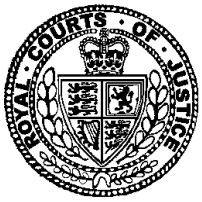

Neutral Citation Number: [2021] EWHC 1594 (Comm)

Case No: CL-2020-000412

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**COMMERCIAL COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/06/2021

**Before** :

**THE HONOURABLE MR JUSTICE CALVER**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

**ALI PARSADOUST**

**Claimant**

**- and -**

**HANGING GARDENS LIMITED**

**Defendant**

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**Lord Grabiner QC, Conall Patton QC and Daniel Fletcher** (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Claimant**
**David Lord QC and Stephen Ryan** (instructed by **Dechert LLP**) for the **Defendant**

Hearing dates: 25-26 May 2021

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# APPROVED JUDGMENT

**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 17 June 2021 at 10:00 am**

**Mr Justice Calver :**

## INTRODUCTION

1. The Claimant is the founder and Chief Executive Officer of Babylon Health, a digital healthcare provider. The Defendant is a shareholder in Babylon Health's holding company, Babylon Holdings Limited (the "Company"), which is a company registered in Jersey.

2. By a written Option Agreement dated 17 August 2016 (the "Option Agreement"), the Defendant granted the Claimant a call option over some of its shares in the Company (the "Option" over the "Option Shares"). It is common ground that if the Option has not lapsed, it applies to what are now 26,345,000 of the Defendant's shares in the Company. The Option Shares are now said to be worth tens of millions of pounds and so if it has not lapsed, the Claimant is heavily 'in the money' on the Option. Under the terms of the Option Agreement, the Claimant is entitled to exercise the Option during the "Option Period" of five years, i.e. until 16 August 2021.

3. It is the Claimant's case that he exercised the Option by way of an exercise notice dated 12 June 2020. That notice was preceeded by a letter dated 13 May2020 written by his then solicitors, Taylor Wessing LLP ("Taylor Wessing"), addressed to the Defendant. By this letter, the Claimant sought to notify the Defendant of his intention to exercise the Option with immediate effect. The Defendant, however, has refused to comply. The Claimant has brought this action for specific performance. In the alternative to specific performance, the Claimant claims damages for breach of the Option Agreement. By this application, the Claimant seeks summary judgment on his claim.

4. There is no dispute that, if the Option Agreement has not been varied, the Claimant is entitled to the relief sought. However, the Defendant alleges that, on 30 July 2019, the parties orally agreed to vary the Option Agreement. The Defendant's case is that, by this alleged oral agreement, the terms of the Option Agreement were varied and that the Claimant failed to exercise the Option in accordance with the Option Agreement as varied, in particular as regards a stipulation as to time, and thereby lost the right to exercise the Option. Alternatively the Defendant contends that the Claimant lost the right to exercise the Option by virtue of an implied term that in the event that the Claimant failed or refused to exercise the Option as soon as reasonably practicable, which the Defendant contends he did, he would lose the right to exercise the Option ("the Forfeiture Term").

5. Originally, in the alternative to summary judgment, by his application the Claimant sought an injunction restraining the Defendant from dealing with the Option Shares pending trial. However, subsequently undertakings to equivalent effect were sought by the Claimant and were given by the Defendant, as recorded in a Consent Order dated 3 February 2021. Accordingly, that part of the application is no longer live.

## BACKGROUND

6. In 2019, the Company was raising funds from new investors ("the 2019 fundraising"). During a previous fundraising round, other shareholders in the Company (including the Defendant) had transferred a percentage of their shares to the Claimant (or at his direction) in order to prevent his stake in the Company from being diluted. Such shares

were known as "*anti-dilution*" shares. The shareholders were not under any pre-existing obligation to make transfers of anti-dilution shares, but during the previous fundraising they had entered into an *ad hoc* agreement to do so in recognition, it is said by the Claimant, of the Claimant's work in founding and leading the Company.

7. In the context of the 2019 fundraising, it was envisaged that most of the other shareholders would transfer 13.6% of their existing shareholdings to the Claimant (or at his direction) as anti-dilution shares. A draft letter provided on 15 July 2019 indicated that, in the case of the Defendant, this would involve the transfer of 14,433 shares. This was later revised to 14,161 shares, and subsequently to 14,161,051 shares because the 2019 fundraising would involve the subdivision of each share in the Company into 1,000 shares. The number of anti-dilution shares to be transferred by the Defendant was calculated by reference to the Defendant's total shareholding in the Company at the relevant time, *including the shares that were subject to the Option*.

8. The Defendant (alone among the shareholders) took issue with the proposed transfer of anti-dilution shares. By way of an email dated 23 July 2019, Mr. Daniel Hallgarten – a partner of HGT Management LLP, which provides administrative, accounting and tax support services to the Defendant and others – acting on behalf of the Defendant, commented in relation to the draft documentation for the transfer of anti-dilution shares:

> "I have now had feedback from [the Defendant].
>
> No comments on the documents but surprise expressed that there is yet another anti-dilution protection for the founder, which is highly unusual and not market normal, and that the other shareholders being diluted have been prepared to accept this again."

9. The Defendant's evidence is that part of its objection to the transfer centred on the fact that the number of anti-dilution shares that it was asked to transfer was calculated by reference to its entire shareholding, including the Option Shares.

10. In that context, on 29 July 2019 Mr. Hallgarten told the Claimant that the Defendant was considering using its shareholder rights to veto the fundraising. The Defendant contends that it was represented to it on behalf of the Claimant and/or the Company that the 2019 fundraising needed to be completed urgently, and that it might be jeopardised if it were not concluded imminently.

11. The next day, 30 July 2019, three telephone calls took place between Mr. Hallgarten and the Claimant. Mr. Hallgarten recorded the calls, but did not reveal to the Claimant that he was doing so. The Defendant's case is that an oral agreement was reached during these calls. As set out at paragraph 24 of the Defence, the express terms of that alleged oral agreement are said to have included the following terms, namely that:

    a) The Claimant would exercise the Option immediately or as soon as reasonably practicable after the fundraising had been approved.

    b) The number of anti-dilution shares that the Defendant would be required to transfer to the Claimant or at his direction would be reduced (such that the Defendant would be required to transfer 10,652,089 instead of 14,161,051 of its shares in the Company).

c) The Claimant would issue a promissory note to the Defendant for £2.4 million, payable by the end of the Option Period specified in the Option Agreement, i.e. by 16 August 2021 (although the Claimant would endeavour to repay it sooner), which would constitute consideration for the exercise of the Option.

d) The Option Agreement was varied in accordance with the terms set out above in sub-paragraphs (a)-(c).

e) The Claimant would use his best efforts to facilitate a sale of 50% of the Defendant's remaining shares in the Company by the end of 2019 at the latest at the share price reflected in the 2019 fundraising or as close thereto as possible.

f) The Claimant confirmed his understanding that there would be no further transfers of anti-dilution shares required.

g) The Defendant would support the 2019 fundraising by:

i. procuring that its nominated director, Mr. Peter Kadas, would vote in favour of the 2019 fundraising at the board meeting scheduled to take place later that evening (30 July 2019);

ii. not exercising its stakeholder rights to veto the 2019 Fundraising; and

iii. procuring that the documents required to effect the 2019 fundraising be executed on the Defendant's behalf as required.

h) Owing to there being insufficient time before the board meeting scheduled to take place later that evening (30 July 2019), the oral agreement had to be concluded orally, but the parties would record in writing the terms of the oral agreement as soon as reasonably practicable after the board meeting.

12. As set out at paragraphs 25-26 of the Defence, the implied terms of the alleged oral agreement are said to have included in particular:

a) The Forfeiture Term, that is that if the Claimant failed or refused to exercise the Option and/or to provide a promissory note for the option price as soon as reasonably practicable, the Claimant would lose the right to exercise the Option;

b) A term removing or dispensing with clause 15.1 of the Option Agreement (the "NOM Clause"), which required any variation of the Option Agreement to be "*in writing and signed by or on behalf of each party*".

*The first 30 July call*

13. The first of the 30 July calls lasted approximately 15 minutes. The call was initiated by the Claimant, who asked Mr. Hallgarten (as the Defendant's representative) how the Defendant wanted to proceed as regards the 2019 fundraising:

> "AP: … What would you like to do? We have an option agreement that we will call you on. What would you like to do? You want to block the deal, we can do that. Then we have to put the company into administration. What would you like to do?"

14. Mr. Hallgarten responded as follows:

> "DAH: Ali, I'm just the — I'm just the messenger…
>
> …
>
> DAH: …what the, the board of HGL, having met, decided was that this was an unacceptable level of dilution for, for the founders of the company…
>
> …
>
> DAH: …HGL is saying it's not, it's not agreeing to this dilution at this time."

15. As the conversation progressed, the Claimant asked, "*who do I need to talk to? Who is this board of HGL?*" Mr. Hallgarten responded, "*I will pass on the message.*"

16. The Claimant then put forward a proposal that the Defendant's transfer of anti-dilution shares would be limited to its shares *net of the Option Shares*:

> "AP: Ok, let's say... look, let's, let's give them something so they don't... I mean, I can't let you... I can't let you take forty million dollars of my money, which is the option, right? But the only thing I think may be fair is that we... you shouldn't... that, not get you diluted on the, uh, your dilution, what you have to transfer will not be on the entire amount of your option, and that's a one-off offer, but on what will be left. Right? So basically that cuts your dilution by [INDISCERNIBLE]…
>
> DAH: Sorry, what… sorry, sorry, I don't, I'm not sure I understand. We…
>
> AP: So…
>
> DAH: There's, there's an additional fourteen thousand one hundred and sixty-one share dilution proposed in this, in this C round.
>
> AP: So, I don't know what's the number of dilution… or shares we're gonna… What I'm saying is that, at the moment it's presumably calculated based on a hundred per cent of your holding, right?
>
> DAH: Uh, yes, yeah.
>
> AP: I'm happy to say, I'm happy to say we do a transaction, because I don't want this to become everybody saying why you done that, we go in and say I execute my, I, I do my options, I buy my options out, right? So we turn but then that two and a half million I owe you will become a loan, right? Uh, that, that transpires on the day that we said, uh, that, that the options are long- standing. That means that your existing shares will be, your existing shares would be less by twenty per cent which means your transfer, what you need to transfer, your proportion, will also fall by twenty per cent. Right? So if you have to transfer fourteen thousand, that means you will have to transfer, uh, eleven thousand now."

17. Clarifying his suggestion as to how the option price would be paid on exercise of the Option, the Claimant explained that the option price would be paid by way of a loan, payable at the end of the Option Period (i.e. 16 August 2021):

> "AP:… But what I'm happy to do, Daniel, is to say look, I'm gonna, we exercise the options at the same time, we turn... I don't pay you the amount now because I don't have it but I would turn that into a loan, um, which I will pay within the time that we have,

> right, and I'll try and liquidate enough shares to immediately pay you and... so, pay you as soon as possible."

18. Addressing the proposed anti-dilution transfers more generally, the Claimant stated:

> "AP:…This is, this is something I went to with honour. I tell you that now, we all agreed on it, every other shareholder agreed on it, and if you now withdraw at the last minute because you can, this is a matter of honour..."

19. Mr. Hallgarten explained he would relay the proposal to the Defendant and take instructions:

> "DAH: Ok, I've noted all that. I will relay it as the HGL director that I need to speak to is available and I will relay that.
>
> AP: And when will you come back to me?
>
> DAH: Well, as soon as I... as soon as I've... you know, I need to speak to... um, I need, I need to track him down and speak to him, and, um, take, take, take instructions."

20. As the conversation drew to a close, the Claimant stated:

> "AP: This is... you've basically got from me now, and it's a one-off offer, it's not in writing, it's this and it won't be repeated. Which is you now get about, whatever it is, three thousand shares back at two thousand dollars each, right, um, you know, so you've got six million dollars back for this conversation, right? Please don't make it any more... worse than this, because it won't be... right? That's a big win for you, please take it as that and leave it at that."

*The second 30 July call*

21. The second of the 30 July calls also lasted approximately 15 minutes. This call was initiated by Mr. Hallgarten, who opened the call explaining:

> "DAH:... I'm managing conflicting internal, um, stuff here, um.
>
> …
>
> DAH: I think... Here's, here's, here's, I think, a way, a way, forward if it, if, if we can figure something out. I think your... you know, we, we... basic- basically, Lajos needs to be taken off the table. Peter doesn't want to be taken off the table."

22. This was a new proposal that had not been raised in the first of the 30 July calls. By this, Mr. Hallgarten meant that Mr. Lajos Varga (a shareholder in the Defendant) wanted to be bought out of his stake in the Defendant's shares in the Company. By contrast, Mr. Peter Kadas (then a director of the Company, whose family beneficially owns an investment holding structure that acquired shares in the Defendant) was

content to remain invested in the Company through the Defendant. Mr. Hallgarten explained further:

> "DAH: Um, I think your offer of the, you know, the exercise of the option to reduce the dilution is helpful, but I think what, what we, what we would have to figure out very quickly is how, how can we take, how can we take half the equation off the, off the table in the secondary. And I don't know, you know, you're very close to what's going on now, how quickly could we offload whatever it is, approximately sixty, you know, sixty million dollars of, you know, for the fifty per cent stake. Because I think what... I think if, if we can get... um... if we can get Lajos comfortable that he can just be taken out of this completely. Peter, Peter wants to stay in for the ride, um, as I think you, you sort of guessed."

23. In response, the Claimant explained that demand for the Company's shares appeared to exceed the amount of shares being issued as part of the 2019 fundraising. The Claimant suggested that Mr. Varga's stake could be bought out by prospective investors independent of the 2019 fundraising:

> "AP: Um, so what I cannot do is do any secondaries. What I can do is promise that we will do everything we can…
>
> …
>
> AP:… people like Tencent, BlackRock, there is a lot of others who are coming in but they just didn't get through the door in time.
>
> …
>
> AP: When I look at that demand, that looks more than the hundred million that we need to close…
>
> …
>
> AP: So, so, so we have a lot more demand than the hundred million. And I think what we can do is that, once this demand materializes, we can tell to people that, look, you can't come in on primary but you can come in by buying these guys directly, their shares from them. Right?
>
> DAH: Mm-hm.
>
> AP: And I'm happy to commit to that, but I can't guarantee that.
>
> …
>
> AP: But I think... so I think you can have Lajos out by the end of the year, completely. By November.
>
> DAH: Mm-hm.
>
> AP: But I can't guarantee it because what happens..."

24. Mr. Hallgarten then went on to explain "*I understand that*" but that they needed to "*find some formulation in…the next few hours which… would give [Mr. Varga] enough comfort.*" The Claimant went on:

> "AP:… Um, so, so we can do that. That formulation is, is we have to buy forty we, we so, we do two things. One is I exercise my share... my options immediately, now. That reduces the number of shares you have, which means it reduces, it reduces the amount of shares you have to transfer.
>
> DAH: Yeah, by my, by my calculation it reduces that by about three and a half thousand shares. Bit less.
>
> AP: Ok whatever that is, that you just made yourself seven million dollars if that's true. So that's fine. Uh, so you do that. And then... and then... um... and then, and then I take a loan note to you, a, a vendor note, that needs to be paid by whenever it's... the option needs to be paid, um, which was pretty much 2021, but in reality I'll, I'll tell you I'll exercise it now, as soon as I get my handover to some secondary.
>
> DAH: Mm-hm.
>
> AP: We will then give you, we will then give you, a best-effort commitment to take you out at this round price or as close to this round price as possible…"

25. Mr. Hallgarten went on to explain he would go back to the relevant individuals at the Defendant to discuss the proposal in advance of a board meeting of the Company that was to take place that evening to approve (or reject) the 2019 fundraising:

> "DAH: Let, let, let... let me go back... 'cause you've got a board call in seven minutes and I need to get Peter in the right shape.
>
> AP: No, no, no, the board call, the board call has been pushed back because of you.
>
> DAH: Ok.
>
> AP: To five o'clock in the afternoon. To eight o'clock in the evening, from five.
>
> DAH: Sorry... oh, ok. I didn't, I don't, didn't know that. Ok.
>
> AP: Because we, we didn't, didn't know whether we were gonna accept this…
>
> DAH: Ok, look, I need, I need, I need to, I need to go back to both of them."

26. Mr. Hallgarten then restated the "*best efforts*" nature of the proposal for Mr. Varga to be bought out in due course:

> "DAH: I think, look, I don't think anyone thinks… you know, this obviously has to be best efforts because it's quite understandable you can't, you can't guarantee anything like that, but as long as, as long as, you know, you're happy, you know, to work to get Lajos off your back, then…
>
> AP: Daniel, I'm actually pretty sure we can get... I mean, when I look at how much demand there is… the demand is absolutely gonna be there, I just can't say it publicly."

27. As the call came to a close, Mr. Hallgarten stated: "*Let me, let me talk to them, I'll, I'll get back to you.*"

*The third 30 July call*

28. The third of the 30 July calls lasted approximately 5 minutes. Mr. Hallgarten opened the call stating:

> "DAH:… Um, ok, I think, I think if, if there's a way for me to get this documented quickly then it looks like we can... we can get something done…"

29. After brief trouble with the telephone connection, Mr. Hallgarten explained there was a further point that the Defendant wanted to raise, which was that it required assurances that in return for approving the 2019 fundraising (i.e. not exercising its veto rights) there would be no further "*anti-dilutive clawbacks*":

> "DAH: Ah, the... ok, the proposals on the table, uh, for the new shareholders' agreement: the, the, you know, the veto disappears, and that, you know, it's understood that that's what happens in, in big companies but I think we... I think Peter would need some assurance that this is the end of the sort of anti-dilutive, uh clawbacks and is... uh, just wanted to, to understand from you what the, what your position is on that."

30. The Claimant explained that there was at that time no intention for future anti-dilutive clawbacks, but that he could not agree to that in writing:

> "AP: No, no, there is, there is, there is no, there is no more anti-dilutive clawbacks. Look, this is not, this was not anti-dilutive clawbacks, this was [SL: the round happened and the value was this and people said look if you can pull this one off we, we will give you that six per cent if it comes up with valuations].[1]
>
> DAH: Yep, ok, let's, let's not rehearse the history here, just, the important, the important thing to get this done is that there's no, there's no intention to do this at the next round and the next round and the next round.
>
> AP: No. None. But I can't write that down for you.
>
> DAH: Yeah.
>
> AP: I can't change documentation. But I'm telling you there is zero interest to doing it.
>
> DAH: Yeah. Ok..."

31. There was then a significant discussion at the end of the third call. The Claimant returned to the question of the exercise of the Option, and explained that Mr. Henry Bennett, the Company's General Counsel, had suggested that the Claimant's proposal regarding the Option might not be "*workable*" and was "more difficult than us just taking from you now":

> "AP: Ok, so I'm gonna get, I'm gonna get Henry to talk to you, because Henry said maybe what I suggested to you is not exactly workable because, from our end now, to

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[1] "*SL*" is the transcriptionist's shorthand for "*sounds like*". The sentence in square brackets that follows is the transcriptionist's and parties' best guess at what was said.

> change the documents, for me to execute the options, blah blah blah, is more difficult than us just taking less from you now.
>
> DAH: Mm-hm.
>
> AP: Uh, and just explaining it to others that I am going to exercise the option shortly.
>
> DAH: Mm-hm.
>
> AP: And that's why I took less, right?"

32. Mr. Hallgarten explained that he would draw up a one-page document "*that everyone can agree to and get…signed*":

> "DAH: Right. Ok. We don't... I don't think we mind about the sequence. So, what I, what I need to do now is get, just get a sort of one-pager drawn up that everyone can agree to and get, and get, um, signed. I think Peter... that's not gonna happen before the board. Peter's very happy to show up to the board and vote in favour of everything, but on the condition that we can, we can get something, sort of, signed up in the next twenty-four hours.

33. The Claimant responded, "*Yes, that's absolutely right.*" He then returned to the topic of a potential buyout of Mr. Varga's stake in the Company:

> "AP:… The only thing, Daniel, we cannot do, remember, I cannot guarantee that I will buy you out…
>
> DAH: No, no, no, Ali, it's, it's understood that that's best efforts, it always has to be best efforts. You know, you've... you, you made the point before that this is... all of this is sort of a matter of honour, we take you as a... at least, Peter and I take you as a man of your honour, and... and, you know, you know, I'm sure, I'm sure you'll work hard to get it done and then get Lajos out of the equation."

34. The call ended with the Claimant stating, "*I'll get Henry... I'll get Henry to talk to you about the details now*", to which Mr. Hallgarten responded, "*Yeah.*"

*The fourth 30 July call*

35. Following the three calls with the Claimant, at 6pm on 30 July 2019, Mr. Hallgarten had a further call with Mr. Charlie Steel, the Company's Chief Financial Officer, and Mr. Bennett. Mr. Hallgarten also recorded this call. The call lasted approximately five minutes.

36. At the start of the call, Mr. Steel sought to understand what had been negotiated between the Claimant and Mr. Hallgarten:

> "CS: I just want to check what you have agreed with Ali, so that there has been nothing lost in translation, so that we can get it through, through in the documentation. So basically, you've agreed that the number of, my understanding is you've agreed that the number of the shares transferred under the antidilution mechanism is 20 per cent lower.

> DAH: Um, no. I don't, well no, I'm, I'm not sure that's, I'm not sure that's, 20 per cent's the right number, because the… the option, at least I think, I need to check, but I think the option is over 26,345 shares.
>
> CS: Yup.
>
> DAH: So that's not 20 per cent because the… that was 20 per cent of…
>
> CS: So, 20 per cent of the options then, is it?
>
> DAH: No, no, no, it's, it's… So my… on, on my numbers we are looking at the, the cap table, I think, I think that were agreed, the current, current number of shares out there that HGL owns is 106,320.
>
> CS: Yup.
>
> DAH: If you reduce that by the option, which is 26,345, you are left with 79,975 shares.
>
> CS: Yup.
>
> DAH: And, applying the same ratio — I, I'm not quite sure how you did the option calculation, but applying the same ratio that ... So, be-before we had the 106,320 and anti-dilution shares of 14,161.
>
> CS: Yup. So, you're taking the percentage of the op — you're taking the option out of the anti-dilution basically, is that your point?
>
> DAH: Yeah…"

37. Mr. Steel then proposed an alternative approach, whereby the Claimant and the Defendant could agree to lower the number of Option Shares whilst keeping the anti-dilution transfer the same, reaching the same net result for both parties. Mr. Hallgarten explained why that would not work:

> "CS: Yep, can I just ask – er, um, maybe I am missing something if we do it this way. Is it not simpler just to lower the number of options by that number of shares instead. And keep the transfer the same.
>
> DAH: Um, well I mean, mm, well I'm not sure how that works. So the, I mean the, the option, we'd have, to, we'd, we'd have to renegotiate the options, because that, that's all documented.
>
> …
>
> DAH: That, the way that, the way that the option was documented, was a fixed number of shares at a fixed price, not a ... it wasn't done on, on a percentage…"

38. Mr Hallgarten then went on to explain the commercial rationale for this approach, as discussed with the Claimant:

> "DAH: I think, what Ali was saying, was if, you had suggested or someone had suggested that the lower number of shares, the sort of anti- dilution clawback, gets noted on the basis that he's gonna exercise the option and, and effectively ... you know, self,

> you know, the, effectively, those, the 3,452, or whatever the number is, is is now, you know, comes from himself, I guess.
>
> CS: Yep, because ... because effectively, that's baked into the option, so..."

39. Finally, Mr Hallgarten noted that the Defendant "*need[s] to fix the, the funding*" of the exercise of the Option with the Claimant and that he would organise the documentation of the arrangement:

> "DAH: OK, so that, and, and then we, we will fix, but that's, that's a sort of a private, personal thing rather than a company thing we need to fix the, the funding of that with him, and, um there's also some other stuff that we, we, we will, we will document… Um, I, I'll get our guys to, to pull something very simple together quickly that we can, we can do… What, what's the timetable now? The board, the board's at eight, and then…
>
> CS: Ah, we are looking to sign today because [two shareholders] are under pressure, from their, uh, from the legal side, to make an announcement before market open tomorrow, otherwise their shares will get suspended."

*The parties' conduct after the 30 July calls*

40. Shortly after the fourth of the 30 July calls, at 6.19pm Mr. Steel sent Mr. Hallgarten an email to confirm that the number of anti-dilution shares to be transferred by the Defendant was reduced from 14,161,051 to 10,652,089 (these figures take account of the subdivision of the share capital that would occur as part of the 2019 fundraising). At 6.23pm, Mr. Steel also emailed other shareholders in the Company to explain the reduction in the Defendant's anti-dilution transfer on the basis that it was "*unreasonable that [the Defendant] should pay anti-dilution based on these shares that [the Claimant] will ultimately hold (they are highly in the money)*".

41. That evening at 8pm, the board meeting went ahead and the Defendant's nominee on the Company's board of directors voted to proceed with the 2019 fundraising round and the associated transfer of fewer anti-dilution shares by the Defendant.

42. On 1 August 2019 at 6.13pm, Mr. Hallgarten sent the Claimant an email entitled "*Documenting the handshake*", which stated "*Please see attached proposed agreement reflecting what we discussed on Tuesday*", i.e. on 30 July. He attached a five-page draft variation of the Option Agreement.

43. At paragraph 31 of the Defence, the Defendant alleges that, at around 8pm that day, Mr. Hallgarten telephoned the Claimant, who "*confirmed his understanding of and prior agreement to the terms of the Oral Agreement*" but said he could not sign as he was travelling. The Defendant contends that the Claimant asked the Defendant to execute the documents required for the fundraising and "*assured Mr Hallgarten that he would sign the Draft Written Agreement within the following few days*". The Claimant does not accept that this call took place and denies giving the alleged assurance. At paragraph 30 of his first witness statement dated 22 December 2020 ("Hallgarten-1"), Mr. Hallgarten states that he did not record the 1 August call because he "*either forgot to do so or was unable to do so*".

44. That same evening at 8.10pm, in an email sent by Mr. Glenn Barnett (a Director of the Defendant) the Defendant released the formal, executed documentation for the 2019 fundraising, including a deed recording the transfer of the reduced number of anti-dilution shares. The deed included, at clause 9.1, an entire agreement clause "*in relation to the transfer of the Shares*".

45. On 4 August 2019, the Claimant wrote to Mr Hallgarten in response to his email entitled "*Documenting the handshake*", requesting "*a quick chat… to clarify a couple of points.*" A call was arranged for 6 August 2019.

46. At paragraph 61 of Hallgarten-1, Mr. Hallgarten states that on the 6 August call, the Claimant claimed that there had been a misunderstanding and that he would neither be entering into the draft written agreement nor issuing the promissory note previously discussed. Mr. Hallgarten also states that the Claimant said that the reduction in anti-dilution shares, as reflected in the executed deed dated 1 August 2019, constituted the sole consideration for exercising the Option.

47. On 19 March 2020, the Defendant wrote to the Claimant asserting that, by failing to provide a promissory note, the Claimant had lost altogether the right to exercise the Option. However, the letter went on to say that the Defendant was "*prepared to provide*" the Claimant with 10 business days in which to exercise the Option and provide the promissory note, failing which it asserted that the Claimant would have lost his right to the Option Shares.

48. On 13 May 2020, the Claimant's then solicitors, Taylor Wessing, wrote to the Defendant, explaining that the 19 March letter had only recently come to the Claimant's attention. They denied the alleged oral agreement and stated that they were instructed that the proposal discussed during the 30 July calls was that the Claimant "*proposed to accept fewer anti-dilution shares from [the Defendant] as consideration for the exercise of the Option.*" In any event, Taylor Wessing stated that the Claimant had decided to exercise the Option and requested details of the bank account to which payment should be transferred. The Defendant's bank details were not forthcoming, and on 12 June 2020, by way of a formal Exercise Notice signed by the Claimant and sent to the Defendant and the Defendant's solicitors, the Claimant purported to exercise the Option with completion to take place on 19 June 2020. The Defendant has refused to provide its bank details or otherwise to perform the Option.

***The grounds of the Claimant's application for summary judgment***

49. In his first witness statement dated 27 October 2020 (Parsadoust-1), the Claimant advanced seven separate, freestanding grounds on which summary judgment was pursued:

    a) Ground 1 – In light of the call recordings and transcripts, the Defendant has no real prospect of proving that an agreement was reached during the 30 July calls (whether on the terms alleged or at all).

    b) Ground 2 – Further or alternatively, the 30 July calls were negotiations subject to the subsequent execution of a written contract and no such contract was ever executed.

    c) Ground 3 – Further or alternatively, the alleged oral agreement did not include the alleged Forfeiture Term or (as the Defendant also alleges) an implied variation

term waiving compliance with clause 15.1 of the Option Agreement, which required any variation of the Option Agreement to be "*in writing and signed by or on behalf of each party*" (the "Oral Variation Term").

d) Ground 4 – Further or alternatively, because the Claimant has exercised the Option and is ready, willing and able to pay the option price, the alleged Forfeiture Term has not been engaged.

e) Ground 5 – Further or alternatively, the alleged Forfeiture Term is penal and unenforceable.

f) Ground 6 – Further or alternatively, the Claimant is entitled to relief from forfeiture of the Option Shares on the condition that he pays the option price (which he has been ready, willing and able to do since at least 13 May 2020).

g) Ground 7 – Further, and in any event, the Claimant has not lost the right to exercise the Option. To the contrary, he has exercised the Option and he is entitled to the Option Shares on the condition that he pays the option price (which he has been ready, willing and able to do since at least 13 May 2020).

50. By the time of the hearing of this application, the Claimant no longer pursued summary judgment in respect of the second part of Ground 3 (i.e. that the alleged oral agreement did not include the Oral Variation Term) or the entirety of Ground 4 (i.e. that the alleged Forfeiture Term has not been engaged).

## LEGAL PRINCIPLES

*Test for summary judgment*

51. The relevant principles on an application of this kind (which I apply) were classically summarised by Lewison J (as he then was) in *Easyair Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15]:

> "…the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:
>
> i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but

also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

*Objective assessment as to whether a binding agreement was reached*

52. In determining whether a binding agreement was reached on 30 July 2019, the Court must conduct an objective assessment of what has been communicated between the parties, by words or conduct. As was stated by Lord Clarke JSC in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14 at [45]:

> "The general principles are not in doubt. 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."

53. In his judgment in *RTS v Molkerei*, Lord Clarke JSC referred with approval at [49] to the often-cited summary by Lloyd LJ in *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601, at 619:

> "(1) In order to determine whether a contract has been concluded in the course of correspondence, one must first look to the correspondence as a whole…
>
> (2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary "subject to contract" case.
>
> (3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed…
>
> (4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled…
>
> (5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.
>
> (6) It is sometimes said that the parties must agree on the essential terms and that it is only matters of detail which can be left over. This may be misleading, since the word 'essential' in that context is ambiguous. If by 'essential' one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract. If by 'essential' one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by 'essential' one means only a term which the Court regards as important as opposed to a term which the Court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and, if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the Judge, 'the masters of their contractual fate'. Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called 'heads of agreement'."

54. In another much-cited passage in *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch 284, Parker J held:

> "It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of a further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal contract may be ignored. The fact that the reference to the more formal document is in words which according to their natural construction import a condition is generally, if not invariably, conclusive against the reference being treated as the expression of a mere desire."

55. Evidence as to the parties' subjective intentions or understanding is of little or no relevance; the question is objective. As Males J (as he then was) noted in *Air Studios (Lyndhurst) Limited v Lombard North Central plc* [2013] 1 Lloyd's Rep 63 at [12]:

> "Because the existence of a binding agreement needs to be determined objectively and does not depend on the parties' subjective state of mind, evidence from the parties about what they intended by or understood from their written communications is of little or no relevance."

56. There was no express statement in the 30 July calls that the discussions were "*subject to contract*". However, as Longmore LJ stated in *Investec Bank (UK) Ltd v Zulman* [2010] EWCA Civ 536 at [16]-[17]:

> "16. In our judgment it is important not to over-emphasise the actual phrase "subject to contract". It is a question, in every case where a written agreement is contemplated, whether the parties intend not to be bound until the relevant document is actually signed or merely intend that the relevant document is to be the record of an agreement made orally and intended to be binding when made. As the editors of Chitty, Contracts 30th ed (2007) para 2-116 put it (albeit in relation to an express rather than (as here) implied stipulation for the execution of a formal document):-
>
> > "One possibility is that the agreement is regarded by the parties as incomplete, or as not intended to be legally binding, until the terms of the formal document are agreed and the document is duly executed in accordance with the terms of the preliminary agreement (e.g. by signature). This is generally the position where "solicitors are involved on both sides, formal written agreements are to be produced and arrangements are made for their execution". The normal inference will then be that "the parties are not bound unless and until both of them sign the agreement". A second possibility is that such a document is intended only as a solemn record of an already complete and binding agreement."
>
> 17. The surest guides to the parties' intentions are usually the terms of the draft documents passing between them. The use of the phrase "subject to contract" is, of course, lawyer's short-hand intending to indicate an absence of intention to be bound until the relevant document is signed but its absence does not necessarily mean an intention to be bound once oral agreement is reached…"

## DISCUSSION

### *Grounds 1 and 2: No binding contract*

57. As Mr. David Lord QC (who, together with Mr. Stephen Ryan, represented the Defendant on the application) himself stated in argument, the first issue is whether or not the Defendant has a realistic (as opposed to fanciful) prospect of establishing that there was a binding agreement that varied the (written) Option Agreement. The Defendant's claim must carry some degree of conviction, being a claim that is more than merely arguable: *Easyair* (*supra*) at 15(ii). This issue forms the subject matter of Grounds 1 and 2 of the application for summary judgment ("the first issue"). If no binding contract was concluded during the three calls between the Claimant and Mr. Hallgarten on 30 July 2019, the Defendant's defence must fail.

58. The second issue is what the Defendant calls its "*primary case*", which is whether the Defendant has a realistic prospect of establishing that the Option was lost because it was not exercised immediately or as soon as practicable, on the assumption that the Option Agreement *was* varied by the oral agreement ("the second issue").

59. If the defendant's primary case fails, then the third issue is whether or not the Defendant has a realistic prospect of establishing that the Forfeiture Term should be implied, and if so whether it is a penalty or the Claimant is entitled to relief from forfeiture ("the third issue").

60. If the Defendant loses on the first issue, it is accepted by it that the Court should grant specific performance of the Option Agreement and that is an end to its defence to the claim (as well as its counterclaim) and the second and third issues do not arise.

61. Ordinarily, a dispute as to whether an oral agreement was reached, varying the terms of a written agreement, would likely require to be resolved at trial. However, this is an unusual case, in that Mr. Hallgarten recorded the three telephone calls between himself and the Claimant on 30 July 2019 upon which the Defendant relies in support of its case that a binding oral agreement was reached on that day.

62. It follows that the Court knows the exact words spoken by the parties at the time when the oral agreement is said to have been reached, and accordingly the parties' alleged *subjective understandings* as to whether an agreement was reached, what its terms were, and whether it was intended to be legally binding are not particularly helpful in assisting the Court in its objective assessment of the call transcripts as to the existence of the alleged agreement. The Court has the benefit of knowing the precise words used by the parties when the oral agreement is alleged to have been reached.

63. This is not a case where a contract is said to be based upon unrecorded oral exchanges (such as in *Moorgate Capital v Sun European Partners LLP* [2020] EWHC 593) or oral exchanges and conduct (such as in *Carmichael v National Power* [1999] 1 WLR 2042) where the evidence of a party as to what terms he understood to have been agreed may constitute some evidence tending to show that those terms, in an objective sense, were agreed. Here, the Court can examine the transcripts of the three calls to see precisely what was communicated between the parties in order to determine whether in fact, objectively, an agreement *was* reached on the terms alleged by the Defendant, which was intended to be legally binding (for the correctness of this approach, see Leggatt J (as he then was) in *Blue v Ashley* [2017] EWHC 1928 at [64]). I should record the fact that the Defendant in this case did not ask the Court to listen to the three calls and did not suggest that there was anything to be gained or added (in terms of tone or emphasis of any of the speakers) by doing so.

64. It follows that, as Leggatt J stated in *Blue v Ashley* (supra) at [63]:

> "As with all questions of meaning in the law of contract, the touchstone is how the words used, in their context, would be understood by a reasonable person. For this purpose the context includes all relevant matters of background fact known to both parties."

65. The relevant background facts known to both parties in this case were as follows:

a) They had concluded a formal, written Option Agreement on 17 August 2016 in respect of the Option Shares which contained a whole agreement clause, and which provided that "*the Option may be exercised in respect of all or some of the Option Shares at any time during the Option Period… but if the Option is not exercised on or before midnight on [16 August 2021] it shall lapse.*" The Option Agreement contained a term that any variation of it "*shall be in writing and signed by or on behalf of each party.*"[2]

b) They had entered into a Shareholders' Deed dated 13 April 2017. Pursuant to this Deed, if an investor Shareholder held 10% of the issued Shares (or held Shares representing at least 10% of the voting rights of the issued share capital of the Company with effect from a Reorganisation (as defined)), he would have the right to appoint a Director of each Group Company and a right of veto in respect of Reserved Matters (as defined in Schedule 1).

c) In July 2019, the Company was proposing to enter into a shareholders' deed and a subscription agreement under which it would receive an investment of up to $500 million in return for the issue and allotment of new shares in the Company. Because the investment would have a dilutive effect on the Claimant's shareholding in the Company, to mitigate that effect he asked most of the Shareholders to agree to transfer to him 13.6% of their respective number of B ordinary shares in the capital of the Company.

d) By 15 July 2019, as is recorded in an email from Josef Fuss (of Taylor Wessing, the Company's solicitors) to Mr. Hallgarten, Shareholders *other than the Defendant* had agreed to enter into an anti-dilution agreement to this effect. The draft anti-dilution agreement contained a schedule which showed the number of shares to be transferred by the Defendant to be 14,433 (later revised to 14,161 shares), being a transfer to the Claimant by the Defendant of 13.6% of its then holding of B ordinary shares in the Company. Together with the occurrence of the 2019 fundraising, this would reduce the Defendant's shareholding in the Company below 10% (to 8.3% and, if the Claimant exercised the Option, to 5.9%). It follows that both parties knew that, if it signed this anti-dilution agreement and the 2019 fundraising occurred, the Defendant would thereby be giving up its rights under (b) above.

e) The Defendant was concerned about the effect of the exercise of the Claimant's Option under the Option Agreement upon the number of shares which the Defendant would then be transferring, should it sign up to the anti-dilution agreement.

f) Both parties knew that the 2019 fundraising needed to be completed urgently and could be jeopardised if not concluded imminently as the Company needed the capital injection. It followed that the Claimant needed the Defendant to vote for the shareholders' deed and subscription agreement (and therefore the fundraising) at the board meeting which was scheduled for 5pm on 30 July (subsequently put back to 8pm that day).

[2] This term is not relied upon by the Claimant as part of its summary judgment application.

66. As described above, the first telephone call took place at 4.09pm (UK time) when the Claimant telephoned Mr. Hallgarten. In my judgment, the important features of this call are as follows:

    a) Mr. Hallgarten said he was just the messenger.

    b) The Defendant was looking to reduce the number of its shares to be transferred under the anti-dilution agreement. Otherwise it would not agree to the dilution at that time.

    c) The Claimant suggested that the Defendant could transfer 20% fewer shares under the anti-dilution agreement, effectively limiting the Defendant's transfer of anti-dilution shares to a proportion of its shares net of the Option Shares. Furthermore, the £2.4 million that the Claimant would owe the Defendant on exercising his Option would become a loan which would expire on the last day of the Option Period (16 August 2021), albeit that he would try and liquidate enough shares to pay the Defendant immediately or as soon as possible. In response, Mr. Hallgarten said that he would relay the suggestion to the Defendant's director and take instructions. The Claimant said it was a one-off offer which would not be repeated.

    d) As Lord Grabiner QC (who represented the Claimant together with Mr. Conall Patton QC and Mr. Daniel Fletcher) rightly submitted, it is clear that no oral agreement was reached during this call.

67. The second call took place on the same day at 5.10pm (UK time), when Mr. Hallgarten telephoned the Claimant. In my judgment, the important features of this call are as follows:

    a) Mr. Hallgarten began the call by saying that he thought that there was "*a way, forward … if we can figure something out*". The way forward was for Mr. Varga to be "*taken off the table*", that is for his 50% shareholding to be bought out. Mr. Hallgarten expressly linked the Claimant's offer to exercise his Option so as to reduce the number of shares to be transferred by the Defendant by way of anti-dilution with taking Mr. Varga's shareholding off the table "*in the secondary*" (i.e. by share purchases in the secondary market). He said that the 50% shareholding was worth around $60 million.

    b) The Claimant said that he was happy to commit to seeking to achieve that, but he could not guarantee it.

    c) The Claimant then said again that his idea was to take the Option Shares and take (i.e. give) a loan note that by 2021 he had to pay the £2.4 million and try and immediately do the secondary with Mr. Varga, so that the aim would be to have Mr. Varga "*out*" (i.e. his shares would be sold) by the end of the year completely.

    d) Mr. Hallgarten said that they had to find some formulation in the next few hours which would give Mr. Varga enough comfort. The Claimant responded by saying that "…*we do two things. One is I exercise my share … options immediately, now. That reduces the number of shares you have, which means it reduces … the amount of shares you have to transfer … and then I take a loan note to you, a, a vendor note that needs to be paid by … 2021, but in reality I'll, I'll tell you I'll exercise it now, as soon as I get my handover to some secondary… we will then*

*give you, a best-effort commitment to take you out at this round price or as close to this round price as possible…*"

e) The Claimant told Mr. Hallgarten that the board call had been pushed back to 8pm and Mr. Hallgarten said that he needed to go back to both Mr. Varga and Mr. Kadas. He would talk to them and get back to the Claimant.

f) Again, as Lord Grabiner QC submitted, it is also clear that no oral agreement was reached during this call.

68. The third telephone call took place at 5.36pm (UK time). In my judgment, the important features of this call are as follows:

a) Mr. Hallgarten began the call by telling the Claimant that if there was a way for him to get this documented quickly then it looked like they could get something done.

b) However, he then immediately stated that the proposals would mean that the Defendant had its veto swept away and Mr. Kadas needed some assurance from the Claimant that this would be the last anti-dilutive clawback of shares by him. The Claimant said that he had no intention to do this at future rounds but <u>he could not write that down</u>.

c) Importantly, the Claimant then stated that he was going to get Mr. Bennett to talk to Mr. Hallgarten because Mr. Bennett had said that maybe what the Claimant had suggested to Mr. Hallgarten was "*not exactly workable because, from our end now, to change the documents, for me to execute the options, blah blah blah, is more difficult than us just taking less from you now… Uh, and just explaining it to others that I am going to exercise the option shortly*." It is plain that the Claimant was thereby telling Mr. Hallgarten that actually <u>executing</u> the Option now might not be workable as opposed to simply entering into the anti-dilution agreement and <u>just explaining</u> to the other shareholders that he was "*going to exercise the option shortly … and that's why I took less, right?*" (because otherwise they might question why he was allowing the Defendant to transfer 20% fewer shares than ought to have been the case). This is much more than, as Mr. Lord QC suggested, the Claimant merely talking about the practicalities. Nor is Mr. Lord QC right to say that the parties cannot have intended to "*rip up what had gone before*." This was a continuing negotiation and it is plain that they had not yet reached agreement.

d) Mr. Hallgarten assented to this proposal, as he responded by saying "*Right. Ok… I don't think we mind about the sequence*."

e) Mr. Hallgarten then said, consistently with the way in which he began this call, that "*what I need to do now is get, just get a sort of one-pager drawn up that everyone can agree to and get … signed*." He said he did not think that would happen before the board meeting at 8pm. "*Peter's very happy to show up to the board and vote in favour of everything, but on the condition that we can … get something, sort of, signed up in the next twenty-four hours*." The Claimant responded that that was absolutely right. He reminded Mr. Hallgarten that the only thing he could not do was guarantee that Mr. Varga would be bought out.

Mr. Hallgarten said he understood that that was best efforts and that all of this was "*sort of a matter of honour*".

f) The call concluded with the Claimant saying that he would get Mr. Bennett to talk to Mr. Hallgarten "*about the details now*".

69. It is therefore clear in my judgment that (a) Mr. Hallgarten was making the demands of Mr. Varga and Mr. Kadas part of the package of terms for a proposed new agreement between the Claimant and the Defendant and (b) Mr. Hallgarten recognised that it was necessary to draw up a written agreement "*that everyone could agree to*" and if that could be done it would be possible to get something done by way of a binding agreement. Until that occurred, there was no binding agreement.

70. It is not surprising that that should be so, as the parties were clearly used to documenting their dealings in formal written agreements, typically with a whole agreement clause precisely in order to avoid the sort of arguments with which this dispute is concerned.

71. In his submissions, Mr. Lord QC contended that the transcripts of the three calls showed that there were three discrete issues which were discussed. One was the Option, the second was Mr. Varga's desire to sell his shares and the third was the Defendant's desire for an assurance that there would be no further anti-dilution "*clawbacks*". He contended that these three issues did not come as a package; that they were not expressly linked; and that there is nothing to suggest in the call transcripts that they were. But in fact, as the foregoing analysis shows, these three issues were undoubtedly linked and they were linked by Mr. Hallgarten himself. Mr. Hallgarten was, as Lord Grabiner QC pithily put it, "*seeking to negotiate a package deal addressing all three issues*". He never suggested that the Option could be dealt with in isolation.

72. As described above, at 6pm on the same date, 30 July, there was a telephone call between Mr. Charlie Steel, the Chief Financial Officer of the Company, and Mr. Hallgarten. Mr. Bennett was also on the call. Because Mr. Hallgarten recorded this call as well, the Court was shown a transcript of it. Mr. Steel said that he wanted to check what had been agreed with the Claimant "*so that we can get it through, through in the documentation*." Mr. Steel correctly said that his understanding was that the Claimant and Mr. Hallgarten had agreed that the number of shares to be transferred under the anti-dilution mechanism was 20% lower. As he put it "*you're taking the option out of the anti-dilution basically*". Mr. Hallgarten said that he thought what the Claimant was saying was that the lower number of shares would be "*noted*" (i.e. explained) to third parties on the basis that "*he's gonna exercise the option*", "*and then we, we will fix … the funding of that with him"* as a *"private, personal thing, rather than a company thing*" and "*there's also some other stuff that we … will document.*" Mr. Hallgarten again confirmed that he would quickly pull together something very simple " *that we can, we can do*".

73. What then happened was that by email to Mr. Hallgarten (cc Mr. Bennett) at 6.19pm on 30 July, Mr. Steel confirmed the number of shares to be transferred under the anti-dilution agreement, namely 10,652,089.

74. Four minutes later, at 6.23pm, Mr. Steel sent an email to some of the other shareholders. He told them it was unreasonable for the Defendant to pay anti-dilution based on (the Option) shares which the Claimant will ultimately hold. This was entirely

consistent with the discussion between the Claimant and Mr. Hallgarten at the end of their third call that same day in which the Claimant told Mr. Hallgarten that actually executing the Option *now* might not be workable, as opposed to simply entering into the anti-dilution agreement and just explaining to the other shareholders that he was going to exercise the option shortly, and that is why he agreed to the Defendant reducing the number of shares which it had to transfer. In this way, the Claimant had not actually committed to anything so far as the execution of the Option was concerned. This does not appear to have provoked any response, let alone any adverse response, from the other shareholders. Moreover, Mr. Bennett was copied in to that email, and he did not say "No, that is wrong, the Claimant is obliged to exercise the option now."

75. At the board meeting at 8pm that night the Defendant voted for the fundraising measures.

76. Mr. Hallgarten did not manage to send out a draft written agreement until 1 August 2019 at 6.13pm, being 2 days after the 30 July calls. The terms of the covering email are instructive. Headed "*Documenting the handshake*", Mr. Hallgarten says "*Please see attached proposed agreement reflecting what we discussed on Tuesday*" (emphasis added). It is unsurprising that he refers to it as a *proposed* agreement, because that is exactly what it was. Although he says it reflects what they discussed on Tuesday, in fact he then recognises in his point three that it goes further than their discussions:

> "[The Defendant] needed something on future A[nti]-D[ilution]. I appreciate that this is not something that you felt you were willing to commit to in writing, so the "best efforts" formulation has been used here too."

This was despite the fact that the Claimant had made clear in their discussions that he could not "*write that down*".

77. Attached to the email was a draft "*Agreement Regarding Babylon Holdings Limited.*" That agreement contained, by clause 2.1, a clause which assumed that by entering into the agreement the Option was thereby immediately exercised, without the need to serve a formal Exercise Notice. Yet the Claimant had not agreed to that.

78. It also contained two best efforts clauses in clauses 3.1(b) and 3.1(c), including the one which the Claimant said he did not want to agree to in writing. These are referred to as contractual "*undertakings*" in the draft. Yet there had been no discussion between the parties about the status of these clauses.

79. The draft agreement contained a number of other clauses which had not been discussed by the parties, namely 3.1.2; 4.1 and 4.2; 5; 6.1, 6.2, 6.3, 6.4; and 7.

80. It should be added that the promissory note was also said to be payable on a precise date, 30 April 2021, although Mr. Hallgarten says in his witness evidence (which I accept for the purposes of the application) that that was a mistake and that the date should have reflected the original Option Agreement, namely 16 August 2021.

81. The existence of an entire agreement clause in the document (clause 6.1) also suggests that the Defendant did not intend to be bound by any oral agreement which may have preceded the tendering of this document.

82. Constrained as he was by the terms of this document, Mr. Lord QC submitted that whilst this document did indeed contain terms which had not previously been agreed, that did not matter as there were three elements in the oral discussions which *were* agreed and which could effectively be excised from the rest of the proposed terms of this draft agreement, namely i) the Claimant would exercise the Option immediately or as soon as reasonably practicable; (ii) the Claimant would agree to issue a promissory note payable on 16 August 2021 if not earlier; and iii) the Defendant need only transfer anti-dilution shares calculated as a proportion of its overall shareholding net of the Option Shares. The Defendant has also sought to plead its case in this way (see paragraphs 24.1-24.3 of the Defence) and to side-line the contractual undertakings by omitting them from the description of the express terms (see paragraph 24.5 of the Defence).

83. I reject this submission. This was indeed a package deal, with all of the terms to which the Defendant was willing to sign up set out in its formal agreement which it offered for signature by the Claimant but which the Claimant refused to sign. It is not open to the Defendant now to seek to re-write that package deal by extracting certain terms from the deal and repackaging them as an earlier oral agreement. In the calls, Mr. Hallgarten himself clearly linked the contractual "*undertakings*" to the other proposed terms of the Option Agreement. It is simply not possible to say, as the Defendant does, that some of these terms were "*essential*" whilst others were not. Indeed, it is notable that Mr. Hallgarten himself states in paragraph 24 of his witness statement that:

> "The deal that I was tasked with negotiating on behalf of HGL would involve a reduction in the number of anti-dilution shares which the Claimant was demanding from HGL as part of the 2019 Fundraising, to compensate for (i) the effect of the cumulative anti-dilution transfers to date and (ii) the calculation of the number of anti-dilution shares being based on HGL's then total holding of shares in BHL even though that included shares which were subject to the Option. <u>There were also other issues which would need to be addressed in this deal. These related to HGL's desire for assurances that this would be the last time that the Claimant would demand anti-dilution shares from it and the wish of Mr Lajos Varga (as a shareholder in HGL) to see an exit of his part of HGL's investment in BHL</u>. If I was successful in negotiating these matters with the Claimant then HGL would agree to support the 2019 Fundraising." (emphasis added)

84. Had the parties in truth concluded an earlier three point oral agreement as submitted by Mr. Lord QC, it would have been a simple matter for Mr. Hallgarten to write those three points down on one page and have the Claimant and the Defendant sign it. Indeed, he presumably could have done that before the 8pm board meeting. But he chose not to do so, and instead to link the exercise of the Option with his principals' desire to a) be taken off the table altogether (Mr. Varga) and b) be spared any further anti-dilution transfers (Mr. Kadas), by drafting a more detailed written agreement containing all of the terms as part of a package of terms. Contrary to Mr. Lord QC's submission, this is not, therefore, the type of case which was posited by Lloyd LJ in *Pagnan* at p. 620 LHC, where the parties make an interim agreement and then continue to negotiate the remaining terms; or where they agree on the essential terms and leave over matters of detail.

85. It follows that this draft agreement was in the nature of a written offer by the Defendant to the Claimant to vary the Option Agreement on certain specified terms, which the

Claimant did not accept. This was not merely a case of formalising the parties' earlier oral agreement in writing. There was no anterior oral agreement and in any event the proposed agreement introduced new (unagreed) terms with specific wording into the proposed deal.

86. The Defendant nonetheless obtained what it essentially wanted, which was a reduction in the number of shares which it had to transfer to the Claimant to take account of the Option Shares, because the Claimant caused his company, ALP Partners Limited, to enter into the anti-dilution deed on 1 August 2019 with the Defendant and the Company to that effect. That was the course that the Claimant told Mr. Hallgarten in their third telephone call on 30 July that he had been advised by Mr. Bennett to adopt, and he duly did adopt it. But this was not a case of his part-performing any oral agreement. He chose to enter into that specific deed and the Defendant in turn chose to vote for the fundraising (by signing the revised shareholders' deed and revised articles of association and documents to effect the transfer of anti-dilution shares).

87. As described above, Mr. Hallgarten says in paragraph 54 of his witness statement that he had a further telephone call on 1 August 2019 with the Claimant which he says that he failed to record. He says that he went through and explained to the Claimant the contents of the draft written agreement, demonstrating that it reflected the terms of the oral agreement and the Claimant confirmed that he was content with what he described and did not suggest for a moment that they did not already have a binding oral agreement in place as a result of the 30 July calls. It is alleged that the Claimant assured Mr. Hallgarten that he would sign the agreement.

88. However, it is important to recognise that the Defendant advances no case that any agreement was reached on 1st August. Its case is solely that it reached agreement on 30 July. I have found that, viewed objectively, it did not reach any binding agreement as alleged on 30 July. In the light of that fact, I also find, although it is not necessary for my decision, that it is inherently unlikely that the Claimant would have had a call in these terms with Mr. Hallgarten on 1 August. Even then, it is notable that Mr. Hallgarten does not say that the Claimant positively agreed that they had a binding oral agreement in respect of the three matters upon which Mr. Lord QC relies (which are set out in paragraph 82 above). Rather he is driven to resort to a double-negative, stating that the Claimant did not suggest that the parties did not already have a binding oral agreement in place as a result of the 30 July calls.

89. Mr. Hallgarten also refers to the fact that the Claimant alleges that a further call took place between 30 July and 6 August 2019 in which he proposed to Mr. Hallgarten that instead of paying the option price of £2.4 million for the Option Shares, the consideration for the Option Shares should be the reduction in "*anti-dilution shares*" to be transferred by the Defendant (or words to that effect). Mr. Hallgarten denies this. Instead, he says that a call did take place on 6 August in which the Claimant claimed that there had been a misunderstanding and that he would not be entering into the draft written agreement nor issuing the promissory note, and that the reduction in anti-dilution shares constituted his consideration for exercising the option. In Taylor Wessing's letter of 13 May 2020, they stated that "*The proposed variation of the Option Agreement was in fact that our client (via his corporate vehicle ALP Partners Limited) was prepared to accept fewer anti-dilution shares from you as alternative Consideration for his exercise of the Option, as opposed to paying any cash consideration to you.*"

90. Mr. Lord QC submits that what this shows is that the Claimant also believed that a binding agreement had been reached on 30 July but that he was trying to avoid paying for the exercise of the Option. I do not consider that it is safe to assume any such thing; nor do I consider that the alleged state of the Claimant's belief is relevant to the objective task of determining what was agreed on 30 July. At this stage (6 August) it was not known by the Claimant that the calls had been recorded by Mr. Hallgarten. The Claimant could not therefore refresh his memory as to what was discussed over the course of the three calls. Equally it is possible that - in view of the inconclusive nature of the oral discussions and the fact that the parties had agreed that they would draw up and sign a written agreement which the Claimant had not yet signed at this stage – the Claimant saw an opportunity to refuse to sign it and instead to assert that the Defendant had already received enough value from him by saving some $6 million in not having to transfer 20% of the anti-dilution shares. But whether that be so or not is irrelevant to this application: the fact remains that no binding oral agreement was reached on 30 July (which is the Defendant's only contention) and what was said in a call on 6 August (and the Claimant's subjective motivation for what he said) cannot change that fact.

91. During argument, I asked Mr. Lord QC to explain the way in which clause 3.1 of the Option Agreement was, on his case, varied. He said that as a result of the alleged oral agreement, clause 3.1 now read:

> "Subject to clause 3.3 the Option may be exercised immediately or as soon as reasonably practicable but if the Option is not exercised immediately or as soon as reasonably practicable it shall lapse."

92. In fact, as Lord Grabiner QC pointed out, that cannot be correct. The Defendant's case is that the option must be exercised immediately or as soon as reasonably practicable: see paragraph 24.1 of its Defence. But that case is not consistent with the terms of the third call; nor is it consistent with Mr. Steel's email to some of the shareholders of 30 July at 6.23pm in which he referred to the Defendant not paying anti-dilution on the Option Shares that the Claimant "*will ultimately hold*" as opposed to "*will now hold*". This is precisely the sort of uncertainty that the formal draft written agreement, which was never concluded, was no doubt intended to avoid.

93. Finally on this topic, I reject the Defendant's submission that the claim should not be determined summarily because of a speculative suggestion that at trial there may be witness or documentary evidence bearing upon the assessment of the claim. Even taking Mr. Hallgarten's witness evidence before the Court at face value, there is no realistic prospect of the Defendant establishing at trial that the parties varied the Option Agreement by an alleged oral agreement on 30 July.

94. It follows that there was no variation of the Option Agreement as alleged by the Defendant and it also follows that the Option has not lapsed.

***Ground 3: Implied Term (the "Forfeiture Term")***

95. This issue does not arise in view of the fact that I have found that there was no oral agreement as alleged and the Defendant's primary case (that the Option has lapsed) accordingly fails.

96. Had it been necessary for me to decide this point, I would have found that it is neither obvious nor necessary to imply the alleged Forfeiture Term.

97. The alleged Forfeiture Term is said to be that "*in the event that the Claimant failed or refused to exercise the Option and/or to provide the Promissory Note as soon as reasonably practicable, the Claimant would lose the right to exercise the Option*": see paragraph 26 of the Defence.

98. The Defendant does not allege that the Forfeiture Term was expressly agreed – or even discussed – during the 30 July calls. There is no reference to it in the transcripts of those calls and indeed Mr Hallgarten accepts it was not discussed: see paragraph 47 of Hallgarten-1.

99. The Forfeiture Term was also absent from the draft written agreement proposed by Mr Hallgarten on 1 August. The Defendant is therefore constrained to argue for an implied term, because the Claimant purported to exercise the Option by an Exercise Notice dated 12 June 2020.

100. But to be implied, a term must be (i) so obvious that it goes without saying or (ii) necessary because, without it, the contract would lack commercial or practical coherence: *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 at [18]-[21]. A further recent summary of the relevant principles is contained in *Yoo Design Services Limited v Iliv Realty Pte Limited* [2021] EWCA Civ 560 at [51], per Carr LJ:

> "In summary, the relevant principles can be drawn together as follows:
>
> i) A term will not be implied unless, on an objective assessment of the terms of the contract, it is necessary to give business efficacy to the contract and/or on the basis of the obviousness test;
>
> ii) The business efficacy and the obviousness tests are alternative tests. However, it will be a rare (or unusual) case where one, but not the other, is satisfied;
>
> iii) The business efficacy test will only be satisfied if, without the term, the contract would lack commercial or practical coherence. Its application involves a value judgment;
>
> iv) The obviousness test will only be met when the implied term is so obvious that it goes without saying. It needs to be obvious not only that a term is to be implied, but precisely what that term (which must be capable of clear expression) is. It is vital to formulate the question to be posed by the officious bystander with the utmost care;
>
> v) A term will not be implied if it is inconsistent with an express term of the contract;
>
> vi) The implication of a term is not critically dependent on proof of an actual intention of the parties. If one is approaching the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time;
>
> vii) The question is to be assessed at the time that the contract was made: it is wrong to approach the question with the benefit of hindsight in the light of the particular issue that has in fact arisen. Nor is it enough to show that, had the parties foreseen the eventuality which in fact occurred, they would have wished to make provision for it, unless it can

> also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred;
>
> viii) The equity of a suggested implied term is an essential but not sufficient pre-condition for inclusion. A term should not be implied into a detailed commercial contract merely because it appears fair or merely because the court considers the parties would have agreed it if it had been suggested to them. The test is one of necessity, not reasonableness. That is a stringent test."

101. The Forfeiture Term fails both tests. So far as *obviousness* is concerned, on the Defendant's case, the Option Period fixed by the Option Agreement (five years) is significantly shortened, so that instead of being exercisable until 16 August 2021, the Option must be exercised "*as soon as reasonably practicable*" after 30 July 2019 (both in terms of the exercise of the Option and the provision of the promissory note), and the practical effect of the Forfeiture Term is that if it is not, it will be lost forever, and it cannot be exercised at any point thereafter.

102. I agree with the Claimant that such a drastic consequence is something that could only have been achieved by express agreement. It is impossible to suggest that this is so obvious that it goes without saying. The opposite is the case.

103. The Forfeiture Term is said to be implied in the event that the Defendant's primary case fails. Yet if its primary case has failed, that necessarily means that the Court has found that the Option has not lapsed despite the Claimant's failure to exercise the Option immediately or as soon as practicable. In those circumstances, it is not at all obvious that the Court should then imply a term that the right to exercise the Option is nonetheless forfeited should the Claimant fail to exercise it within a reasonable period of time.

104. Far from being obvious, the Forfeiture Term would bring about a situation in which the Defendant retained for itself the Option Shares (because they are forfeited) despite having obtained the significant financial benefit of a reduction in the number of anti-dilution shares on the footing that the Option Shares would belong to the Claimant. The purported implied term is therefore inconsistent with the deed, transferring the anti-dilution shares, that the parties actually entered into. Contrary to Mr. Lord QC's submission, this is not "*simply the result of the bargain that was reached and the failure of the claimant to exercise the option*". It is the consequence of implying the Forfeiture Term.

105. Another effect of the Forfeiture Term is that, if the Claimant *did* exercise the Option promptly but did *not* provide the promissory note as soon as reasonably practicable, that too would deprive him of the Option. That would be so even though all that the Defendant would receive is a promissory note, i.e. a written promise to pay later. Actual payment would not fall due until 16 August 2021. The Defendant would not, therefore, suffer any actual financial loss if the Claimant delayed in providing the promissory note for a further two years. Given that the Claimant would, on the Defendant's case, be obliged to make payment, regardless of whether he provided the promissory note, it is hard to see how a delay in providing the promissory note could cause the Defendant any prejudice at all. Indeed, the Defendant did not chase the Claimant to sign the draft written agreement until March 2020, despite the Claimant having sought to recommence negotiations in October 2019.

106. In these circumstances, it makes no commercial sense to suppose that a delay in providing the promissory note should deprive the Claimant of his Option. That is particularly so bearing in mind, as explained above, that the Option Shares were worth tens of millions of pounds, and so the Claimant was heavily 'in the money' on the Option. The Forfeiture Term would apply a completely disproportionate sanction, and one to which a notional reasonable person in the shoes of the Claimant was inherently unlikely to have agreed at the time. That being so, the obviousness test is not satisfied. Moreover, it certainly cannot be said that without this implied term the contract would lack commercial or practical coherence. The contract (the Option Agreement, as alleged to be varied) works perfectly well without it.

107. The Defendant's suggestion – that the implied term would provide certainty that the Claimant would make a payment of £2.4 million to it – makes no sense, as the Claimant was already obliged to make payment under the contract in any event. Agreeing to a provision which mandates that a delay in providing a promissory note will result in the forfeiture of an option worth millions of pounds would make no commercial sense at all. I do not accept it is an answer to this point that, as Mr. Lord QC submitted, there was a real benefit at that moment in the Defendant knowing that the option had been exercised such that the Claimant was liable to pay £2.4 million immediately rather than at some point within the next two years, and that this fact means that it is obvious that the Forfeiture Term would have been agreed between the parties. In any event, one must approach this question not by reference to the hypothetical answer of one of the actual parties, but by reference to notional reasonable people in the position of both parties at the time, and they would not have considered such a term to be at all obvious.

108. Further, I agree with the Claimant that whereas the original Option Period of five years is clear and certain, the Forfeiture Term is expressed by reference to the yardstick of reasonable practicability, and such a yardstick is "*fraught with uncertainty*": *Yoo Design Services* at [66] and [70]. It is far from obvious that the parties would have imported this uncertainty into the Option arrangements where certainty and clarity are essential.

109. Similarly, the suggestion that this term was *necessary* in order to justify to all shareholders why the number of anti-dilution shares required to be transferred by the Defendant had been reduced, is belied by the contemporaneous documentary evidence. Other shareholders were told by Mr. Steel in an email that the reduction in the number of anti-dilution shares to be transferred by the Defendant was justified merely by the existence of the option, not by reference to its exercise or promised exercise. None of them asked any questions about this, nor did they object to this. It cannot possibly be said that it was necessary for the Claimant's Option to be forfeited unless he exercised it and provided a loan note immediately or as soon as practicable.

110. The Forfeiture Term is not necessary to make the alleged oral agreement work. It works perfectly well without it. If the Claimant failed to exercise the Option or provide the promissory note in a timely manner, then, on the Defendant's case, the Defendant could seek specific performance of his obligations to do so. Nothing more was required.

111. In all the circumstances there is no basis for implying the Forfeiture Term.

***Grounds 5 and 6: Forfeiture Term Penal and unenforceable; Court should grant relief from forfeiture***

112. The remaining grounds for summary judgment are that the Forfeiture Term is penal and unenforceable (Ground 5) and that the Court should in any event grant relief from forfeiture (Ground 6).

113. The parties dealt with these two issues only briefly. Since I have found that (i) there was no oral agreement and (ii) even had there been, no Forfeiture Term should be implied, these two issues simply do not arise. As a result, I prefer not to reach any concluded view on them, and not to add to the length of this judgment.

## CONCLUSION

114. In the circumstances, the Claimant's application for summary judgment on his claim for specific performance succeeds and the Defendant's counterclaim is dismissed. I shall hear argument on the terms of a draft Order reflecting my findings in this judgment if the parties cannot agree the same.