. On 21 August 2020 Mr Kulkarni wrote to Andrew Lewis reiterating his concern that the PHMIO created a problem with him holding more than 5% of the shares. He offered no solution.

285. The same day, SJIH allotted to Gwent 1,651 A shares (the **A Share Breach**); and 2,000 B shares (the **B Shares Breach**). In both cases the allotments were dated to take effect from 4 June 2020 on the advice of Bevan Buckland. SJIH and Gwent both admit that the allotments were repudiatory breaches of the SHA.

286. On 25 August 2020 Loosemores recorded that they had not advised on the allotment. "*Partly in light of those allotments*" they provided a draft letter to terminate the SHA. Mr Butler submitted to me that Loosemores' advice was just a cover for Andrew Lewis – he had acted unilaterally before and he would have done so again. He further submitted that, in any event, Loosemores were backed into a corner by the A and B Shares Breaches such that they almost obliged to give this advice. Those were powerful submissions, made with Mr Butler's characteristic fluency. I have, moreover, noted my reservations about Andrew Lewis' approach to legal advice. On balance, however, I cannot accept them.

287. It is certainly true that Andrew Lewis had form when it came to going it alone and hoping the legal advice would catch up with what he had, in any event, decided to do. Judged by his own standards – "*You know it could be said, unfairly, that a leopard never changes its spots*" – this would be proof enough. As I have already noted, however, that standard is unfair, and in my experience a poor guide.

288. Set against that are a number of factors. First, where he had ignored legal advice previously Andrew Lewis was open about it. In this context, by contrast, he was quite clear:

> But from my point of view, if I had not had that advice from Loosemores, I would never have done it. Whether I liked it or not was another matter. Whether or not I would ever have been able to work with Mr Kulkarni is another matter. But that is what I did. I can assure [you], if Mark Loosemore had come back and said to me, "Andy, you can't, the thing is in place", and of course ultimately we find that this advice I received was incorrect. When I found out it was incorrect I tried to put it right.

289. I believed that answer.

290. Secondly, it was obvious that he disliked (and presumably still dislikes) the SHA. He described it variously as "*nonsense*", "*absolute nonsense*", "*never going to work*", "*ridiculous*", "*a load of rubbish*" and "*always destined to fail*". Yet he had at no stage until Loosemores' advice taken steps to terminate it, despite having attempted (wrongfully) to terminate other agreements with Mr Kulkarni.

291. Thirdly, it is not right to say that Loosemores were backed into a corner in giving this advice by the A and B Shares Breaches. They had first raised the possibility on 11 August 2020, when they criticised Mr Kulkarni's "prevarication". Andrew Lewis was a most receptive audience and doubtless

welcomed the advice. As his evidence made clear, he was keen to be rid of the SHA. But he did not force Loosemores into giving that advice.

292. Loosemores provided a draft termination letter on 26 August 2020. Over the next day or so, Andrew Lewis and Loosemores exchanged drafts of a covering email and on 28 August 2020 Andrew Lewis wrote to Mr Kulkarni, copied to Mr Hammond, purportedly in response to Mr Kulkarni's points on the PHMIO:

> Apologies for the delay in getting back to you with regard to the point you have raised below regarding the CMA.
>
> We i.e. [Gwent] have taken legal advice and are advised as follows:-
>
> - If we finalise the offer letter with you as it stands then you will not be allowed to practice at the [Hospital] as a self-employed consultant.
> - No self-employed consultant can have a stake directly/indirectly in [SJIH] that represents more than a 5% shareholding/financial interest.
>
> So you have three choices:
>
> - You sign the letter as it is and do not seek to practice at the [Hospital] as a self-employed consultant.
> - You decline to sign the letter and seek to practice at the [Hospital] as a self-employed consultant.
> - We agree to amend the letter to reduce your percentage 'share of proceeds' from 25% to 5% and you can then also seek to practice as a self-employed consultant at the [Hospital].
>
> Please let me have your thoughts within the next 7 days. Neither of us can allow this to drag on.
>
> In the meantime, please find attached a letter giving you notice in relation to the [SHA] dated 13th February 2020, being the day before [Gwent] made the loan/equity investment. This is not intended as a provocative step on our part. It just needs to be done in order to protect our position.

293. He attached the termination notice in the form suggested by Loosemores:

> 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 [sic] that the SHA is based on a fundamental flaw, namely that the Initial Shareholders included Mr …Kulkarni owning 1,652 A Shares in [SJIH]. 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.

294. This forms the basis of the Termination Breach. The parties agree that it was a repudiatory breach of the SHA.

295. The final alleged breach upon which Mr Kulkarni relies relates to his appointment of Mr Hussain as a director of SJIH. The facts of the Hussain Breach are broadly agreed, although the Defendants deny that those facts represent a breach of the SHA.

296. Under clause 13.2 of the SHA, each A shareholder had a right to appoint a director. In Mr Kulkarni's two letters of claim dated 21 May 2021 he sought to exercise that right. Later that day, Andrew Lewis emailed Mr Hussain stating that, pending legal advice, "*neither Gwent Holdings nor I personally accept the validity of your purported appointment*".

297. In their response to the letter of claim dated 10 June 2021, Gwent's solicitors stated: "*as the SHA has been rescinded by our client, your client has no entitlement to appoint a director*." As is now accepted by all parties, that statement was based on a false premise; the SHA had not been terminated (still less rescinded).

298. That was recognised in a letter from Clarke Willmott, acting for SJIH, dated 24 September 2021. Clarke Wilmott recognised that Mr Kulkarni was still entitled to appoint a director. Initially Clarke Wilmott argued that Clause 13.4 required notification to every other shareholder and the Hospital before the appointment could be confirmed. That argument was abandoned by SJIH and not advanced by Gwent in their pleaded cases.

299. The Board of SJIH "*approve*[d] *the appointment of Mr Shelim Hussain as a Director*" at a meeting on 12 November 2021.

Post-breach conduct

300. There are three events or groups of events that are said to be relevant that followed the admitted and alleged breaches.

301. First, shortly after the various breaches, on 21 October 2020, Mr Hammond received an email from the GMC indicating that the GMC had started an investigation regarding Mr Kulkarni's fitness to practice stemming from his shareholding in SJIH. Apparently this was triggered by a complaint from AXA relating to Mr Kulkarni's shareholding. This is said by the Defendants to show that the issue of Mr Kulkarni's shareholding remained a live and legitimate concern for SJIH.

302. Unlike other GMC complaints that have been raised in the course of this dispute, there was very little information regarding the shareholding investigation. Ultimately, it seems to me that it adds little. AXA's concern, and presumably that of the GMC, was that the PHMIO was complied with. If Mr Kulkarni's arrangements failed to comply with the PHMIO there was an issue in any event and SJIH would be right to be concerned to resolve it. If those arrangements did comply with the PHMIO there was no issue either as regards the CMA or as regards AXA. Obviously, from SJIH's perspective the loss of a major client was and, going forward, would be significant; I readily accept that SJIH would want to resolve the matter to AXA's satisfaction. But it does not change the legal analysis; SJIH needed to comply with the PHMIO in any event.

303. Secondly, on 24 September 2021 SJIH's solicitors, Clarke Wilmott, wrote separately to DJM, at the time acting for Mr Kulkarni, and VWV, acting for Gwent. Clarke Wilmott invited Gwent to return the 1,651 A shares to SJIH so that they could be registered in Mr Kulkarni's name. VWV 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 SJIH, 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 SJIH transferred to him the A shares that it held in treasury.

304. Finally, Mr Kulkarni makes a number of allegations that he and witnesses that he called or intended to call were harassed by Mr Lewis or by Gwent. This is tied to his argument that the relationship that he had with Mr Lewis, Gwent, Andrew Lewis and SJIH was one of quasi-partnership, such that if the mutual trust and confidence that Mr Kulkarni says was necessary for that relationship was damaged, it would render breaches irremediable. Since those form a discrete issue for determination in these proceedings I address the facts below in the context of that specific issue.

Issues for determination

305. Mr Kulkarni's position shifted in the course of these proceedings and, indeed, in the course of the trial. To a lesser, but still significant, degree so did that of Gwent. The shift in Mr Kulkarni's claim rendered SJIH a much more marginal party than had originally been the case.

306. Very helpfully, the parties were able to agree on a list of issues for determination.

Questions of Law Relating to Clause 7.1(d)

Is it possible for the defaulting party to remedy a material and/or persistent breach of the SHA under clause 7(1)(d) is the absence of a notice to remedy?

307. The parties agree that the principles generally applicable to the interpretation of contracts are summarised by Carr LJ, as she then was, in *ABC Electrification Ltd v National Rail Infrastructure Ltd* [2020] EWCA Civ 1645 at [18]:

> A simple distillation, so far as material for present purposes, can be set out uncontroversially as follows:
>
> i) When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. It does so by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions;
>
> ii) The reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision;
>
> iii) When it comes to considering the centrally relevant words to be interpreted, the clearer the natural meaning, the more difficult it is to justify departing from it. The less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning;
>
> iv) Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made;

> v) While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party;
>
> vi) When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time the contract was made, and which were known or reasonably available to both parties.

308. The starting point is therefore the language used in clause 7.1, which provides:

> 7.1 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).

309. Mr Butler submitted that this left cure in the hands of the innocent party; since no notice to remedy had been served, there was no opportunity for Gwent to remedy the various breaches.

310. To my mind that approach does not address the way that the clause as a whole functions. Mr Kulkarni relies on clause 7.1 to show that a Transfer Notice is deemed to have been served. In the case of material breach that happens immediately before:

> 310.1. The commission of a material or persistent breach that is not capable of remedy, in which case Board action is irrelevant.
> 310.2. The commission of a material or persistent breach which is capable of remedy but has not been remedied within 10 Business Days of notice to remedy the breach being served by the Board.

311. 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.

312. Is that plain reading commercial? In posing that question I have in mind the specific points made by Carr LJ in *ABC Electrification* at 18(ii), (iv) and (v).

313. Mr Butler suggested that such a reading would produce a very uncommercial outcome because it risked leaving Mr Kulkarni with no rights if the Board refused, wrongly, to act. He rightly observed that the Board needs Shareholder Consent and the breaching party would be excluded from that vote, but that is a negative control: Mr Kulkarni could stop the Board from serving a remediation notice but could not compel it to do so. Mr Kulkarni could, he submitted, be left with no rights in the face of the clearest of breaches.

314. The difficulty with that argument is that it assumes that the SHA is the only source of Mr Kulkarni's rights. In fact he would have the usual common law rights associated with repudiatory breach, the right to bring a claim for unfair prejudice under section 994 of the Companies Act 2006 and the right to sue the directors for breach of their duties.

315. Mr Kulkarni's position is that he could not accept a repudiatory breach because in some way that right was excluded under the SHA, and Mr Butler submitted before me that a section 994 petition may well not succeed. That takes matters no further, however. Assuming Mr Kulkarni had given up the right to accept a repudiation of the SHA, that cannot in itself mean that the court should flex the reading of other provisions to give him different rights by way of compensation. If a section 994 petition or a claim for breach of duty by the directors is unlikely to succeed, that suggests that the directors were not acting improperly in refusing to serve a remediation notice, and again is not a basis for saying that a plain reading of clause 7.1(d) is uncommercial.

316. That conclusion is reinforced when one considers what it is that Mr Kulkarni is seeking in these proceedings. If a Transfer Notice is deemed served he will have the right to buy Gwent's shares at the lower of their issue price and their fair market value. Given that one of the remedies that Mr Kulkarni seeks is to have fair market value determined in accordance with the SHA it would be wrong to prejudge how that valuation might work out. As a matter of construction, however, it would be a one way bet in Mr Kulkarni's favour, since he either gets the shares for what they are worth or, if it is less, at the issue price. Under no circumstances does the equation work in Gwent's favour.

317. It is, in my view, wholly unsurprising that the parties would limit such a one-sided right. Certainly, I would not regard it as uncommercial that such a right is structured so as to ensure that the breaching party has the opportunity to avoid what is, for it, only ever going to be a negative or neutral outcome by remedying its breach where that is possible.

318. Accordingly, in my view commercial logic chimes with a plain reading of the clause. Service of a remediation notice was a necessary step in the deemed Transfer Notice process.

Are repudiatory breaches of the SHA capable, as a class, of being remedied within the meaning of clause 7.1(d)?

319. It is common ground between the parties that at least some of the breaches were repudiatory in nature. It is also common ground that a repudiatory breach cannot be remedied, in the sense that if a party once commits a repudiatory breach of the contract an attempt to remedy the breach, however effective it may be in practice, does not deprive the innocent party of its right to terminate. Finally, it is common ground that Mr Kulkarni did not accept any of the repudiatory breaches and that the SHA remains in effect.

320. As I have noted, where a material or persistent breach of the SHA is irremediable there is no need for a remediation notice to be served on the breaching party (and indeed there would be no value in doing so). Mr Kulkarni's position is that if a repudiatory breach is irremediable for the purposes of the common law right to terminate, it should be treated as irremediable for all purposes; since at least some of the breaches are accepted by the Defendants to be repudiatory, those breaches are irremediable both at common law and for the purposes of clause 7.1(d) and trigger the deemed service of a Transfer Notice.

321. Mr Butler's starting point was *Bournemouth University Corporation v Buckland* [2010] EWCA Civ 121. Professor Buckland failed a high number of students in year-end examinations. The papers were remarked by the programme leader, who criticised Professor Buckland's original marking. They were then remarked again in a second remarking by a different member of staff, who awarded similar grades to those awarded by Professor Buckland but elevated some students from a straight fail to a marginal zone where their marks in other subject would be relevant to their overall success or failure.

322. Professor Buckland objected to what had happened and, as a consequence, the University set up an inquiry chaired by Professor Vinney. Professor Buckland also objected to this step, considering the Vinney inquiry to lack sufficient independence. Despite those reservations the Vinney inquiry vindicated Professor Buckland and criticised aspects of both the first and second remarking exercises. Professor Buckland remained unhappy with the process and shortly after the Vinney inquiry reported he resigned and brought proceedings for unfair constructive dismissal.

323. The employment tribunal found that in undertaking the second remarking without consulting with Professor Buckland the University breached the fundamental duty of mutual trust and confidence that it owed to Professor Buckland under his contract of employment, which was a repudiatory breach of that contract. The tribunal further found that the report of the Vinney inquiry did not afford sufficient exoneration to remedy the breach. The University appealed and the Employment Appeal Tribunal allowed the appeal; they accepted that the breach was repudiatory but found that it had been cured by the Vinney inquiry report before Professor Buckland had accepted the repudiation through his letter of resignation.

324. The Court of Appeal found that such remediation was not a course open to the University. Sedley LJ started by considering what routes were open to the innocent party when confronted with a repudiatory breach and referred to

Stocznia Gdanska SA v Latvian Shipping Co Ltd (No 3) [2002] EWCA Civ 889, specifically the following quote from Rix LJ at [87]:

> In my judgment, there is of course a middle ground between acceptance of repudiation and affirmation of the contract, and that is the period when the innocent party is making up his mind what to do. If he does nothing for too long, there may come a time when the law will treat him as having affirmed. If he maintains the contract in being for the moment, while reserving his right to treat it as repudiated if his contract partner persists in his repudiation, then he has not yet elected. As long as the contract remains alive, the innocent party runs the risk that a merely anticipatory repudiatory breach, a thing "writ in water" until acceptance, can be overtaken by another event which prejudices the innocent party's rights under the contract — such as frustration or even his own breach. He also runs the risk, if that is the right word, that the party in repudiation will resume performance of the contract and thus end any continuing right in the innocent party to elect to accept the former repudiation as terminating the contract.

325. Sedley LJ concluded:

> 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.
> 41. To introduce into this relatively clear pattern of law an exception where amends have been made or offered for a fundamental breach is to open up case after case to an evaluation of whether the amends constituted an adequate cure of the breach. …I do not think we are justified in releasing the contents of this Pandora's box into the general law of contract.

326. Jacob LJ was of like mind:

> 52. …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.

327. Mr Butler's argument was a simple one – if a breach cannot be remedied, it cannot be remedied for any purpose. Since repudiatory breaches have been held to be irremediable by their nature, it would make no sense to say that they could be remedied for the purposes of clause 7.1(d). To adopt one of Sedley

LJ's metaphors, the cards held by Dr Kulkarni included both the repudiatory breach and the deemed Transfer Notice.

328. Mr Higgo attacked this as a false equivalence. Material breach is a separate question to repudiatory breach and is more pragmatic and forward looking; as Lord Wilson put the point in *Wickland (Holdings) Ltd v Telchadder* [2014] UKSC 57 at [31], the answer: "*is to be found in a practical inquiry whether and if so how …the mischief resulting from Mr Telchadder's breach could be rederessed*". He further referred me to the observations of Staughton LJ in *Savva v Hussein* (1996) 73 P&CR 150 at 154: "*it is a remedy if the mischief caused by the breach can be removed.*" These cases showed, he submitted, that material breach was a separate regime with a separate test. One could not simply assume that because the breach was repudiatory it could not be remedied for the purposes of clause 7.1(d).

329. He further relied on two judgments of the Court of Appeal which, he argued, involved a similar position to the one before me: a breach that was alleged to be both repudiatory and a material breach for the purposes of a clause of the contract itself. In both cases the Court of Appeal had proceeded on the basis that the breach was remediable for the purposes of the termination provision.

330. The first was *Crane Co v Wittenborg AS* (unreported, 21 December 1999). Crane sold vending machines to Wittenborg. The termination clause of their contract for the supply of such machines provided that:

> Either party shall be entitled forthwith to terminated [sic] this Agreement by written notice to the other if that 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.

331. Crane decided to discontinue the model of vending machine in question and on 15 and 25 April 1997 wrote to Wittenborg explaining: "*Because of a recent history of low volumes, this model will be discontinued upon completion of the above purchase order.*" As the terms of those faxes made clear, the current order would be fulfilled. Accordingly, the most that they could represent was an anticipatory breach of the agreement.

332. Wittenborg initially did very little in response but on 13 June 1997 placed a further order for the machines. Crane responded on 20 June 1997, attaching copies of the April faxes and explaining that the model had been discontinued. On 11 July 1997 Wittenborg wrote to Crane purporting to give formal notice of the breach and stating that it was treating itself as discharged from any further performance under the contract. On 31 July 1997 Crane responded, denying that it had breached the agreement and purporting to accept what it described as Wittenborg's repudiatory breach.

333. The Court of Appeal upheld the trial judge's finding that Crane was not in repudiatory breach of the agreement. Moreover, if it had committed a breach then termination would have to be in accordance with the clause set out above,

that is it would only arise in the case of substantial breach. Mance LJ, as he then was, at paragraph 21 of the transcript of the judgment treated that term as being synonymous with repudiatory breach. He appeared to accept that such breaches potentially were capable of remediation.

334. The second decision to which Mr Higgo referred me was *Force India Formula One Team Ltd v Etihad Airways PJSC* [2010] EWCA Civ 1051. This was the same year as *Buckland* but before a different panel of the Court of Appeal and *Buckland* does not appear to have been cited.

335. The Claimant owned the Force India Formula One team (the **Team**), which it had acquired from a Dutch company, Spyker. The Defendant was one of the Team sponsors. Under the sponsorship agreement, Etihad's name was to form part of the Team name, the Team was not to enter into activities that might conflict with Etihad's activities and was not to have another airline sponsor. Upon acquisition of the Team the Claimant changed the livery of the Team to include the logo of Kingfisher, another airline. Etihad claimed this represented a repudiation of the sponsorship agreement and purported to terminate; the Claimant argued that the termination was invalid and, itself, represented a repudiation of the agreement and it, in turn, purported to terminate.

336. The agreement contained a termination clause which provided, so far as is relevant:

> [Etihad] 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;

337. Rix LJ, with whom Patten LJ and Sir Mark Waller agreed, found that the breaches in question were repudiatory in nature and irremediable as a matter of fact. However, at paragraphs [87] and [102] he plainly assumed that a repudiatory breach was, in principle, remediable for the purposes of the termination clause.

338. Mr Higgo therefore submitted that *Buckland* could be right, and indeed accepted that it was right in saying that a repudiatory breach could not be remedied for the purposes of the common law right to terminate, but that would not affect the question of whether the same breach, in its guise as a material breach, was remediable for the purposes of clause 7.1(d).

339. In weighing those competing positions it seems to me helpful to take a step back and look at the broader principles. It is trite law that a repudiatory breach contains two elements: a breach of an obligation under the contract; which in turn represents a repudiation of that contract (Chitty on Contracts 35th Ed at 28-009). An anticipatory breach, by contrast, involves only the latter – it

arrives at a time before the relevant performance is due (28-071). It is equally trite that in the case of repudiatory breach affirmation of the contract is not waiver of the breach (Chitty, 28-054). The innocent party has two separate and freestanding rights and can choose to enforce either, neither or both.

340. The co-existence of both elements is critical to the issue of remediation. *Union Eagle v Golden Achievement* [1997] AC 514 (PC) involved a sale of land. Completion was to be at 5pm on the specified date and time was of the essence. The purchase monies arrived at 5:10pm, after the contractually specified time but before the seller had accepted the repudiation. The seller terminated the contract for repudiatory breach and forfeited the deposit. The Privy Council agreed that it was entitled to do so, noting at 518C-D that:

> It is true that until there has been acceptance of a repudiatory breach, the contract remains in existence and the party in breach may tender performance. Thus a party whose conduct has amounted to an anticipatory breach may, before it has been accepted as such, repent and perform the contract according to its terms. But he is not entitled unilaterally to tender performance according to some other terms. Once 5pm had passed, performance of the contract by the purchaser was no longer possible. The vendor could be required to accept late performance only on the grounds of some form of waiver or estopel.

341. A non-repudiatory breach contains only one of the two elements and as a result the outcome is quite different. As Neuberger LJ, as he then was, explained in *Akici v LR Butlin Ltd* [2005] EWCA Civ 1296 at paragraphs [64]-[65]:

> 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… 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.

342. *Akici* was a case under section 146(1) of the Law of Property Act 1925, but that provision equally involves an analysis of whether a breach is capable of remedy. None of the parties suggested that anything turns on the fact that the concept of remediability was being considered against a statutory rather than a contractual backdrop. In any event, the same point was made in the context of contracts by Lord Reid in *L Schuler AG v Wickman Machine Tool Sales* [1974] AC 235 at 249H-250A: "…*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 applies.*" In my view the reasoning in *Akici* applies equally to the contractual analysis. Nor is *Akici* an outlier. None of the jurisprudence on remediability that I address below would make any sense if the position were that an inability to perform the contract in accordance with its terms renders a breach irremediable.

343. What sets repudiatory breaches apart from other breaches is the rights to which they give rise. Thus, in *Buckland* Sedley LJ at [40] looked at "*the alternative courses which may be taken in response to a repudiatory breach*". The issue was that: "*From that point* [repudiatory breach] *the cards are in the hand of the wronged party: the defaulting party cannot choose to retreat*". Jacob LJ took a similar approach at [52]: "*I see no reason for the law to take away the innocent party's right to go.*"

344. Popplewell J, as he then was, in applying *Buckland* took the same approach in *Super-Max Offshore Holdings v Malhotra* [2017] EWHC 3246 (Comm) at [120]:

> I am bound by Court of Appeal authority that English law does not permit a party in repudiatory breach unilaterally to cure the breach once it has been committed, so as to affect the innocent party's right to rely upon it to put an end to the contract. The innocent party may terminate unless he has lost the right to do so because of an election to affirm or a deemed affirmation from the passage of time.

345. In the case of repudiation the issue is not simply that the contract can no longer be performed in accordance with its terms; it is that this has resulted in the innocent party acquiring a right, and the defaulting party cannot unilaterally take that right away. Put another way, it is not just a question of whether the breach is, as a factual matter, remediable; it has given rise to a right and that right is protected.

346. It is important to recognise that Sedley LJ in *Buckland* went on to note at [41] that to introduce an exception where amends had been made or offered "*is to open up case after case to an evaluation of <u>whether the amends constituted an adequate cure of the breach</u>*" (my emphasis). That is, unquestionably, focussed on the adequacy of remediation and not the right acquired by the innocent party. It seems to me, however, that he was not there setting out the principled basis for the rule, which he had already explained, but rather was raising a practical benefit that buttressed his principled position. To the extent that is the basis for the rule I find it difficult to reconcile with the greater weight

of authority that takes on precisely that issue – to use Sedley LJ's metaphor, which opens just that Pandora's box – in the case of material breach.

347. It follows that where the "*innocent party's right to go*" has been lost there is no reason to treat a repudiatory breach in any way differently to other breaches. By allowing the breaching party to remedy in those circumstances the court is not affecting that right at all; the innocent party has already given it up.

348. 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 SJIH 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).

The Share Allocation Issue

What was discussed and (if anything) agreed at the Pre-Meeting on 7 February 2020, and on behalf of whom?

349. It is common ground that Mr Lewis attended the meeting as a representative of Gwent, of which he is the directing mind and will, but not of SJIH.

350. In his witness statement Mr Kulkarni recognised that at the time he did not give much thought to the capacities in which the attendees were present but with hindsight considered that he was there in his personal capacity and as a representative of SJIH. He said nothing about Mr Davies.

351. It seems to me unsustainable to suggest that Mr Kulkarni was acting in anything other than his own interests at the Pre-Meeting. Three issues were addressed at that meeting. The first was control, which was plainly a shareholder issue. Once the shareholders had agreed control, SJIH could not sensibly have anything to say about it. The second was the alleged debt of £750,000. Broadly, Mr Kulkarni wanted SJIH to assume a debt he claimed was owed to him by Oldco, for which SJIH would not otherwise have any liability. Plainly, Mr Kulkarni had a conflict on that point – he could not act for SJIH on such an issue. In any event, there is nothing to suggest that he had actual authority to negotiate on SJIH's behalf and no argument was advanced that he had apparent authority. Finally, as to the discussion on the payment for Mr Kulkarni's shares, his own evidence is that this was an arrangement between him personally and Gwent, rather than an obligation of SJIH. If it were an arrangement between him and SJIH he would face the same conflict issues that I have just noted.

352. The only capacity in which Mr Davies could attend was as a director of SJIH, but since he did not agree to anything at the meeting that is only relevant to SJIH's corporate knowledge.

353. For these reasons I consider that the Pre-Meeting was, legally, a meeting between Gwent and Mr Kulkarni personally, which SJIH attended only as an observer.

354. It was not in dispute that the test for formation of an agreement is an objective one. The principles are conveniently summarised in *RTS Flexible Systems Ltd v Molkerei Alois Müller Gmbh* [2010] UKSC 14 at [45]:

> Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement.

355. It is also common ground that since any agreement reached at the Pre-Meeting was wholly oral, I can look to subsequent conduct in establishing what was agreed (*Carmichael v National Power plc* [1999] 1 WLR 2042). Mr Butler rightly reminded me that subsequent conduct might represent a mistaken understanding by a party as to what was agreed but accepted the general principle.

356. As I have noted, Mr Kulkarni's evidence is that the issue of control was what took much of the time at the Pre-Meeting. It is, however, the simplest of the three issues. Mr Lewis, on behalf of Gwent, and Mr Kulkarni agreed in principle that Gwent was to have board control of SJIH. That was not intended to be a binding agreement in itself; it needed to be (and was) documented in the SHA.

357. The second part of the discussion involved Mr Kulkarni's claims against Oldco for £750,000, which he wanted to be paid by SJIH. I have found that Mr Lewis agreed that if Mr Kulkarni could evidence his debts and if SJIH was profitable, SJIH should in some way make Mr Kulkarni whole for those debts.

358. That agreement was flawed in that Mr Lewis had no power to bind SJIH. Doubtless it provided considerable comfort to Mr Kulkarni that Mr Lewis was open to SJIH paying sums Mr Kulkarni claimed from Oldco, since between them he and Gwent controlled the board and the majority of the shares in SJIH. But only SJIH could actually assume those debts, and even if Mr Davies had authority to act on SJIH's behalf, which I do not believe he did for these purposes, nobody suggests that he agreed the proposal.

359. It was also subject to real uncertainty. The point was discussed further in the Main Meeting, at which James Davies noted: "*Need to work this out.*" That is only consistent with the point not, at that stage, having been worked out.

360. It also seems to me that Mr Kulkarni could not have understood it to be a binding agreement. His justification for not disclosing the arrangement at the 13 February board meeting was that he was being treated no differently to the other consultants. The other consultants, as Mr Kulkarni himself said shortly after, had only a gentleman's agreement. Mr Kulkarni knew what that meant – it meant they had nothing that was legally enforceable. He could only have believed he was in the same boat as them if his agreement, too, was non-binding.

361. In connection with Mr Kulkarni's inability to claim EIS relief on the SJIH shares I believe that Mr Kulkarni and Mr Davies explained the issue to Mr Lewis, much as Mr Kulkarni described, then Mr Lewis agreed that Mr Kulkarni could "*have the shares*". I do not believe that he mentioned Mrs Lewis, at least at that stage. Almost immediately on him saying that, the Pre-Meeting ended. I do not believe there was any need to persuade Mr Kulkarni and certainly, for the reasons I have given, Mr Lewis made no attempt to do so.

362. While there was therefore an apparent consensus, in my view it was insufficient to form the basis of a binding contract.

363. First, it was uncertain in context what Mr Lewis had agreed to do. Mr Kulkarni obviously took it to mean that Gwent would give Mr Kulkarni his 1,651 A shares in SJIH. His exchanges with his advisors from mid-February onwards demonstrate that; it remains in part the language used in the Re-Re-Amended Particulars of Claim, albeit now finessed to include a concept of exchange and consideration. Applying *Carmichael*, all of that is relevant in considering what was agreed. The difficulty with that reading is that Gwent at that stage had no shares in SJIH and at the 13 February board meeting applied only for its shares; Mr Kulkarni applied separately for his 1,651 A shares accompanied by, as I have noted, a promise to pay for them. Had the intention been that Gwent would transfer the shares, that would make no sense – it first needed to acquire them and this was the ideal opportunity, and if Gwent was to furnish Mr Kulkarni with shares there was no reason why Mr Kulkarni should apply to SJIH for an allotment and issue.

364. The fallback now adopted by Mr Kulkarni is that Mr Lewis' words amounted to a promise by Gwent to pay for his A shares. That requires more work with the words, since a reference to "*have the shares*" is different to "*we will pay for your shares*". I accept, though, that this was a short meeting, Mr Lewis is a non-lawyer and language is a flexible tool.

365. The difficulty with Mr Kulkarni's fallback is it is obviously not what he understood at the time, as his repeated references to gifting the shares made clear. Those references included requests for tax advice, where one would

expect language to be used with more precision. There is a consistent pattern, from the first communication with Mr Isaacs through his exchange with Andrew Lewis in late April all the way to the commencement of proceedings: his talk was of a gift of shares, not a promise to pay for them. That, too, is relevant under *Carmichael*.

366. The difference was potentially a significant one. At the time of the Pre-Meeting it was understood that Mr Kulkarni would pay £80,000 for his 1,651 A shares but there was no binding agreement with SJIH to that effect. Things were moving quickly, Mr Lewis subsequently reduced his capital contribution, it would have been entirely possible that SJIH would have either sought more from Mr Kulkarni or (which is less likely) reduced the price of his A shares pro rata. What then? If the agreement was to transfer the shares, the risk of a price fluctuation rested with Gwent; if it was to pay for the shares regardless of price it also sat with Gwent; but if it was to pay £80,000 for the 1,651 A shares it sat with Mr Kulkarni. One ought to be able to say from inception which is correct; in my view, that is not possible from the discussion at the Pre-Meeting.

367. Nor is that the end of it. Mr Higgo submitted that it could have meant that Gwent would not object if Mr Kulkarni were able to reach an agreement with SJIH under which he could have his shares. Alternatively, Mr Lewis might have been suggesting active support in passing the necessary resolutions.

368. Assessed objectively, those readings make much more sense in the context of the Pre-Meeting as a whole. The parties had started by agreeing control of SJIH. They then moved to Mr Kulkarni's claims against Oldco, which he wanted paid by SJIH. What was provisionally agreed was that payment would depend on SJIH's profitability, a solution that would not expose Gwent's capital contribution to SJIH. When they moved to Mr Kulkarni's shares it would make sense for Mr Lewis to propose a similar approach that did not expose Gwent to making any upfront payment. Such a reading also makes more sense when one considers that Gwent did not have shares to give and only applied to acquire its own shares, but SJIH could obviously issue and allot shares to Mr Kulkarni.

369. There would be issues to iron out with such an agreement, notably tax and the capital maintenance rules of the Companies Act. But that, too, is consistent with what happened: Mr Kulkarni immediately sought tax advice. Gwent did nothing but then the onus under such an arrangement was not on Gwent; it was Mr Kulkarni who wanted his shares transferred without having to pay for them. Maybe more strikingly, Mr Lewis did not inform Andrew Lewis, Gwent's appointee to the board of SJIH, but since it is obvious that Mr Lewis simply forgot about the arrangement, whatever it was, that seems to me not to prove a great deal. The need to obtain further advice would necessarily render the agreement provisional on that advice, but that is consistent with Mr Kulkarni not declaring the discussion when disclosing his conflicts of interest at the 13 February board meeting. Since nothing had been fixed, he was in no different a position, legally, to the other consultants.

370. Finally, it is, at the very least, not inconsistent with Mr Kulkarni agreeing to subscribe for and pay for shares at the 13 February board meeting. Plainly, if Gwent was agreeing to exercise its rights as a shareholder of SJIH it had to first become a shareholder; Mr Kulkarni would not take the risk of missing out, trusting instead that once he and Gwent were in control, things could quickly be resolved.

371. That, though, is not the end of the uncertainty. The relationship between the £80,000 and the £750,000 was confused. Mr Davies' evidence here was striking:

> And I was thinking, hang on a minute, where does the, where is that £80,000 fitting into the 750? If it had been a formal legal meeting which I was conducting as a lawyer I would have said, "Hang on, everyone sit down a minute, where are we going here? Where does the 80,000 go into the 750?" I was there literally thinking, where are we going here. But they were gone, and then [Mr Kulkarni] came back, wanted a copy of that, [Mr Davies' note of the Pre-Meeting]. I got, that is the whole purpose of the next meeting, to sort the detail out.

372. It remained unclear at the Main Meeting, as evidenced by the notes of James Davies and Ms Evans, which I will address in the context of that meeting.

373. Self-evidently, the conclusion "where are we going here" is not the hallmark of a binding contract. In my view there remained too much uncertainty on key aspects of what had been agreed for there to be a binding agreement.

374. A further issue for Mr Kulkarni is that a promise to make a gift is not enforceable (*Standing v Bowring* (1885) 31 Ch D 282 *per* Lindley LJ at 290). In order to show that any agreement reached was binding, Mr Kulkarni must show that it was supported by consideration, that is to say he must have provided something in exchange for Mr Lewis' promise if he is to enforce that promise (Chitty at 6-001). It is fair to say that Mr Kulkarni's position on what was agreed has evolved in light of that requirement.

375. As I have noted, his consistent position was precisely that what had been promised by Mr Lewis was a gift. Mr Butler cautioned me, rightly, against reading too much into the use of the word gift by someone with no legal background. It is not simply the language that Mr Kulkarni used, however; it is what was not said. In multiple emails he refers to Mr Lewis' or Mrs Lewis' or Gwent's promise; he does not identify what he gave up to secure that promise.

376. That position persisted into the original Particulars of Claim, which simply referenced a promise to gift shares made against the backdrop of Mr Kulkarni having explained the issues with him securing EIS relief. There then followed a Request for Further Information, in response to which Mr Kulkarni clarified that his claim in respect of the £80,000 was a claim for breach of contract. Shortly after he served Re-Amended Particulars which asserted that the

consequence of Mr Lewis' promise was that Gwent rather than Mr Kulkarni had to pay SJIH for Mr Kulkarni's shares.

377. In their respective Defences the Defendants denied that Mr Kulkarni gave any consideration for any promise made by Mr Lewis. It was only in the Reply, served almost a year after proceedings had commenced, that Mr Kulkarni addressed the point. There, the consideration was said to be Mr Kulkarni's agreement to reclassify his existing share in SJIH into an A share, thereby enabling Gwent's investment to proceed. A further year passed before the Amended Reply (which, I stress, was the first statement of case settled by Mr Butler) added that Mr Lewis' promise also secured the continued involvement of Mr Kulkarni at SJIH.

378. The position evolved further in Mr Kulkarni's witness statement, where he described an exchange between him, Mr Davies and Mr Lewis after Mr Lewis' promise that he could have the shares in which Mr Kulkarni initially rejected that offer as not being adequate compensation for his loss of EIS relief but Mr Lewis and Mr Davies persuaded him to accept it.

379. Taking each of these in turn, I reject the suggestion that Mr Kulkarni bargained for the promise of free or discounted A shares in return for the reclassification of his existing share in SJIH. There is no suggestion of any such exchange in any of the evidence. Moreover, such a technical solution might occur to a lawyer familiar with the English law on consideration but would be highly unlikely to present itself as a solution to an orthopaedic surgeon. It is simply implausible that this was ever discussed.

380. As to keeping Mr Kulkarni at SJIH, I agree that this was in play at the Pre-Meeting, but in my view it was linked to, and only to, the discussion over the alleged debts of Oldco. Thereafter, in Mr Kulkarni's words, the discussion "*moved on*".

381. There is a suggestion in Mr Kulkarni's witness statement that a similar threat was at least hinted at in connection with the £80,000, when he complained it was inadequate compensation for his loss of EIS relief. I have rejected that evidence, however, as being inconsistent with the evidence of Mr Davies and, indeed, Mr Kulkarni on cross-examination. I believe that Mr Lewis said that Mr Kulkarni could have the shares and the meeting almost immediately broke up with nothing more said on the point.

382. In my view the evidence shows that Mr Kulkarni, assisted by Mr Davies, explained Mr Kulkarni's problem to Mr Lewis and simply left it to him. Mr Kulkarni may well have hoped for a particular outcome but he did not propose, less still request, one. As he put it in his statement:

> I told [Mr Lewis] that the other Consultants would therefore benefit from EIS relief and I would not. [Mr Lewis] immediately offered that instead of paying £80,000 for my 1,651 new 'A' Shares, Gwent would instead gift me my 1,651 'A' Shares.

383. For reasons I have given I prefer the evidence of Mr Davies as to what Mr Lewis did propose and as to what happened thereafter – the Pre-Meeting broke up. But Mr Kulkarni's description of how the proposal came to be made seems to me probable.

384. The difficulty for Mr Kulkarni is that such a discussion does not represent the necessary exchange. He was not offering to give up his EIS relief if Mr Lewis would pay for or gift his SJIH shares. He was complaining that he would inevitably not obtain EIS relief. He was not asking for Mr Lewis to do anything in particular; the proposal came from Mr Lewis and did not require Mr Kulkarni to do anything in return. It was a promise to make a gift, nothing more.

385. Finally, I note what happened after the Pre-Meeting concluded. In the Main Meeting, James Davies and Mr Hammond both recalled Mr Kulkarni saying he would not or should not have to pay for his shares. Nobody recalled him saying that Gwent would pay for or gift those shares, none of the contemporaneous notes record it and in the Minutes prepared by Ms Evans shortly thereafter it is recorded that Mr Kulkarni would pay for his shares. None of that is consistent with a binding agreement having been reached at the Pre-Meeting. Quite to the contrary, it is flatly inconsistent with such an agreement ever having been communicated to anyone.

386. The Minutes also record a very limited declaration of potential conflicts from Mr Kulkarni at that board meeting. His justification, which I accept, is that he believed he was getting nothing better than the other consultants. I do not believe he could sensibly have reached that conclusion had he thought he had a binding agreement from Gwent to pay for or provide his shares.

387. All of that is consistent with the nature of the Pre-Meeting itself. As Mr Davies described it: "*I would not have put the label of a meeting on it, certainly at the beginning of it.*" Mr Kulkarni had sprung the Pre-Meeting on Mr Lewis and Mr Davies without notice or an agenda. I believe that, as with the deadlock proposal, he was seeking to secure some late concessions, although Mr Lewis used it to force the issue of control. I further believe that Mr Kulkarni was offered some comfort by Mr Lewis but it was a throw-away line at the end of the Pre-Meeting with the participants under time pressure to go through to the Main Meeting. Mr Kulkarni snatched at what he had got. I accept Mr Davies' evidence that what he had got was unclear and uncertain, that it needed to be resolved at the Main Meeting and ideally go into a formal agreement. None of that happened. What was agreed at the Pre-Meeting was a phase in discussions, not an end-point to them. It was not enough to put Mr Lewis or Gwent under a legal obligation.

What was discussed and (if anything) agreed at the Main Meeting on 7 February 2020, and on behalf of whom?

388. It is not Mr Kulkarni's case that further agreements were reached at the Main Meeting but, rather, that the agreements reached at the Pre-Meeting were repeated and accepted by the participants at the Main Meeting.

389. The issue of control did not require any further discussion, other than to update all parties that it had been agreed between the future A shareholders, Gwent and Mr Kulkarni. At this stage it remained subject to final documentation, which was achieved through clause 14.5 of the SHA.

390. The £750,000 was discussed and alternatives such as an increase to Mr Kulkarni's salary in due course were considered but nothing was agreed. In the words of James Davies' contemporaneous note, "*Need to work this out.*" It remained very much a work in progress.

391. At the risk of repetition, this is reflected in subsequent events. It is simply not plausible that James Davies, Ms Mills and Ms Evans would have heard Mr Kulkarni say he had a binding agreement that SJIH would pay his claims against Oldco but then proceeded to draft the Minutes for the 13 February board meeting in the way that they did.

392. Mr Kulkarni indicated that he would not pay for his shares. His basis for that position was not clearly expressed, however, and James Davies at least understood it to be in some way tied to the £750,000, the same confusion that Mr Davies had experienced in the Pre-Meeting. What is very clear is that no mention was made of Gwent paying for or gifting Mr Kulkarni his shares. Not only do the attendance notes not mention it, it is obvious from the Minutes and her 10 March email to Mr Hammond that Ms Evans understood the opposite to be true.

393. Mr Davies' evidence in respect of the Pre-Meeting was that the agreement reached there around Mr Kulkarni's SJIH shares was uncertain. He concluded: "*But everyone is off into the* [Main Meeting] *and, frankly, I thought, well, we are still going, and that is the purpose of the* [Main Meeting] *is to sort all this out.*" In my view, it had not achieved that purpose.

What was discussed and (if anything) agreed at the SJIH Board Meeting on 12 or 13 February 2020, and on behalf of whom? Specifically, was a contract of allotment under which shares would be issued conditional on payment of £80,000 concluded between SJIH and Mr Kulkarni at that meeting?

394. For the reasons I have given above, I consider that the meeting took place on 13 February and the Minutes are a largely accurate reflection of it.

395. Mr Kulkarni made a limited disclosure of his personal involvement in the transaction, a disclosure that he could not honestly have believed to be true if he thought he had binding commitments worth in excess of £800,000 that was contingent on the transaction going ahead.

396. At that meeting Mr Kulkarni offered to subscribe for 1,651 A shares at a total price of £80,000 and SJIH accepted that offer, resulting in a contract of allotment on those terms. There is nothing to suggest that Mr Kulkarni even sought, let alone was granted, additional time in which to pay or that he was to receive his shares ahead of payment, which in any event would have been

inconsistent with the articles of SJIH. In my view, the best reading of the evidence is that he agreed to pay for his shares upfront and the obligation on SJIH to issue was conditional on receipt of that payment.

What is the true construction and effect of Recitals (A) and (B) of the SHA, and does the doctrine of estoppel by deed operate to prevent Gwent or SJIH from challenging what is stated? If the doctrine of estoppel by deed does apply, what is the effect of that doctrine?

397. Estoppel by deed is a sub-species of estoppel by contract and the two operate in similar ways (*Reeve v McDonagh* [2024] EWHC 439 (Ch) at [55]).

398. Such an estoppel arises where the parties to the contract intend that the assumed statement of fact is to be treated of true, regardless of whether it in fact is. In *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, Moore-Bick LJ summarised the rule at [56]:

> There is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis for the transaction, whether it be the case or not. For example, it may be desirable to settle a disagreement as to an existing state of affairs in order to establish a clear basis for the contract itself and its subsequent performance. Where parties express an agreement of that kind in a contractual document neither can subsequently deny the existence of the facts and matters upon which they have agreed, at least so far as concerns those aspects of their relationship to which the agreement was directed. The contract itself gives rise to an estoppel.

399. *Peekay* was cited with approval in *First Tower Trustees Ltd. v CDS (Superstores) International Ltd.* [2018] EWCA Civ 1396, in which the Court of Appeal emphasised that, unlike many forms of estoppel, reliance is not required: the contract itself forms the basis of the estoppel (see Lewison LJ at [47] and Leggatt LJ at [95]).

400. The rule applies equally to recitals. As Lord Russell explained in *Greer v Kettle* [1938] AC 156, 167:*"…where a recital is intended to be an agreement of both parties to admit a fact, it estops both parties, but it is a question of construction whether the recital is so intended…"*

401. The point was further addressed by the Privy Council in *Prime Sight v Lavarello* [2013] UKPC 22 at [41]: "*However, if as a matter of construction the recital amounts to a mutual agreement to treat it as true, and if there are no vitiating factors such as illegality or misrepresentation, the fact that the parties have willingly so bound themselves is itself sufficient reason for the contract to be enforced.*"

402. As the exercise is one of construing the contract, the normal rules, summarised in *ABC Electrification* at [18] and set out above, will apply. Given that the SHA is part of a wider transaction in which both Gwent and Mr Kulkarni

agreed to invest in SJIH it seems to me that the decision in *Re Sigma Finance* [UKSC] 2 is also relevant. Lord Mance stressed at [12]:

> Of much greater importance in my view, in the ascertainment of the meaning that the Deed would convey to a reasonable person with the relevant background knowledge, is an understanding of its overall scheme and a reading of its individual sentences and phrases which places them in the context of that overall scheme.

403. That is in my view wholly consistent with what is more briefly summarised in *ABC Electrification* at [18(i)(iii)].

404. In interpreting the SHA, and in particular Recital B, I therefore need to determine both what that Recital means and whether the parties intended to contract on that basis. There is overlap between the two questions; as Lord Mance noted in *Sigma*, the process is iterative. It seems to me, however, that there is conceptual clarity in tackling the two as individual stages of an overall enquiry.

405. Taking first what Recital B means, again the starting point is the language used. In this respect, Recital B seems to me quite clear in stating, in the present tense, that Mr Kulkarni is the registered holder of 1,652 fully paid A shares. There is no reason of language to read that as meaning he will, at some point in the future, become the owner of fully paid A shares; to convey that meaning that would require quite different wording.

406. Mr Higgo submitted that I should take account of the fact that this transaction was necessarily put together at haste and nobody on behalf of Gwent focussed on Recital B. That seems to me to stray beyond the exercise of contractual interpretation. I am not seeking to establish the actual intention of the parties but, rather, the presumed intention of the parties that would have been understood by an objective bystander looking at the language used and having access to the matrix of fact reasonably available to both parties at the time of contracting (*ABC Electrification* at [18(i)]). The fact that Gwent rushed into signing the SHA, did not take independent advice on it or did not read it are all purely subjective factors that are not relevant to the enquiry I must undertake.

407. Mr Thompson noted, rightly, that in cross-examination it was put to Mr Hammond that: "*All parties knew or expected that* [the position in Recital B] *was the position that would be reached?*" The thrust of his submission was that this is what the parties intended Recital B to mean. Leaving aside that this was a question put to Mr Hammond, rather than an attempt to set out Mr Kulkarni's case, it also sems to me to fall foul of the rule in *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, excluding the parties' subjective understanding from the exercise of contractual interpretation.

408. The starting point, then, is that 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.

409. That is not the end of the analysis, however, 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. In this he faces insurmountable obstacles:

409.1. The SHA was part of a wider transaction involving the raising of capital from both the A and B shareholders for SJIH. In any such transaction, one would expect the agreements to provide that the shareholders should subscribe for their shares and pay the subscription monies. The case is all the more stark here because SJIH was desperate for capital and all parties knew it; Mr Kulkarni accepted as much in his cross-examination: that was what drove the push to raise money from the consultants through them subscribing for B shares. SJIH was a company with no trading history of its own, buying a business out of a pre-pack administration. In those circumstances, 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. It was put to Mr Hammond in cross-examination that this was not Mr Kulkarni's case; but it then becomes unclear what Mr Kulkarni's case is, because as a matter of logic that is the effect of the estoppel for which he contends.

409.2. The position is especially acute when one considers that Recital B applies equally to Gwent as it does to Mr Kulkarni. In fact, Gwent paid for its shares, but a party's subsequent conduct is irrelevant to the interpretation process under the decision in *James Miller & Partners Ltd*. Mr Kulkarni's case is, therefore, that the parties in a transaction whose aims included raising capital for SJIH intended to be bound regardless of whether either of them contributed any capital.

409.3. The B shareholders were to become parties to the SHA through deeds of adherence. Given that the estoppel is a matter of contractual construction, not reliance, upon doing so they would also be bound by any estoppel. It would be, in my view, a remarkable conclusion to say that they 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.

409.4. The SHA was executed alongside what I have found to be a contract for the allotment and issue of shares made at the 13 February 2020 board meeting and recorded in the Minutes in which Mr Kulkarni was obliged to pay for his shares. It seems to me highly unlikely that SJIH contracted on the basis that Mr Kulkarni had to pay under the allotment contract but not under the SHA.

409.5. Mr Thompson referred me to section 580 of the Companies Act, which prohibits the allotment of shares at a discount. His point was that if the SHA meant what Mr Kulkarni said, it would breach that provision and be unenforceable on the ground of illegality (applying

Prime Sight at [47]). With that precise point I disagree; I have found that the shares were to be issued and allotted under a separate contract of allotment which did require Mr Kulkarni to pay for them. What I do accept is that it would be highly unusual for the parties to contract on the basis that they would proceed with their arrangement even in breach of the Companies Act.

410. Mr Rowan submitted that if there were no estoppel, absurdity could result. He gave the example of the right under clause 13.2 of the SHA of an A shareholder to appoint a director: could it sensibly be suggested that every holder of 1 A share should have that right? Clause 13.2 works because the parties are estopped from denying the ownership of shares.

411. I do not accept that. First, and most obviously, it is Mr Kulkarni's case that even if he held only one A share he would have the right to appoint a director. So the answer to the rhetorical question is yes. Second, the risk to which Mr Rowan adverted arises if there are multiple A shareholders. At the inception of that transaction that is not a risk regardless of any estoppel because there were only two shareholders; the size of their shareholding does not affect that. Registration (upon subscription or transfer) was restricted under Schedule 2 of the SHA – that is the whole point of the A Shares Breach case. And if allotted and issued to Mr Kulkarni (and the same logic applies equally to Gwent) he was prohibited from transferring only some of his shares under clause 6.2 of the SHA. No estoppel is needed to address the situation; the terms of the SHA already cater for it. Thirdly, the suggested estoppel does not address the risk because it only deals with the situation at the inception of the SHA; it does not affect the position going forward.

412. In my view Recital B was a clear statement that Mr Kulkarni owned 1,652 A shares at the time of the SHA but was not intended to be the basis upon which the parties contracted. To have done so would have fundamentally undermined the wider transaction both commercially and legally.

Breaches

Was the Board of SJIH required to accept the appointment of Mr Hussain as a director of SJIH immediately on service of notice of appointment? If so, did Gwent or SJIH breach the SHA in failing to acknowledge or accept the directorship of Mr Hussain as a director of SJIH until 11 November 2021?

413. Mr Kulkarni had a right to appoint a director under clause 13.2 of the SHA. On 21 May 2021 he nominated Mr Hussain. Under clause 13.4 that appointment should have been accepted the same day. In fact, the appointment was only confirmed on 12 November 2021.

414. Mr Higgo submitted that Mr Hussain's appointment was for an improper purpose, because by that stage Mr Kulkarni and Mr Hussain had entered a funding arrangement under which Gwent was to be forced out of SJIH and Mr Kulkarni would see his historic Oldco debts paid. As such, Mr Higgo submitted, the appointment was a nullity because it breached clause 2.2 of the

SHA, which provided that shareholders were to use their reasonable endeavours to promote the success of SJIH in the interests of the shareholders as a whole.

415. There are, it seems to me, four difficulties with that submission. First, the point is not pleaded, as Mr Butler rightly points out.

416. Secondly, the agreement to which I was referred as evidencing the arrangement is a communication from Mr Hussain to Mr Kulkarni expressly caveated "*if you and me come to a legally binding agreement*". It is not at all clear that any such agreement was reached and if so on what terms. The communication that I was shown did not mention Mr Hussain being made a director.

417. Thirdly, as a matter of construction, the reasonable endeavours obligation is to promote the success of and develop the business, in each case for the benefit of the shareholders as a whole. The fact that Mr Hussain and Mr Kulkarni might ultimately have intended to carve up the company does not mean that the appointment of Mr Hussain would not promote the success of and develop the business in the interim. The clause does not require the appointment to be intended to benefit the shareholders as a whole *per se*; the benefit to which they are entitled is if the business grows.

418. Finally, as a factual matter Mr Hussain was ultimately appointed as a director of SJIH, and no claim is advanced that his appointment was in some way defective or a nullity. Given that the validity of the appointment seems to be accepted, it is hard to see how a six-month delay in that appointment could be legitimate. Obviously, some time is required under the articles to arrange the various formalities of director appointment, but in the case of Andrew Lewis that numbered days not weeks, and certainly not months.

419. For these reasons, in my view the delay in appointing Mr Hussain was a breach of the SHA.

Did the Hussain Breach, if made out, amount to a material or persistent breach of the SHA?

420. Again this is a question of contractual interpretation. Persistent can have two different meanings, both of which might be said to be possible interpretations of clause 7.1(d). On the one hand, to say a state of affairs is persistent simply means it is continuing: persistent rain, persistent noise, a persistent cough. On the other hand to say that something or someone persists implies a more active state – that they do so in the face of opposition or obstacles.

421. In his written closing Mr Butler seemed to accept that the latter is what was intended – a breach if persistent if the wrongdoer does not desist from it at the earliest opportunity.

422. I do not accept Gwent's position that breaches cannot be both persistent and material. In his closing Mr Higgo recognised that materiality goes to the

seriousness of the breach; persistence goes to its duration. In principle, a breach that is at first immaterial might become material purely because it persists over time, but in many cases the two will be independent of one another.

423. In assessing materiality Mr Butler referred me to the decision of Neuberger J as he then was in *Phoenix Media Limited v Cobweb Information* (unreported, 16 May 2000) at [61]:

> Materiality involves considering the following: the actual breaches, the consequences of the breaches to [the innocent party], [the breaching party's] explanation for the breaches, the breaches in the context of the Agreement, the consequences of holding the Agreement determined, and the consequences of holding the Agreement continues.

424. *Phoenix Media* concerned a termination clause, so the last two criteria are not strictly relevant here. Even leaving those aside it seems to me the Hussain Breach was plainly material. I accept that, based on Loosemores' advice, SJIH thought it was entitled to terminate the SHA and that a valid termination would have meant that Mr Kulkarni had no right to appoint a director. It remains the fact, however, that legal advice is not a blanket defence to a claim for material breach. One of the important purposes of the SHA was to give Mr Kulkarni, a minority A shareholder, some say in the management of SJIH. Deprivation of board representation was a significant matter, certainly well beyond what might be considered trivial.

425. As to persistence, Gwent and SJIH continued in their course despite repeated protest from Mr Kulkarni's lawyers. In my view that rendered this a persistent breach.

Did any of the other three breaches relied on by Mr Kulkarni in the Re-Re Amended Particulars of Claim amount to a persistent breach of the SHA?

426. The A and B Shares Breaches and the Termination Breach continued until Mr Kulkarni sent his letter of claim, and indeed for some time after that. Applying the approach I set out above I consider that those breaches were persistent.

The Remediation Issue

Were any of the four specific breaches of the SHA relied on by Mr Kulkarni incapable of being remedied within the meaning of clause 7.1(d)?

427. In his written closing Mr Butler described this as "really the nub of the case".

428. The starting point on what constitutes remediation is *Schuler v Wickman Machine Tool Sales*. In that case there was a term of the contract, expressed to be a condition, that the UK company visit certain UK manufacturers at least once a week. The UK company failed to do so, which the arbitrator found was a material breach. The House of Lords considered that the term "condition"

was not being used as a term of art, such that the breach was not repudiatory. Lord Reid found that the breach was remediable, stating at pages 249G-250B:

> The question then is what is meant 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.

429. In *Phoenix Media* Neuberger J addressed the relationship between materiality and remediability at 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, [the innocent party] contends that [the breaching party]'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…Nonetheless, they are different concepts.

430. I should pause here to note that the contract there, unlike the SHA in this case, contained an express obligation of trust and confidence.

431. I have already considered the decision of Neuberger LJ in *Akici*. As I have noted, he stressed at [64] that the proper approach to the remediability of a breach was "*practical rather than technical*" and at [65] that "*the great majority of breaches of covenant should be capable of remedy*". However, he considered two types of breach to be incapable of remedy. The first, at [68], was a breach involving illegal or immoral use. Neuberger LJ questioned the traditional understanding that this was due to the "stigma" said to have been attached to the property, but accepted that there remained public policy justifications. In either event, it has no relevance on the facts before me.

432. The second was a covenant against subletting. That is of much greater potential significance because Neuberger LJ accepted at [67] that it would logically extend to transfers: "*the general assumption that an unlawful*

assignment also constitutes an irremediable breach is correct". He made clear at [75] that it did not extend to the simple parting with possession.

433. In *Force India*, Rix LJ considered that changing a racing car's livery to remove the association with a sponsor was irremediable, saying at [108]:

> The judge concluded that any breaches of clauses 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…the marketing genie cannot be put back in the bottle.

434. *Telchadder* concerned (fixed) mobile homes. Under the Mobile Homes Act 1983 an owner is entitled to terminate an agreement if they are "*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*". Lord Wilson (who was in the majority) considered that the nature of the covenant was not determinative of its remediability, in that breaches of negative covenants are sometimes remediable, and breaches of positive covenants sometimes irremediable. Lord Wilson said at [31] that remediability involved "*a practical enquiry whether and if so how…the mischief resulting from Mr Telchadder's breach could be redressed.*"

435. From these authorities I think the following propositions emerge that are relevant to this case:

435.1. The exercise is a practical one.

435.2. The focus is forward-looking. Remediation can only rarely, if ever, cure the historic breach; the question is whether it can put matters right for the future.

435.3. The more serious the breach, the harder it will be to remedy, but even material breaches are remediable.

435.4. Remediation is more difficult to achieve once third parties become involved. If an asset is transferred to a third party or they receive confidential information or come to perceive a party in a different way it may be impossible to achieve remediation. That is not always so, however, and the question must be assessed on a case-by-case basis.

436. Mr Butler suggested that the cases had not addressed a situation where a previously social relationship became a contractual one, and submitted that in such cases remediation should be harder to achieve. This, it seemed to me, was essentially the quasi-partnership case: that the nature of the relationship

between Mr Lewis, Andrew Lewis, SJIH and Mr Kulkarni depended for its success on good relations and mutual trust and confidence between those parties, and if those relations broke down remediation became harder. Given the argument that this is a distinctive feature of this case that takes it outside the authorities it is important that I address it first.

437. Very simply, I cannot accept that submission.

438. The starting point is to identify the relevant relationship. Mr Butler focussed on what he said was a deep friendship between Mr Kulkarni and Mr and Mrs Lewis. An immediate difficulty is that the relationship relied on in the Re-Re-Amended Particulars is a different one, between Mr Lewis, Andrew Lewis, SJIH and Mr Kulkarni. It is wholly unclear why the friendship, however deep it might have been, between Mr Kulkarni and Mr and Mrs Lewis should affect Andrew Lewis or SJIH. That is especially true where, as here, it was contemplated that SJIH would have other shareholders who would have nothing to do with Mr or Mrs Lewis (or, quite possibly, Mr Kulkarni).

439. The second difficulty is that this claim is not a dispute about personal relationships in which the SHA is said to play a part; it is a claim for breaches of the SHA. The starting point is therefore the SHA itself. This was based on a standard form precedent and is of a type that is commonly used in commercial transactions. Often, in my experience, such agreements are used where there is no particular relationship between the parties; indeed, on occasion they are used where there is a positive lack of trust, the parties preferring to place their faith in the law of contract, rather than in any other relationship they may believe they have with one another.

440. That is reflected in various terms of the SHA:

440.1. Clause 9 is a drag-along right, allowing one shareholder to force another to sell their shares. That is not the hallmark of quasi-partnership.

440.2. Clause 11.2 contemplates B shareholders becoming parties to the SHA and clause 13.3 contemplates them having board representation. That is not consistent with the SHA embodying a relationship between Mr Kulkarni and the Lewises.

440.3. Clause 14.5 gives Gwent board control. That is nothing like a quasi-partnership: ultimately, Gwent, and Gwent alone, runs the business.

440.4. Clause 19 is an entire agreement clause which expressly supersedes "*all previous … arrangements and understandings*" between the parties. On its face that excludes reference to some wider relationship. Mr Butler suggested that this had to be read in connection with clause 16.1, which references the "*spirit and intention of the agreement*". I accept that the two clauses must be read together, but the agreement referred to in clause 16.1 is the SHA, not some broader, inchoate understanding, such that the two clauses work in harmony.

440.5. Clause 22 states that the SHA is not intended to establish any partnership or joint venture between the parties. Obviously, that is

wholly inconsistent with the position Mr Kulkarni now seeks to advance.

441. In short, the contents of the SHA seem to me 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.

442. The third issue for Mr Kulkarni arises from what the SHA does not contain. The cases make clear that where there is an express or implied duty of trust and confidence, remediation will be more difficult to achieve when the breach was deliberate. There is no such express duty in the SHA and no implied duty is asserted in this claim. To accept that remediation is harder simply because of the parties' prior relationship would seem to me to introduce through that back door that which Mr Kulkarni could not secure through negotiation.

443. Fourthly, to the extent that the relationship between Mr Kulkarni and the Lewises were relevant, it is 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. He 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.

447. The fact that there was a background relationship between some or all of the parties seems to me irrelevant to remediation, therefore.

448. 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.

449. The final general point is the time at which remediability is to be assessed. This came up specifically in connection with the Hussain Breach, but would also seem relevant, at least as a matter of principle, to the A and B Shares Breach.

450. Mr Higgo invited me to look at the situation with the benefit of hindsight – in the period between each of those breaches and their purported remediation, nothing had happened that might have been changed had the breaches not occurred.

451. Certainly, I recognise the concern voiced by O'Connor LJ in *Expert Clothing Ltd v Hillgate House* [1986] 1 Ch 340 at 364E-G, a case under section 146 of the 1925 Act, to the effect that it would make no sense to say that a breach that had subsequently been remedied was one that is, or therefore was, incapable of remedy. That has to be read against what he had said at 362F, where he observed that the question of remediability had to be assessed as at the date of the section 146 notice.

452. Moreover, in the situations that O'Connor LJ was considering subsequent events demonstrated that effective remediation was possible and so, logically, had always been possible. To take one of his examples, if window boxes are installed in breach of covenant but are subsequently removed and the damage repaired, one can assess whether the property has, in fact, been returned to its prior state.

453. Certain breaches in this case are rather different in nature, however, because subsequent events do not prove the counterfactual in the same way. A breach whereby a party is excluded from management decisions is a case in point. It may be that no decisions were made during the period of exclusion but that cannot be in any way determinative because had the innocent party been able to appoint its director, different points may have been discussed at the board and decisions may have been made. In my view this is therefore a case where hindsight does not assist.

454. Turning to the breaches in this case, and focussing at this stage on the point when they were committed, the A and B Shares Breaches in my view could be remedied for the future. There are two parts to the analysis.

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 SJIH could move swiftly. Gwent also held the overwhelming majority of the shares in SJIH 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.

456. That leaves the point of principle arising from the observation of Neuberger LJ in *Akici* regarding an assignment in breach of covenant being irremediable. Should the allotment and issue of shares in this case be treated in the same way? In my view the answer is no.

457. First, Neuberger LJ was dealing with a different context – section 146 of the Law of Property Act 1925. While there is obvious overlap between leases and other contracts, there are also points of difference. Notably, Neuberger LJ reached his conclusion by specific reference to underleases, which has no direct analogy here. Neuberger LJ did not suggest that the approach that he was adopting was one of general application outside that context. On the contrary, he considered himself bound by the earlier decision of *Scala House and District Property Co Ltd v Forbes* [1974] QB 575, part of the reasoning in which he considered to be "*defective*" (*Akici* at [67]). O'Connor LJ in *Expert Clothing* at 365B also disapproved of the reasoning in *Scala House* and would have gone further, restricting it purely to underleases. Neuberger LJ's reference to an assignment in breach of covenant must be seen in that light, a light that does not shine on this case.

458. Secondly, so far as I am aware none of the cases concerned a situation where the transferor and transferee were under common control, as is the position here. Mr Higgo submitted that this was significant, and I agree that it is. The cases where breaches are found irremediable often involve truly independent third parties. The information ceases to be confidential because it is in the public domain and beyond the control of the disclosing party; the image of the formula one team is affected permanently because the perception of it in the eyes of at least some members of the public may have changed in a way that the breaching party can no longer control; once an asset is transferred to a third party, that third party typically cannot be forced to give it back. That is different in nature to the position here; Gwent at all times could control both the genie and the bottle.

459. Both as a matter of practicality and as a matter of principle, in my view the A and B Shares breaches were remediable.

460. The Termination Breach is not linked to a specific clause of the SHA; Mr Butler described it, rather, as a renunciation of the SHA as a whole. I accept that, but one must be careful to be clear as to what is and, in particular, is not alleged here. Mr Kulkarni is not alleging that he terminated the SHA for renunciation or repudiatory breach. That creates some difficulty for him, however, because English law adopts an elective theory of repudiatory breach. The position is summarised in Chitty at 28-054:

> In this respect, the innocent party has a decision to make. He can terminate further performance of the contract or he can decide not to do so. A party who decides not to do so may either simply withhold its performance or it may decide to affirm the contract. A party may withhold performance

> where performance by the other party is a condition precedent or a concurrent condition to its own obligation to perform. In such a case, its obligation to perform is effectively in suspension pending performance by the other party. Alternatively, he may elect to affirm the contract, in which case the contract continues in existence for the benefit of both parties and the innocent party is given a right to recover damages in respect of the loss occasioned by the breach.

461. I should reiterate at this point that Mr Kulkarni's position was slightly different to that set out in Chitty; his pleaded case is that he could not have accepted the renunciation, or indeed any renunciation. That seemed to me an unusual position and the legal basis for it was never made clear. In any event, his position is that he did not elect to affirm the SHA, whether positively or through the passage of time, it simply continued in force.

462. 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.

463. The Hussain Breach is a breach of clauses 13.2 and 13.4.

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 SJIH. 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 SJIH 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 SJIH, 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 Director 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 Director 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 SJIH.

Alternatively, even if capable of remedy when first committed, did they cease to be capable of remedy because of their persistence or for any other pleaded reason?

467. Mr Kulkarni advances an alternative case that even if the breaches were initially capable of remedy, the fact that they persisted and the events that took place after DJM wrote to Gwent and SJIH on 21 May 2021 render them irremediable. Mr Butler submitted that thereafter the breaches persisted at least until Gwent and SJIH commenced remediation on 24 September 2021, which seems to me inescapably correct.

468. The principal basis for Mr Butler's submission was the destruction, caused by the breaches, of the trust and the relationship which Mr Kulkarni had with the Lewises, Gwent and SJIH. I have addressed the point at length above; 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.

469. Mr Butler noted that motive can still be relevant in purely commercial relationships, and referred me to Chitty paragraph 28-039: "*The question whether or not a failure of performance is deliberate may be a relevant factor in deciding whether or not a breach of contract gives to the innocent party the right to terminate further performance of the contract, (Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1967] 1 A.C. 361, 394, 414, 415, 429) since it may indicate the attitude of the party in default towards future performance and so be evidence of an intent to renounce the contract.*"

470. I accept that intention is relevant to the question of repudiation. As *Suisse Atlantique* itself made clear, however, that is not typical. Viscount Dilhorne emphasised at 394E:

> Further, if it was established that a breach, though not of sufficient duration as to lead to the conclusion that the performance of the contract became totally different to 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.

471. Lord Hodson at 415F dismissed the argument: "*For myself, I see no reason to hold that attributing to the respondents a wilful intention of limiting the number of contractual voyages affects the sums otherwise payable by way of demurrage so as to open the way to a claim for damages at large.*"

472. Finally, Lord Upjohn at 429B-D took a very similar approach to Viscount Dilhorne (my emphasis):

> …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**.

473. *Suisse Atlantique* does not, in my view, assist Mr Kulkarni. The House of Lords made clear that intention is relevant only to one matter: repudiation. Gwent has already presented Mr Kulkarni with multiple instances of repudiation and he either could not, (because the SHA to which he willingly agreed precludes him from doing so), or simply has not taken advantage of them. That must now be read, of course, in light of Neuberger J's observation in *Phoenix Media* that a deliberate breach would be relevant to remediability where the contract contains a duty of trust and confidence. However, both relate to a breach of the contract undermining the contract as a whole. Mr Kulkarni's argument goes as far as saying that other conduct that is not itself a breach, or even connected with the SHA more generally, could be relevant. To my mind, *Suisse Atlantique* is not authority for such a proposition.

474. That is not to say that Gwent's conduct could not render a remediable breach irremediable. To take a very obvious example, if Gwent had sold the A Shares that it was allotted in August 2020 to a bona fide purchaser for value without notice, one might very well conclude that the breach had become irremediable within the 10 business day time period provided for in clause 7.1(d). That, though, is simply an application of the practical and forward looking test that I have set out above. The conduct upon which Mr Kulkarni relies is subject to that same test.

475. There are five key strands to these communications, being the correspondence relating or regarding: (i) the GMC; (ii) Correspondence with Mr Davies and Mr Edwards apparently connected to their perceived willingness to give evidence at Mr Kulkarni's request in these proceedings; (iii) conduct towards Mr Hussain; (iv); solicitors / the SRA; (v) harassment of Mr Kulkarni.

476. On Friday 21 May 2021 Mr Kulkarni's then solicitors, Douglas-Jones Mercer, sent a letter of claim to Gwent. The next working day, Mr Lewis contacted the GMC insisting that it reopen its investigation into Mr Kulkarni and pursued this line with some vigour. I can deal with the episode quite quickly; his complaint against Mr Kulkarni was baseless. After a full investigation the GMC closed the case in January 2023 on the ground that the realistic prospect test was not met.

477. In doing so the GMC observed:

> When considering the weight to be given to the evidence provided by Mr Lewis, we were compelled to take into account the timing of the complaint. …We are troubled by Mr Lewis' email dated 24 May 2021, which makes clear that he intended to embargo the release of the complaint to the GMC for a short period, threatening to release it if he did not receive a response as to why the letter should not be released. The email specifically references the potential of ongoing litigation and was sent after Mr Kulkarni's solicitors sent a letter before action in relation to a high value legal claim. It appears that the complaint to the GMC may have been sent in response to the threat of litigation. The tone of Mr Lewis' communications with the GMC and attempts to press the GMC to suspend Mr Kulkarni add to this impression.

478. Mr Lewis during his cross-examination accepted that he over-reacted, although he thereafter went on to make further, I should stress seemingly equally baseless, allegations about Mr Kulkarni's professional integrity.

479. I accept Mr Butler's criticisms of Mr Lewis over this incident. Mr Lewis made a spurious complaint to the medical regulator in the middle of a pandemic; he did so for personal advantage with a view to undermining civil proceedings in which he had a significant financial interest; despite a full investigation which dismissed his complaint he continues to make serious allegations against Mr Kulkarni, allegations that are wholly without foundation. There is no good justification for any of this.

480. What I do not accept is that it makes any of the breaches irremediable. The A and B Shares Breaches involved a wrongful allotment and issue of shares in SJIH. In the case of the A shares, these are now in the name of Mr Kulkarni. The Termination Breach had no legal effect because the repudiation was not accepted, so there was nothing to put right. The Hussain Breach was remedied by the appointment of Mr Hussain. The fact that Mr Lewis is making wild and unfounded allegations does not change any of that.

481. Of course, if the SHA had contained an express or implied duty of trust and confidence the position might well be quite different. As Neuberger J noted in *Phoenix Media* at [60], in such cases deliberate and cynical conduct can itself form a breach, and a pattern of such breaches may render that breach irremediable, even if a single instance does not. That, though, is precisely the point: the operative provision upon which the party needs to rely to show irremediability is the breach of the duty of trust and confidence, not the other clauses that might also have been breached. No such duty exists in the SHA. What Mr Kulkarni is trying to do, in my view, is to secure the benefit of such a provision through these proceedings when he was not able to do so, or did not think to do so, in the course of negotiating the SHA. That is not legitimate.

482. That is not to say that Mr Lewis can act with impunity. His actions apparently have cost him money in wasted legal fees; they may merit further costs orders in this case. But as I have stressed from the outset, these proceedings concern a specific dispute under the SHA. Mr Lewis' conduct vis-à-vis the GMC is irrelevant to that contract.

483. The next matter to which Mr Butler referred me was a series of emails to and about Mr Davies. I have made reference to them earlier in this judgment. The emails can sensibly be divided into two categories.

484. The first are emails prompted by a request, from Mr Kulkarni, that Mr Davies provide a witness statement in these proceedings. Mr Davies wrote to Mr Hammond proposing to share a draft of any statement before it was provided to Mr Kulkarni's then solicitors. In the course of his evidence before me, Mr Davies confirmed that he had prepared a draft himself. Mr Hammond questioned why Mr Davies would cooperate with Mr Kulkarni when he was not obliged to do so. Mr Davies explained that he was seeking to be uncontentious and helpful but that since it was clear that SJIH would not see it that way, he would not proceed.

485. The very suggestion that Mr Davies might provide evidence other than under the control of Gwent obviously irritated Mr Lewis (although for whatever reason he chose to draft some of the emails as if they came from Mrs Lewis). He sent repeated emails questioning Mr Davies' professional integrity and loyalty. No such attack was advanced against Mr Davies on cross-examination but given the vehemence with which it was advanced in correspondence I should record that those attacks were lacking in any foundation. They proceeded on the incorrect bases that there could be property in a witness, which is wrong at law, that Mr Davies had personally acted on the transaction, which he had not, and that he was co-operating with Mr Kulkarni in providing a witness statement, which again he was not as he made clear to Mr Hammond from the outset.

486. At the same time I recognise that Gwent is a client of Mr Davies' firm (although it was not in this transaction) and as a client Mr Lewis may have felt he was entitled to ask for Mr Davies' assistance in these proceedings. When those requests were not met with the level of co-operation that Mr Lewis wanted he became exasperated, as clients sometimes do. He wrote a series of

ill-considered emails, but Mr Davies dealt with them courteously and professionally. It was within the bounds of normal solicitor-client exchanges.

487. The second category comprises a single email sent in January 2023 by Mr Lewis to Michael Farkas (**Mr Farkas**), who had no connection with any of the events in question, copied to Mr Davies. The email was purportedly about the fact that James Davies was unable to act for either Mr Lewis of Mr Farkas in a transaction. Mr Lewis described James Davies as being "*totally up front* [sic] *and honest and complying with his regulators* [sic] *rules surrounding conflicts*".

488. It quickly becomes apparent that this was simply a contrived excuse to allow Mr Lewis to launch a sustained attack on Mr Davies' honesty and professional integrity. Most remarkably, in support of those allegations of gross misconduct Mr Lewis makes reference to a letter signed by James Davies. Mr Lewis sought to argue that an unnamed third party had compared correspondence from Mr Davies and James Davies and had concluded that in fact the letter was written by Mr Davies. Leaving aside that Mr Davies had put his reference on the letter, which is hardly the hallmark of the master trickster Mr Lewis seems now to believe Mr Davies to be, it is entirely normal in a firm of solicitors that matters will be handled by and correspondence will be the product of more than one lawyer. What Mr Lewis ignored in all this was that his fraud hypothesis was simply irreconcilable with the fact that the "*up front and honest*" James Davies was happy to sign the letter.

489. Mr Lewis concluded his email, "*Apologies for boring you with matters that don't concern you…*", then proceeded further to malign Mr Davies. He was right to recognise that this whole episode was irrelevant to Mr Farkas. Mr Lewis could have sent the email to anyone; what mattered to him was that it was copied to Mr Davies. When asked why it was sent Mr Davies said he thought it was an attempt by Mr Lewis to intimidate him. I agree. It could have no other possible purpose. When the email was put to Mr Lewis he doubled down on it and accused Mr Davies again of dishonesty.

490. Given the public nature of Mr Lewis' attacks on Mr Davies, both in the email to Mr Farkas and before me in open court, it is right that I record my conclusion on those attacks. They are hopelessly misplaced. The best that can be said of Mr Lewis' email to Mr Farkas is that it was, so far as I am aware, an isolated incident. It was a baseless attack on a potential witness in these proceedings, purportedly underpinned by nothing more than a conspiracy theory that was patently wrong on its face.

491. A similar incident occurred in respect of Mr Edwards in September 2022: Mr Lewis sent emails to Mr Edwards, copied to his colleagues, accusing him of being evasive and of concealing fraudulent activity at Oldco. Mr Edwards responded:

> David, please do not try and use your bully boy tactics on me. My integrity has never been in question in any business I have been in.

492. Again, Mr Lewis chose to go public with his attacks, so again it is only right that I record my findings in respect of them. They were also baseless. Mr Lewis started to pursue them long after the alleged "fraudulent share transactions" had taken place, and long after Gwent had assumed control of SJIH and would have become aware of any issue. If Mr Lewis had actually believed there to be a problem he would have pursued it much sooner. The fact that it was brought up after proceedings commenced seems to me far from coincidental.

493. Again, what comes of this? Plainly, attempts to intimidate witnesses in legal proceedings are deplorable and may give rise to both criminal and civil sanction in appropriate cases. What they do not entitle to court to do is to rewrite the parties' contract. The difficulty here for Mr Kulkarni is the same one that he faces in connection with the spurious GMC complaint: it does not alter the remediability of the various breaches alleged in and of themselves, and while it would obviously undermine a relationship of trust and confidence, the SHA does not embody such a relationship.

494. Mr Butler referenced, albeit briefly, attacks made by Mr Lewis on Mr Kulkarni's solicitors, including threatening criminal proceedings against the lawyers individually and reporting them to the SRA.

495. I am conscious that, at least as far as the SRA complaint was concerned, Mr Lewis' own solicitors were involved, doubtless had in mind their own professional obligations and satisfied themselves that they complied. In the circumstances, the SRA has investigated the matter and dismissed it; I have nothing further to say on it.

496. The threat of criminal proceedings equally went nowhere. As with so much of Mr Lewis' conduct in this regard it had no basis; I can only imagine that the solicitors in question saw this as rather pointless posturing.

497. Finally there was a series of attacks on Mr Hussain, including leaving negative web reviews about his companies and threatening civil and criminal proceedings. The difficulty here is twofold. First, to the extent it is advanced as a means of turning the SHA into a relationship of trust and confidence it faces (and falls at) the hurdle already dealt with above: the SHA is not, and is not alleged to be, a relationship of trust and confidence. Secondly, all of the conduct in question came after Mr Hussain's appointment, that is to say after the Hussain Breach had been remedied. A breach that has been remedied cannot in some way be unremedied. Mr Butler, I felt, somewhat accepted that in his written closing when he recognised that he might need to rely on some fresh breach, possibly under the "spirit and understanding" language of clause 16 or as impacting some other breach. For the reasons I have given, the "spirit and understanding" language does not help Mr Kulkarni; there is no other breach that became irremediable as a consequence of the conduct said to have been directed against Mr Hussain.

498. Finally, Mr Kulkarni relies on harassment directed at him. This includes a series of deeply unpleasant incidents at his home, including nails being

scattered on his drive, smashed glass being left in the vegetable garden, gates being broken and the security system being vandalised. There have been intruders in his garden deliberately creating disturbance in the early hours of the morning, causing alarm and distress to Mr Kulkarni, his wife and his children.

499. I do not in any way trivialise these events; they are serious criminal matters and Mr Kulkarni has reported them to the police. As Mr Kulkarni recognises, however, there is no direct connection between them and Mr Lewis. Moreover, while Mr Kulkarni said that a bottle of wine in a paper bag was left outside his door and that he understood this to be Mr Lewis' calling card, in respect of the other incidents referred to Mr Lewis has been nowhere near so subtle. In all cases he has made clear that he (or at times Mrs Lewis) sent the communication in question. He has not tried in any way to disguise his involvement. Moreover, the actions in question have been very different in nature; at no stage is it suggested that Mr Lewis has sought physically to intimidate anyone in connection with these proceedings. The harassment that Mr Kulkarni alleges is different in nature to the conduct I have described above.

500. Finally, the allegations were put to Mr Lewis and he denied them; I believed that denial. I have noted on multiple occasions that Mr Lewis has a ruthless streak but he also struck me as someone who has lines that he would not cross. Leaving broken glass in a garden used by Mr Kulkarni's children, one of whom I understand has Down's syndrome and who may therefore be especially at risk from such actions, seems to me one of those lines.

501. In a similar vein, in giving her evidence Mrs Lewis spoke of Mr Kulkarni with genuine affection and a sense of real regret that the relationship had broken down. Mr Lewis, in turn, demonstrated a deep affection for his wife and her wellbeing. It seems to me inconceivable that Mr Lewis would take steps that might result in Mr Kulkarni's children being seriously injured, not only, but certainly not least, because of the effect if would have on Mrs Lewis.

502. Accordingly, I reject the suggestion that Mr Lewis was behind these incidents. It naturally follows that they can have no bearing on the question of remediation.

Relief from Forfeiture

Does Clause 7.1(d) engage the court's equitable jurisdiction to grant relief from forfeiture?

503. In light of my findings as to the operation of clause 7.1(d), this question does not arise for determination.

If so, should the court grant D1 relief from forfeiture?

504. Again, this question does not arise for determination.

Remedies

Is Mr Kulkarni entitled to declarations as a result of the Court's findings on any of the above issues? In particular is Mr Kulkarni entitled to a declaration that Gwent is deemed to have served a Transfer Notice, and is SJIH obliged to appoint Valuers pursuant to clause 8 of the SHA?

505. For the reasons given above, no Transfer Notice is deemed to have been served and SJIH is not obliged to appoint Valuers pursuant to clause 8 of the SHA.

Is Mr Kulkarni entitled to the sum of £80,000 from Gwent in respect of the 1,651 'A' Shares? Is Mr Kulkarni entitled to interest on the same?

506. For the reasons I have given no binding agreement was entered into at the Pre-Meeting or subsequently under which Gwent would gift the 1,651 A shares to Mr Kulkarni. Less still did Gwent agree to pay the purchase price of those shares, whether to Mr Kulkarni or to SJIH. Accordingly, the claim for £80,000 (and, as a necessary consequence, interest thereon) fails.

Is Mr Kulkarni entitled to rectification of the Register to show him as the registered shareholder of the 1,651 'A' shares with effect from 13 February 2020?

507. Mr Kulkarni is not so entitled. As I have found, the parties did not enter the SHA on the basis that they be estopped from denying the truth of what is said in Recital B, such that there is no estoppel in the first place. In any event, relief is sought under section 125 of the Companies Act, rather than under the SHA, and any contractual estoppel is limited to claims under the relevant contract itself (*Reeve v McDonagh* at [58]).