Neutral Citation Number: [2022] EWHC 1304 (Ch)

Case No: BL-2020-000292

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

Rolls Building
Fetter Lane, London

Date: 27 May 2022

Before :

HIS HONOUR JUDGE JARMAN QC
Sitting as a judge of the High Court
Between :

(1) LA MICRO GROUP (UK) LIMITED	**Claimants**
(2) DAVID BELL	
- and -	
(1) LA MICRO GROUP INC	**Defendants**
(2) ROMAN FRENKEL	
(3) ARKADIY LYAMPERT	

Mr Paul Strelitz and Mr Oliver Hyams (instructed by **Owen White Limited**) for the **claimants**
Mr William Buck and Mr William Hooper (instructed by **Fladgate LLP**) for the **first defendant**
Mr Alex Barden (instructed by **Schofield Sweeney LLP**) for the **second defendant**
Mr Matthew Thorne (instructed by **O'Melveny & Myers LLP**) for the **third defendant**

Hearing dates: 10 and 101March 2022
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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

It was handed down remotely, deemed at 10.30 am on 27 May 2022 , and copies emailed to the parties and transferred to the National Archives.

HHJ JARMAN QC:

Introduction

1. This matter first came before me in January 2021 when there were several issues between the parties, one of which was whether in 2010 the first defendant (Inc) disclaimed its beneficial interest in shares of the first claimant (UK). That interest arose following an agreement between the first claimant Mr Bell and the third defendant Mr Lyampert on behalf of Inc in 2004 (the 2004 agreement) whereby 51% of the shares were held on trust for Inc. Another issue was whether following further agreement between Mr Bell and Mr Lyampert in 2010 (the 2010 agreement), they are now the only shareholders of UK, as they assert. Inc maintained that nothing changed in 2010 so that it is still beneficially entitled to a 51% shareholding in UK and to an equal share of the profits.

2. In a judgment handed down later in January 2021 (NC number [2021] EWHC 140 Ch) after hearing evidence from the three individual parties, Mr Bell, Mr Frenkel and Mr Lyampert, I found in favour of UK and Mr Bell on those issues. I dealt with Mr Bell's evidence before me as to the disclaimer relied upon, and what he understood by it, in paragraphs 28 to 35 of the 2021 judgment. Because of inconsistencies in his evidence I treated his evidence on these points with caution.

3. Nevertheless, after weighing up all of the evidence and inherent likelihoods, I made findings of fact at paragraphs 57 and 58, and concluded that the balance of likelihoods tipped in favour of Mr Bell's account on the points set out in paragraph 9. In summary, in February 2010, Mr Frenkel told Mr Bell that he

was dissolving Inc and wanted nothing to do with UK and that the business was his to do with what he liked. The following month he repeated that position and told Mr Bell that the company was his. Mr Frenkel made clear that he was walking away from UK.

4. These statements have become known together as the Frenkel disavowal. The context was that the two directors and equal shareholders of Inc, Mr Frenkel and Mr Lyampert, had fallen out badly and the company was in deadlock. Mr Bell says, and I accept, that his concern, which he expressed in speaking with Mr Frenkel, was how that would affect UK, and the Frenkel disavowal came in response.

5. After the 2021 judgment, Inc accepted that it was not entitled to a share of the profits of UK, but appealed to the Court of Appeal as to the ownership of the shares. The first ground was that Mr Bell and UK were estopped by conduct from asserting that the ownership changed in 2010. The appeal came on for hearing in October 2021. The Court of Appeal rejected the first ground.

6. The second ground related to the finding of disclaimer. It was submitted on behalf of Inc that it could not have had the requisite knowledge for such a disclaimer. At the outset of Inc's submissions on this issue, the Court raised the question of whether Inc could disclaim, when it had previously accepted the shareholding. As a point of pure law, Inc was allowed to introduce that question into the appeal, which was not strenuously opposed on behalf of UK and Mr Bell. It was upon this point that Inc ultimately succeeded before the Court of Appeal (NC number [2021] EWCA Civ 1429).

7. UK and Mr Bell had filed respondents' notices seeking to uphold the finding that Inc's shares were held between Mr Bell and Mr Lyampert on bases other than disclaimer. The first of these, abuse of process, was rejected by the Court.

The issues now for determination

8. The second basis was an alleged contractual surrender of Inc's shareholding in 2010. Sir Christopher Lloyd summarised the submissions on behalf of UK and Mr Bell under this heading as follows at paragraph 57:

> "i) For the reasons expanded on below, the effect of the Frenkel disavowal and the 2010 arrangements was that there was a binding agreement between Inc, Mr Bell and Mr Lyampert pursuant to which, amongst other matters, Inc was to surrender its beneficial interest in the shares in UK and/or to release Mr Bell and Mr Lyampert as trustees.
>
> ii) The 2004 agreement had been a collaborative commercial agreement between Mr Bell and Inc involving (a) 49/51 beneficial ownership of shares; (b) 50/50 share of profits; and (c) preferential trading between Inc and UK. This was a coherent package: Inc was entitled to proprietary rights and a profit share because it was contributing to UK through the preferential trading arrangement.
>
> iii) It is now common ground that by the 2010 arrangements (a) Inc was released from its debt to UK, (b) the profit-sharing arrangement with Inc was brought to an end, and (c) the preferential trading arrangement was brought to an end.
>
> iv) In those circumstances the judge ought to have held that the 2010 arrangements included the surrender by Inc of its beneficial interest in the share of UK and/or the release of Mr Lyampert and Mr Bell as trustees because (a) it made no commercial sense for Inc to retain a controlling interest in UK; (b) Mr Lyampert and Mr Bell agreed to split the shareholding in UK 50:50 at a time when Mr Lyampert had authority to act and was acting for Inc, and it was implicit in that arrangement that Inc would surrender its beneficial interest and/or that Mr Bell and Mr Lyampert would no longer be trustees; and (c) Mr Frenkel, who also had authority to act and was acting on behalf of Inc had said that he wanted nothing to do with UK. Those words were clear enough to bring all three elements of the 2004 agreement to an end."

9. Sir Christopher Floyd then went on to consider these points, but concluded at paragraph 80:

> "We did not hear full argument on the points which I have thus far identified. Having identified them, I consider that they should be decided, if indeed they arise, on the basis of actual rather than assumed facts, and after more extensive legal argument than we have heard."

10. He came to a similar conclusion in relation to whether any such arrangement needed to be in writing under section 53(1)(c) of the Law of Property Act 1925 or whether the 2004 agreement gave rise to a constructive trust so that under section 53(2) there was no need for writing in respect of any surrender in 2010. He held that it was impossible to come to a concluded view on the limited argument which the Court heard.

11. The next basis on which it was contended that the judgment should be upheld even though there had been no disclaimer of the shares, was on the basis of laches in that it is unconscionable for Inc now to assert a beneficial interest in the shares of UK. It is common ground now that the 2010 agreement put an end to preferential trading and profit-sharing between UK and Inc and those companies thereafter only rarely traded, and then on terms which were not preferential. Accordingly, Inc ceased to bear any commercial risk or expense associated with UK's business, and made no contribution to UK's profits. In the years since then, such profits have increased substantially.

12. The final ground in the respondent's notice was that the Frenkel disavowal amounted to a representation that Inc was giving up its beneficial interest in the shares in UK, which Mr Bell relied upon in deciding not to wind up UK and conduct its business through another commercial vehicle, but instead

continued to operate on the basis of the 2010 agreement. It would be unconscionable for Inc to deny that it gave up its interest in 2010 and to become the controlling shareholder of UK.

13. On these two issues the Court took a similar course to that taken in respect of contractual surrender, namely to refer these issues to this court. At paragraph 108, Sir Christopher Floyd said this:

> "I would allow the appeals to the extent of referring the issues of contractual surrender, laches and proprietary estoppel to the judge pursuant to CPR 52.20(2)(b). It will be a matter of case management for the judge as to whether to allow further evidence, but he should bear in mind that there has already been a trial of these issues, and the parties have had a full opportunity to advance their cases."

Basis of determination

14. I subsequently held a case management conference in which I decided not to allow further evidence. Moreover, by my order dated 17 November 2021, I directed that these issues should be confined to the way in which they were set out in the respondent's notices. Accordingly the referred issues came on for hearing before me over two days in March 2022. Each of the parties filed skeleton arguments, which totalled some 130 pages of further written submissions. Each made oral submissions over a further two days. Mr Buck, for Inc, properly made clear that he did not seek to go behind any of the factual findings which I made in the 2021 judgment as they impact upon the referred issues.

15. Those findings were made in the absence of a great deal of contemporaneous documentation. In making those findings, I observed that the 2004 agreement and the conversations between the individual parties in 2010 concerning UK

were not at the time put into or evidenced in writing and no lawyers were then involved. They tended to deal with each other by oral communication. This has given rise to several court hearings, in this jurisdiction where UK is based, and in California where Inc is based.

16. Accordingly, much of the cross-examination of these parties before me was based upon what they had said in these previous proceedings. Each of them sought to discredit his opponent. I found that there were substantial credibility or reliability issues as to the evidence of each of them with little or no independent corroboration. In those circumstances, I relied particularly in making my findings on the undisputed or incontrovertible facts, the proper inferences to be drawn from them, and the inherent likelihoods.

17. Those observations remain valid in the determination of the referred issues. It remains the case also that as it is UK, Mr Bell and Mr Lyampert who are asserting that the beneficial ownership of shares in Inc changed in 2010, it is for them to prove on the balance of probabilities that that is the case.

18. In dealing with the referred issues, I do not repeat here all of the background details which are set out in the 2021 judgment or in the judgment of the Court of Appeal, but I take them into account. I refer to them in this judgment only insofar as it is necessary to do so to understand my reasoning and conclusions on the referred issues.

Contractual surrender: general

19. With regard to the first referred issue, it is necessary to say something more of the 2004 agreement dealing with the setting up of UK. At that time Inc was a

successful company which sold computer goods and which was owned equally by Mr Lyampert and Mr Frenkel who were based in California. The former was president of Inc, and the latter was its chief financial officer. Mr Bell was based in this jurisdiction and both he and Inc were looking to set up a similar business here on a collaborative basis, with equal profiting sharing, preferential trading terms, and shared ownership. Inc was keen to establish a base in this country, which would also give better access to European markets. The vehicle chosen, on accountants' advice, was an "off the shelf" company with one issued share. It was agreed orally between Mr Lyampert on behalf of Inc and Mr Bell that Inc would own 51% of the shares in UK and Mr Bell would own the remainder.

20. The one issued share was registered in the name of Mr Bell. No one could explain why this was, but Mr Bell accepts that as a result of his agreement with Inc he held the share as to 51% for Inc. It is common ground that no one then gave any thought to the practicalities of the share-holding. However, in my judgment the 2004 agreement was clearly intended to give control of UK to Inc.

21. In the event no further shares were issued to give effect to this agreement, although in practical terms this does not seem to have mattered. Only three people were involved. A further share in UK was issued in 2008 or 2009 to Mr Lyampert. No one can recall why, but it appeared to be accepted ultimately that this was to be held for Inc. As I found in the 2021 judgment this might just as easily have been issued to Inc.

Contractual surrender: whether the 2004 agreement was indivisible

22. Mr Strelitz relies upon arguments advanced in the Court of Appeal as to why the Frenkel disavowal was effective to surrender Inc's rights in respect of the beneficial ownership of UK in three alternative ways. The first is that the 2004 agreement was a collaborative commercial venture and its three components formed a single indivisible agreement. The equal profit-sharing component went hand in hand with ownership and Inc's controlling interest was a form of security. It was implicit that on the termination of preferential trading and profit-sharing, Inc's rights in respect of the ownership of UK would come to an end. Otherwise, Inc would now be entitled to a 51% share of the profits rather than the 50% which it was entitled to under the 2004 agreement, although no longer contributing to those profits by way of preferential trading.

23. Mr Strelitz relied upon *Dalkilic v Pekin* [2021] EWHC 219, where Bacon J dealt with an agreement between four founders of a company that they would own it in equal shares. However, unlike the present proceedings, in that case each of the parties on whom the constructive trust was imposed was a party to the agreement.

24. Mr Buck for Inc, supported by Mr Barden for Mr Frenkel, submits that the categorisation of the 2004 agreement as an indivisible agreement did not form part of the respondents' notice in the Court of Appeal, which formed the basis of the referred issues. Sir Christopher Floyd observed that the case on contractual surrender was put far more clearly in that notice than in the pleadings or skeleton arguments. However, at paragraph 57 cited above, he referred to the argument that it was implicit on the ending of the preferential trading and profit-sharing that Inc's rights in respect of ownership of UK

would also end. In my judgment that is sufficient for inclusion in the referred issues of whether the 2004 agreement was indivisible.

25. As to whether it was, Mr Buck points out that the case of UK and Mr Bell in proceedings brought against them in 2015 by Mr Frenkel was not that the 2004 agreement was indivisible, but that ownership of UK was a separate issue. Mr Frenkel's claim was rejected in a 2017 judgment by Miss Tipples QC, as she then was. This was also Mr Bell's stance in earlier proceedings in California in 2012, and a letter written by his solicitors in 2016 to Mr Frenkel's solicitors. In that letter it was said on behalf of Mr Bell that he believed that Inc was the correct legal and beneficial owner of 51% of the shares in UK and entitled to 50% of the dividends. It does not follow, for example, that if Inc decided to end profit-sharing, it would automatically lose its rights in respect of the ownership of UK. There is no evidence that the parties envisaged that this would happen.

26. In my judgment, by agreeing in 2004 as to how UK was to be owned, the parties must be taken as intending that this was to give control of UK to Inc. UK was a start-up company, whereas Inc was an established and profitable company. Inc had no other base in this country. I am not satisfied that the parties to that agreement must be taken to have intended that if profit-sharing or preferential trading become no longer mutually beneficial that Inc would automatically also lose that base. I do not accept the submission that there was no need for control once profit-sharing ended. Inc may reasonably be taken as intending to keep control of its base in this jurisdiction, even if it no longer wished to share profits, and Mr Bell may reasonably be taken to have accepted

that. In my judgment, this part of the claim on contractual surrender is not made out.

Contractual surrender: rights to more shares

27. I next deal with issues in relation to contractual surrender identified by Sir Christopher Floyd in paragraph 70 of his judgment , namely whether the 2004 agreement created a specifically enforceable agreement to issue shares in the proportions 51:49, or whether it amounted to an express declaration of trust. UK and Messrs Bell and Lyampert contend for the former, and say that that gave rise to a constructive trust. Inc had previously in these proceedings also contended for a constructive trust, but now contends for an express trust. Sir Christopher Floyd observed that it would be unfair to hold Inc to that position, given the way the case against it was clarified in the appeal. He also identified a further underlying question as to whether the 2004 agreement envisaged that shares would be issued in the identified proportions, or were the two shares to be held on trust in those proportions?

28. The importance of the distinction between a constructive trust and an express trust, in this context, is the absence of writing containing or evidencing the surrender, which is required in respect of a disposition of an equitable interest under an express trust, but arguably not under a constructive trust. Section 53(1)(c) of the Law of Property Act 1925 (the 1925 Act) requires the disposition of an equitable interest to be in writing (unless saved by the provisions of section 53(2)):

> "53(1) Subject to the provision hereinafter contained with respect to the creation of interests in land by parol—…

> (c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will.
>
> (2) This section does not affect the creation or operation of resulting, implied or constructive trusts.

29. The constructive trust contended for is one which obliged the men to issue shares in the agreed portions and continued for so long as the 2004 agreement remained in force or was specifically enforceable, but ended when that agreement came to an end. Mr Bell and Mr Lyampert were then released as trustees and were then each the legal and beneficial owner of one share.

30. At paragraph 72, Sir Christopher Floyd observed that the notion that a trust arising under a specifically enforceable contract may simply come to an end with the contract is not a new one. Amongst other authorities he cited Lord Walker in *Jerome v Kelly* [2004] UKHL 25 where he explained the role of the trust created in the context of a specifically enforceable sale of land. At paragraph 32 Lord Walker continued:

> … "It would therefore be wrong to treat an uncompleted contract for the sale of land as equivalent to an immediate, irrevocable declaration of trust (or assignment of beneficial interest) in the land. Neither the seller nor the buyer has unqualified beneficial ownership. Beneficial ownership of the land is in a sense split between the seller and buyer on the provisional assumptions that specific performance is available and that the contract will in due course be completed, if necessary by the Court ordering specific performance. In the meantime, the seller is entitled to enjoyment of the land or its rental income. The provisional assumptions may be falsified by events, <u>such as rescission of the contract (either under a contractual term or on breach)</u>. If the contract proceeds to completion the equitable interest can be viewed as passing to the buyer in stages, as title is made and accepted and as the purchase price is paid in full." (emphasis supplied).

31. Mr Strelitz submits that is more likely that the intention in the 2004 agreement was that shares would be issued in the identified proportions. The language used was that of ownership, which to non-lawyers is likely to have meant legal ownership rather than by way of trust. It was also likely that Inc was intended to have voting rights attached to a controlling interest in UK, rather than relying upon Mr Bell complying with fiduciary duties to enforce its rights. If Mr Bell declared a trust in respect of his single share, it is not clear that Inc would have been able to stop him issuing others shares to another party which may not be bound by any such trust.

32. Mr Buck contends that there is no evidential basis for construing the 2004 agreement in that way. Indeed the witness statements of Mr Bell suggested that no thought was given as to what might happen if more shares were issued, and that the agreement was to deal with the situation at the time and to divide the ownership as from that time. Such an obligation would require an implied term to that effect, would be contrary to the evidence, and has not been pleaded. The parties at the time had no legal knowledge or advice as to how voting might in practice take place in light of the agreed split of ownership.

33. He further contends that no one argues that Mr Lyampert was a party to the 2004 agreement in his personal capacity, and no constructive trust can be imposed on him in respect of the one share then issued. He submits that it is now common ground that when the second share was issued in his name, he held that for Mr Bell and Inc in the previously agreed proportions, so it must be the case that he did so on express trust. Although his evidence has varied somewhat in this regard, he accepted in re-examination before Miss Tipples

QC that he understood the previously agreed proportions of ownership, and so must have held the second share on this basis.

34. As already observed, the parties to the 2004 agreement must be taken to have intended that Inc would control UK. I accept that no thought was given as to the issue of more shares, and that the agreement was intended to deal with the ownership at the time of the agreement and from that moment on. There is an insufficient evidential basis from which to conclude that the parties must also be taken to have intended the issue of further shares at some point in the future in the agreed proportions or to find an implied term to that effect. Such a term was not necessary to make the agreement work, and indeed the agreement did work without the issue of more shares.

35. Having come to that conclusion, I take comfort in the fact that no one suggested after the 2004 agreement that there should be further shares issued in such proportions. It was not until 2008 or 2009 that one further share was issued, on accountants' advice to Mr Bell, and that was issued in the name of Mr Lyampert.

Contractual surrender: the 2010 agreement

36. A further way in which contractual surrender is put arises from what is said to have been agreed in the 2010 agreement in the aftermath of the Frenkel disavowal. On 8 February 2010 Mr Frenkel served a notice of dissolution in respect of Inc. The next day Mr Lyampert phoned Mr Bell to tell him that Mr Frenkel had closed down Inc and had taken its staff to a new company. Mr Lyampert assured Mr Bell that he would carry on with Inc as best he could. Mr Frenkel in March 2010 commenced proceedings against Mr Lyampert and

Inc in the Californian courts seeking dissolution of the company and damages against Mr Lyampert for conversion of its assets and on other grounds.

37. The Frenkel disavowal was made in those circumstances. Mr Bell and Mr Lyampert each say they then agreed to carry on the business of UK equally between them, and that UK would trade on ordinary commercial terms (and so be able to compete with Inc). That was inconsistent with the previously agreed 51:49 split. Mr Lyampert also agreed to assume responsibility for a six figure debt which Inc owed UK and that Inc was thus released from the debt. They say that this was at a time when Mr Lyampert had authority to act and was acting for Inc.

38. Further, it was explicit or implicit in the 2010 agreement that Inc would surrender its beneficial interest and that Mr Bell and Mr Lyampert would no longer be trustees in respect of the shares in UK. Mr Frenkel, who also had authority to act and was acting on behalf of Inc, had said that he wanted nothing to do with UK. Those words were clear enough to bring all three elements of the 2004 agreement to an end. The 2010 agreement was a binding and specifically enforceable agreement.

39. In paragraph 50 of the 2021 judgment, I observed that the evidence of Mr Bell and Mr Lyampert as to the 2010 agreement was not challenged before me, and Inc accepted in its pleading that that agreement reflected the business of the two companies as it subsequently developed as a matter of fact after the fall out. I made no finding as to whether part of the agreement was that Inc would surrender its beneficial interest in UK.

40. During his cross-examination before me, Mr Bell maintained that the issued shareholding would "be the new relationship." However, he had not previously indicated in previous proceedings or in his solicitor's letter in 2016 that there had been a change in such a beneficial interest in 2010.

41. Mr Lyampert in his witness statement appeared to confirm the account which Mr Bell gave in cross-examination before me, but then during his own cross-examination, he seemed to shift his ground somewhat. He accepted that his belief in 2010 that he was beneficially entitled to the share issued in his name was not affected by anything which Mr Frenkel said or did and that it was the trading relationship which came to an end.

42. There is also documentary evidence which is inconsistent with such an implication. Shortly after the 2010 agreement, Mr Frenkel sent text messages to Mr Bell asking for payment of dividends from UK and Mr Bell responded by asking for his payment details.

43. In 2012, in the course of his deposition in the Californian courts, Mr Bell stated that the owners of UK were himself, Mr Lyampert and Mr Frenkel. In the 2015 proceedings, Mr Bell clarified that what he meant by that was that Mr Frenkel and Mr Lyampert were owners "via Inc." In closing submissions on his behalf in the 2015 proceedings, it was said that at the time the 2012 deposition was made, Mr Frenkel and Mr Lyampert were still the owners of Inc and as a result it was still arguably correct to say that the owners of UK were the three men, albeit in the case of Mr Frenkel and Mr Lyampart through their corporate vehicle of Inc.

44. By letter dated 31 August 2016 in the 2015 proceedings, Mr Bell's solicitors responded to a request by Mr Frenkel's solicitors for the resumption of dividend payments from UK, and said "Mr Bell believes that LA Micro Inc is the correct legal and beneficial owner of 51% of the shares and entitled to 50% of the dividends." In the 2015 proceedings, it was Mr Bell's case that payment of such dividends were then made to Mr Lyampert at his direction on behalf of Inc. It is the case of Inc and Mr Frenkel that this could only be on the basis that Inc continued to have a beneficial interest in the ownership of UK.

45. On that latter point, as Sir Christopher Floyd observed in paragraph 29, the events of 2010 were not directly in issue in the 2015 proceedings. However, these inconsistencies cause me to doubt that as part of the 2010 agreement, Mr Bell and Mr Lyampert discussed expressly the share ownership of UK. It is more likely that what they focussed on was the business of UK going forward and how profits would be divided.

46. The issue remains as to whether by agreeing to divide profits equally, which was inconsistent with the previously agreed 51:49 split, it was implicit that they would also own UK equally.

47. Mr Strelitz relied on the Court of Appeal judgment in *Neville v Wilson* [1997] Ch 144, where it was held that where shareholders agreed an informal dissolution of a company whereby its assets were sold and resulting cash shared out, they must have intended that the company should not be left with assets so that shares which the company owned in another company and which no one had thought of would be divided between them in proportions corresponding to their shareholding. Nourse LJ, giving the judgment of the

court, said at 158A that each shareholder's oral or implied agreement created an implied or constructive trust in favour of the other shareholders. Accordingly section 53(2) of the 1925 Act applied (see also *Dalkilic* at paragraph 299).

48. In my judgment, it was a necessary implication of the 2010 agreement that the shares in UK would thenceforth be held in the same way as the profits were to be split, namely that each of the issued shares would be held beneficially for the person in whose name it was issued. The 2010 agreement was entered into on the basis of the Frenkel disavowal, his setting up a new company to compete with Inc, and his steps to dissolve Inc. If there were no discussions between Mr Bell and Mr Lyampert in those circumstances as to how UK was thenceforth to be owned and controlled, then by agreeing to carry on the business of UK equally, the proper inference is that they are to be taken in all the circumstances as intending that ownership also was to be equal.

49. However, it is another issue whether such an implication bound Inc. Mr Barden submits that Mr Lyampert would have been acting in breach of his fiduciary duties to Inc, and in his own interests rather than those of Inc, by agreeing to give up its shareholding in UK in his favour. I was not referred to Californian law in relation to such duties, and so the presumption must be that such law is the same as in this jurisdiction (See *Iranian Offshore Engineering and Construction Company v Dean Investment Holdings* [2018] EWHC 2759).

50. Mr Lyampert did not have the approval of the other director and shareholder of Inc to such an implication, and indeed there is no suggestion that Mr Frenkel knew of it at the time.

51. The difference between the latter's disavowal and the 2010 agreement is that by the former, Mr Frenkel acquired no personal interest in UK, but in the latter Mr Lyampert says he did. Mr Barden submits that that would be in breach of section 175 of the Companies Act 2006, which provides that a director must avoid a situation where he has, or can have, a direct or indirect interest which may conflict with the interests of the company. It would also be a breach of the duty under section 177 to declare such an interest to the other directors.

52. A director does not have the authority to commit a company to a transaction which would amount to a breach of his fiduciary duties (see, for example *GHLM Trading Ltd v Maroo* [2012] EWHC 61 (Ch) at paragraphs 170-1 per Newey J, as he then was, and *Criterion Properties v Stratford* [2004] UKHL at paragraphs 27-32 per Lord Scott).

53. This point taken by Mr Barden is unpleaded. Moreover, the 2010 agreement was arrived at in the context that Mr Frenkel was seeking to dissolve Inc, had taken its staff to a new company and had indicated to Mr Bell that UK and its business was his. In those circumstances, in my judgment, Mr Bell was free to enter into the 2010 agreement with Mr Lyampert, who must be taken as having the necessary authority on the part of Inc to do so.

54. However, that finding will not assist UK or Mr Bell if Inc's beneficial interest in UK's shareholding arose by way of an express trust as a result of the 2004 agreement. The reason for that is the absence of writing in respect of the 2010 agreement and the effect of section 53(1)(c) of the 1925 Act. I have already found that such an interest did not arise on the basis of constructive trust as

contended for by UK and Bell, and it was not contended on their behalf that it did so on the basis of resulting or implied trusts.

55. In my judgment, the 2004 agreement is more consistent with an express trust of the then one issued share being held in the agreed proportions. Mr Lyampert was acting on behalf of Inc in the 2004 agreement and not in his personal capacity. It is not suggested that an express trust was ever mentioned.

56. However an explicit declaration is not needed and the word trust need not be used. It is a matter of construing the substance and effect of the words used in the surrounding circumstances (see Snell's Equity, 34th edition, paragraphs 22-013 and 22-049). The person said to have created the trust need not be aware that they have, but may be taken to have done so if that is the effect on a proper legal construction. Scarman LJ, as he then was, in *Paul v Constance* [1977] 1 WLR 527 at 530 observed that it is not to be expected that people who are unaware of the subtleties of equity will use "stilted lawyer's language." There, the words "The money is as much yours as it is mine" were held to be a sufficient declaration of trust.

57. In my judgment the 2004 agreement as to how UK would be owned was a sufficient declaration of trust in respect of the then only issued share. An express trust arose from the words spoken as to ownership in the surrounding circumstances.

58. It is now common ground that when the second share was issued to Mr Lyampert, he held it in trust for Inc in the agreed proportions. Although Mr Lyampert believed at the time that the share issued in his name in 2008 and 2009 was beneficially owned by him, Miss Tipples QC found that such belief

was incorrect. It was not suggested before me that Mr Bell or Mr Frenkel gave any cause to Mr Lyampert for that belief. There was no evidence before me of any understanding between the parties in respect of that share which differed to the understanding which they had in respect of the first share. In my judgment that belief is insufficient to impact in any significant way on the clear agreement reached as to ownership in 2004, and the parties to that agreement, Inc and Mr Bell, are to be taken as intending that the second share should be held on the same basis as the first share, namely on express trust to be inferred from the words used in the 2004 agreement and/or the conduct of the parties thereafter until 2010.

59. That being so, any disposition of Inc's beneficial interest in respect of UK's ownership would need to be in writing to comply with section 53(1)(c) of the 1925 Act, and it follows that the lack of such writing means that such disposition is not valid.

60. If, contrary to that finding, the shares were held on constructive trust, I would accept that any disposition of Inc's beneficial interest in them would amount to an operation within the meaning of section 53(2).

61. However, for the reasons given above, I am not satisfied that UK and Mr Bell are entitled to the relief sought on the basis of contractual surrender.

Proprietary estoppel

62. Although the Court of Appeal took the issue of laches after contractual surrender, Mr Buck contends that laches can only arise if the cases on

contractual surrender and proprietary estoppel both fail, and so I will deal next with the issue of proprietary estoppel.

63. There was no substantial dispute before me as to the principles of proprietary estoppel to be applied. They were summarised by Sir Christopher Floyd at paragraph 102 of his judgment by reference to the observations of Lord Walker in *Thorner v Major* [2009] UKHL 18 at paragraph 29. This was to the effect that although there is no comprehensive and uncontroversial definition of proprietary estoppel, most authors agree that it consists of three main and overlapping elements; namely a representation or assurance made to the claimant, reliance on it by the claimant; and detriment to the claimant in consequence of his reasonable reliance.

64. At paragraph 56, Lord Walker said that the assurance relied upon must be "clear enough" and that whether it was depended upon context. At paragraph 61 he continued that such an assurance must relate to identified property owned or about to be owned by the person making the assurance. He observed that such identified property would usually be land, but did not confine the application of the principle to land. In *Fisher v Brooker* [2009] UKHL 4, the doctrine was considered by the House of Lords as it applied to the recognition of a share in the copyright of a musical work, and there was no suggestion that it could not be applied to such property.

65. Lord Neuberger in paragraph 101 of his opinion in *Thorner,* cited Hoffmann LJ (as he then was) in *Walton v Walton* (unreported, 14 April 1994), at paragraph 21, that "equitable estoppel [by contrast with contract]… does not look forward into the future [; it] looks backwards from the moment when the

promise falls due to be performed and asks whether, in the circumstances which have actually happened, it would be unconscionable for the promise not to be kept."

66. UK and Mr Bell contend that the Frenkel disavowal in 2010 was a representation or assurance that Inc was giving up its beneficial interest in the shares in UK. It was reasonable for Mr Bell to understand that to be intended as a promise on which he could rely, and he did so understand it. In reliance on that promise, Mr Bell decided not to wind up UK and conduct its business through another commercial vehicle, but to enter into the 2010 agreement and to operate on the basis of that agreement thereafter. If Inc is allowed to go back on the Frenkel disavowal Mr Bell will suffer a detriment because Inc will become the controlling shareholder of UK. It would therefore be unconscionable for Inc to deny that it gave up its interest in 2010.

67. UK and Mr Bell contended before the Court of Appeal that although the necessary findings to support the case on proprietary estoppel were not made in the 2021 judgment, they were made by Miss Tipples QC in the 2017 judgment, and it is now submitted before me that the evidence before me is not materially different to that before Miss Tipples.

68. Mr Buck and Mr Barden submit that the Frenkel disavowal was not sufficiently clear to found proprietary estoppel and did not amount to a promise to do anything. Mr Bell could not have thought that Mr Frenkel was disavowing all of Inc's interest in UK. Mr Bell could not have relied on the disavowal, as he saw Inc and Mr Lyampert as interchangeable.

69. In my judgment, that was a clear enough assurance to Mr Bell that Mr Frenkel wanted nothing to do with UK and that that the company and business was his to do with what he liked. This was important to Mr Bell, given that Inc had beneficial rights to control UK, and given that Inc was owned equally between Mr Frenkel and Mr Lyampert, whom Mr Bell saw then as two warring factions. He did not want to be between them. Once the Frenkel disavowal was given, that concern disappeared. It is likely that the precise legal consequences did not then much matter to Mr Bell. The two issued shares were in his name and the name of Mr Lyampert respectively. What mattered to Mr Bell, was that Mr Frenkel, one of the warring factions, was out of the picture so far as UK was concerned, and that Mr Bell was free to deal only with Mr Lyampert, with whom he remained on friendly terms. Mr Bell is likely to have reasonably understood the Frenkel disavowal to mean that Inc speaking through Mr Frenkel, would not seek to rely upon the 2004 agreement as to the beneficial interest of Inc in UK.

70. It is not surprising that Mr Bell did not understand the effect of the Frenkel disavowal in terms of corporate identity. Nor is surprising that, as he later recalled, he then saw Inc and Mr Lyampert as interchangeable, given the fact that Mr Lyampert assured him that, despite Mr Frenkel seeking to dissolve Inc and taking its staff to a new company, he, Mr Lyampert, would carry on with Inc as best he could. In my judgment neither of these facts, individually or taken together, are sufficient to impact upon Mr Bell's reasonable understanding of what the Frenkel disavowal meant in terms of UK.

71. The focus on this issue was rather upon whether Mr Bell relied upon those assurances to his detriment. Unsurprisingly Mr Buck, supported by Mr Barden, submits that in light of the subsequent conduct of Mr Bell in engaging with Mr Frenkel's request for payments from UK and Mr Bell's inconsistent indications in subsequent proceedings and in the 2016 letter, it cannot be the case that Mr Bell understood these assurances in the way that he says or that he relied upon them at all, let alone to his detriment.

72. It is important in this context, in my judgment, to focus upon the detrimental reliance which forms part of Mr Bell's case, and, in the words of Hoffman LJ in *Walton*, to look backwards from the moment the assurance fell to be performed. In my judgment that moment was immediately after the assurances, or in other words the Frenkel disavowal, had been given.

73. Mr Bell in cross-examination before me said that after the assurances, the impression he had was that UK was his. He also confirmed his witness statements to the effect that if he thought UK would still be owned between himself and "the two warring partners…via Inc" he would have resigned from UK and he would have widened or restarted his other business operations which he had the knowledge and resources to make a success of "in order to avoid getting caught up." Instead he entered into the 2010 agreement with Mr Lyampert. The latter gave evidence in support of this part of Mr Bell's evidence.

74. In my judgment that evidence has the ring of truth about it, given the modest financial position of UK in 2010, and I accept it. Mr Bell's evidence as to what he would have done if he thought that UK was still owned by himself

and two warring factions is similar to what Mr Frenkel did in fact do. Mr Buck and Mr Barden submit that by 2011 and 2012 it was clear that Mr Frenkel was not walking away and yet Mr Bell continued to observe the 2010 agreement and did not resign from UK. Thus he did not rely upon the Frenkel disavowal.

75. However, in my judgment, once the 2010 agreement was made with Mr Lyampert on that basis and acted upon successfully for a year or two, it would be more difficult for Mr Bell to walk away from UK to pursue other business options. This was not dealt with in any great detail in the evidence before me. However, in my judgment it is likely that Mr Bell and Mr Lyampert made their decision in 2010 in reliance on the Frenkel disavowal.

76. The fact that Mr Bell in subsequent proceedings in California and in this jurisdiction became highly confused as to the legal consequences of all that occurred in 2010 (which are still not clear cut to lawyers) does not, in my judgment, significantly impact upon the detrimental reliance in 2010.

77. As Inc remained deadlocked it made no claim to a beneficial interest in UK until the present proceedings. Indeed in the 2015 proceedings it was Mr Frenkel who was claiming a beneficial interest in UK, a claim which was subsequently rejected. In light of the substantial successes of UK in the meantime, in which Inc played no part and took no risk, in my judgment it is unconscionable of Inc now to assert a 51% beneficial ownership in UK so as to give it control. In my judgment the claim of Mr Bell and UK on proprietary estoppel so as to prevent that situation, is made out.

Laches

78. In case I am wrong about that I shall next deal with laches. This has been described as "…an equitable doctrine, under which delay can bar a claim to equitable relief" in which "some sort of detrimental reliance is usually an ingredient…" (see Lord Neuberger in *Fisher v Brooker*). Accordingly, a party who has waited to see whether there was value in claiming an equitable interest while allowing another to take the commercial risks involved may be denied a remedy.

79. The commercial context makes it a different kind of case from that of a beneficiary under a trust, because in the former case the trust is a vehicle for accomplishing a commercial aim (per Mummery LJ in *Patel v Shah* [2005] EWCA Civ 157 at paragraph 34). In that case laches was held to bar from relief a claimant who had departed from commercial arrangements and ceased to bear any of the risk or expense.

80. For similar reasons to those given in relation to proprietary estoppel, in my judgment the element of detrimental reliance is also present when considering laches. However, the conduct underlying the latter principle is delay. It is rather unusual for UK and Mr Bell to rely upon the delay of Inc when they waited 10 years before bringing their claims. Whilst Inc and Mr Frenkel have brought counterclaims, these are in essence to counteract those of UK and Mr Bell and to achieve certainty should their claims fail.

81. Mr Lyampert is in a somewhat different position. He does not dispute the claims of UK and Mr Bell, and has aligned himself to them. However he is a defendant to a Part 20 claim brought by Inc.

82. As Mr Buck submits, the authorities dealing with laches all do so on the basis of "a bar to a claim of equitable relief" in the words of Lord Neuberger, and none cited to me concerned a case where a claimant seeks to found a claim on the basis of the doctrine. As UK and Mr Bell seek to do so, the question is raised as to whether any delay on the part of Inc should be judged in light of their own delay.

83. In my judgment, there are several difficulties in the submission that Inc should have acted in 2010 or within a reasonable time to assert its beneficial ownership of UK. First, it was deadlocked, and although a court appointed administrator could have been sought earlier than it was, that was not a straightforward exercise and one that was not to be taken lightly unless there was a clear need to do so.

84. Second, it is now accepted that until 2010 Inc was beneficially entitled to a 51% shareholding in Inc. UK and Mr Bell did not make it very clear then or for some years afterwards that they regarded that interest to have ceased.

85. Third, even if Inc is to be taken as being aware of the issues in the 2015 proceedings, to which it was not a party, as indicating such a change, in Mr Bell's 2016 letter a different stance was taken. In the 2017 judgment, Mr Frenkel's claim to a 25.5% beneficial interest in UK was rejected, but in my judgment the stance of Mr Bell in particular remained confused. Even if Inc should have asserted a claim in 2017 or within a reasonable time thereafter, the delay since then has not in my judgment added to any significant extent to detrimental reliance and should not bar equitable relief.

86. For all these reasons I am not satisfied that UK and Mr Bell are entitled to rely upon laches in the way in which they seek to do.

87. As for the point that Mr Lyampert does not come to equity with clean hands because he has failed to pay a judgment debt owed to Mr Frenkel as a result of the proceedings in California concerning his conduct in respect of Inc, Mr Thorne on his behalf submits that that doctrine cannot apply to any unrelated reprehensible conduct. Such conduct must have an immediate bearing on the matters in issue, see *Richardson v Blackmore* [2005] EWCA Civ 1356 at paragraphs 55 to 56, and here it does not.

88. In my judgment, an outstanding debt from Mr Lyampert to Mr Frenkel is not such conduct as to deprive the former of equitable relief which he would otherwise be entitled to in respect of the ownership of UK.

Conclusion

89. In my judgment the case of UK and Mr Bell on the basis of contractual surrender and laches fails, but succeeds on the issue of proprietary estoppel. Inc is estopped from asserting a beneficial interest in UK and it is appropriate to give declarations to give effect to that position.

90. I would be grateful if counsel could agree a draft order and file it within 14 days of handing down of this judgment. Any consequential matters which cannot be agreed should be dealt with on the basis of written submissions, which should also be filed within the same timescale.