Neutral Citation Number: [2023] EWHC 2829 (Comm)

Case No: CL-2023-000232

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

Date: 13/11/2023

Before :

MR JUSTICE ANDREW BAKER

- -

Between :

BAILEY AHMAD HOLDINGS LIMITED	**Claimant**
- and -	
BELLS HOLDINGS LIMITED	**Defendant**

- -
- -

Adam F. Griffiths (instructed by **Freeths LLP**) for the **Claimant**
Francis Moraes (instructed by **Edwin Coe LLP**) for the **Defendant**

Hearing date: 3 November 2023

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Approved Judgment

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to the National Archive.
The date and time of hand-down is deemed to be 2.00 pm on 13 November 2023.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker:

1. This Claim concerns Omer & Company Accountants Ltd ('the Company'), a company carrying on an accountancy business. The Company is owned by the claimant as to 40% and by the defendant as to 60%, on the basis of Articles of Association of the Company ('the Articles') and a Shareholders' Agreement ('the Agreement') each dated 31 July 2019.

2. The claimant says that the defendant committed and failed to remedy (if capable of remedy) material or persistent breaches of the Agreement. The claimant has purported to exercise contractual rights that arose if it is correct about that. It is clear from the evidence filed to date that the defendant says not only that it committed no relevant breach of the Agreement, but also that the claimant had and has no reasonable basis for the assertion of breach, indeed that the claimant knew and knows full well that there has been no breach, and so, in substance, has acted and is acting in bad faith in making the assertion. Nothing in this short judgment is intended to convey any view on any of those issues between the parties.

3. The Agreement contains a governing law and jurisdiction provision (Clause 24) providing that the Agreement and any dispute or claim arising out of or in connection with it, its subject matter or formation (including non-contractual disputes or claims) shall be governed by, and construed in accordance with, English law (Clause 24.1), and that the courts of England and Wales shall have exclusive jurisdiction over any such dispute or claim (Clause 24.2). All the disputes I have outlined above plainly fall within the scope of Clause 24.2.

4. The claimant says that it will not be necessary to resolve those disputes. It contends that on the proper construction of the Articles and the Agreement, it does not have to be correct in its claim that the defendant *did* commit (and, if relevant, fail to remedy) material or persistent breaches. Using the procedure under CPR Part 8, it seeks a declaration that:

   "*the Claimant is entitled to rely on the Defaulting Shareholder mechanism of the … Agreement … and the Articles … based on the Claimant's honest belief in a material breach by the Defendant rather than requiring prior judicial determination of the presence or absence of material breach.*"

5. The Articles define circumstances in which a shareholder becomes a 'Defaulting Shareholder', and create a mechanism by which, in those circumstances, the other shareholder as 'Non-Defaulting Shareholder' may buy the Defaulting Shareholder out of the Company. To propose the declaration sought, the claimant's case has to be, and is, that on the proper construction of the Articles, a shareholder becomes a Defaulting Shareholder if the other shareholder forms the belief that there has been a material or persistent breach of the Agreement that is either irremediable or unremedied, whether or not that is in fact so, i.e. even if the belief is mistaken.

6. The Part 8 Claim was listed for a case management hearing, which took place on 3 November, to determine whether it was an appropriate use of the Part 8 procedure or whether, as the defendant said, any litigation (if there is no amicable resolution of the parties' differences) should be under CPR Part 7. It may be that whether Defaulting

Shareholder has the meaning under the Articles for which the claimant contends is a question of construction that in principle could be determined using Part 8. However:

(i) were the claimant correct on the question, litigation that should be conducted under Part 7 could not be avoided, given the defendant's position on the facts as summarised in paragraph above; and

(ii) the claimant's case depends upon an argument that the Articles do not mean what, at least at first sight, they appear to say.

7. It was clear from the solicitors' correspondence and Mr Moraes' skeleton argument for the defendant that the first premise for the defendant's case management position that this is not a proper case for Part 8 proceedings, because the disputes summarised in paragraph above cannot be avoided, is that the contractual construction proposed by the Part 8 Claim is not arguable. (The second premise is that Part 7 proceedings cannot be avoided anyway, because the honesty of the claimant's asserted belief that the defendant has committed relevant breaches will be in issue.)

8. Mr Moraes submitted with some force that at any first hearing in a Claim commenced under Part 8, even if it has been listed with case management in mind, a claimant should be prepared to show the court, if asked, that there is an arguable issue to be tried justifying the proceedings. He noted that in the correspondence, over a 12-month period, the claimant had been asked a number of times to explain its case and to identify whether there was any authority to support it, and the claimant had said it was acting with the benefit of counsel's advice. Acknowledging that the possibility of a summary disposal of the Part 8 Claim, if the defendant be correct that it is not arguable, was raised by the court at the hearing rather than by an application made by the defendant, Mr Moraes contended that the claimant's case indeed had no arguable merit and could properly be dismissed now. Summarily disposing of claims or issues is within the court's general case management powers.

9. Mr Griffiths for the claimant indicated that he was not as prepared as he would have wished to be to meet an argument of that kind. That was true both generally and because, in particular, he said he would wish to refer the court to authority that was not to hand at the hearing.

10. In those circumstances, I considered that justice would be served best by giving the claimant the opportunity to supplement Mr Griffiths' submissions at the hearing as to whether the declaration claim on the meaning of Defaulting Shareholder is arguable. Counsel addressed sufficiently in their skeleton arguments, and at the hearing, the possible case management solutions that might be adopted for it to be fair to settle directions for the subsequent conduct of this Claim, if it is to continue, without a further hearing. I therefore adjourned the hearing for a decision to be made on paper as to the viability of the claim after the claimant had put in any additional submissions it might wish to make, and for whatever order or case management directions may be appropriate in the light of that decision to be issued.

11. In the circumstances, I consider it is fair to determine now whether the claimant's construction of the Articles has any real prospect of being correct; and that the arrangement put in place at the hearing gave the claimant ample opportunity to show the court that it does, if that be possible.

12. Under that arrangement, the claimant put in a 10-page supplementary note from Mr Griffiths, with supporting authorities, and I have now considered the question of whether there is arguable merit in the claimant's proposed construction of the Articles with the benefit of that note, for which I am grateful. My conclusion is that the claimant's claim is not arguable. There is no real prospect of the court concluding that under the Articles a shareholder who has not committed, or (if relevant) has not failed to remedy, a material or persistent breach of the Agreement, is a Defaulting Shareholder if the other shareholder honestly but *ex hypothesi* erroneously thinks otherwise, is not arguable.

13. I agree with Mr Moraes' submission that in those circumstances, the proper outcome is that this Claim be summarily dismissed. Both parties, by counsel, assured the court that they wish to commit time and effort in the short term to resolving their differences without litigation if they can, through mediation or some other process of negotiated dispute resolution, and only to litigate if that short term effort does not prove successful. I consider it appropriate to take the parties at their word and leave them to liaise and cooperate, through their solicitors, with a view to finding a solution away from court. If a settlement is not achieved, then appropriate proceedings under CPR Part 7 can in due course be brought, but any such proceedings should not be in this court.

14. The remainder of this judgment explains my conclusion that the claimant's case on the meaning of Defaulting Shareholder is not arguable, before explaining briefly that last observation about the venue for any future litigation.

15. Article 2.1 of the Articles provides that Compulsory Transfer Event, Defaulting Shareholder, and Non-Defaulting Shareholder have the meanings given to those terms in Articles 14.1, 14.2 and 14.3, respectively.

16. Article 14.1 provides that a Compulsory Transfer Event "*shall be deemed to have occurred in relation to a Shareholder if that Shareholder:*

> *14.1.1 commits a material or persistent breach of any shareholders' agreement relating to the Company to which it is a party and fails to remedy such breach (if capable of remedy) within 14 Business Days of being given notice by the other Shareholder to do so;*
>
> *14.1.2 goes into liquidation whether compulsory or voluntary ..., has an administrator appointed or if a receiver, administrative receiver or manager is appointed over all or a material part of its assets or undertaking;*
>
> *14.1.3 ceases to carry on business or is or becomes insolvent or is or is deemed to be unable to pay its debts as they fall due within the meaning of section 123 of the Insolvency Act 1986;*
>
> *14.1.4 enters into any composition or arrangement with its creditors or a moratorium is declared in respect of its indebtedness or any creditor action;*
>
> *14.1.5 is affected in any way in any jurisdiction other than England and Wales by anything equivalent to any of the things referred to in Articles 14.1.2 to 14.1.4; or*

14.1.6 undergoes a change of control (as control is defined in section 1124 of the Corporation Tax Act 2010) … ."

17. Article 14.2 provides that, "*If a Compulsory Transfer Event occurs in relation to a Shareholder, then that Shareholder shall be deemed to be a Defaulting Shareholder.*"

18. Article 14.3 provides that, "*A Shareholder which is not a Defaulting Shareholder (the Non-Defaulting Shareholder) may, at any time, serve written notice (a Default Transfer Notice) on the Defaulting Shareholder and the Company identifying the Compulsory Transfer Event. Upon service of such Default Transfer Notice, the Defaulting Shareholder shall be deemed to have given the Non-Defaulting Shareholder irrevocable notice offering to transfer all of the Shares held by it (Sale Shares) to the Non-Defaulting Shareholder in accordance with Article 14.5.*"

19. Article 14.4 provides that if a Compulsory Transfer Event occurs, the Defaulting Shareholder is deemed to have served notice to remove any director of the Company appointed by it. Article 14.5 entitles a Non-Defaulting Shareholder who has served a Default Transfer Notice to require the Defaulting Shareholder to sell it all of the Sale Shares and, if the Non-Defaulting Shareholder does so require, provides for the joint appointment of an independent expert to determine the fair value of the Sale Shares, fixing the price for the forced sale, which Article 14.6 requires to be completed within 20 days of the expert's determination.

20. The only matter agreed to be referred to an independent expert for determination is the fair value of shares that are to be sold where there is a Defaulting Shareholder and the Non-Defaulting Shareholder has served a Default Transfer Notice. Any dispute between the parties as to whether there is a Defaulting Shareholder or as to whether, if there is, the Non-Defaulting Shareholder has served a Default Transfer Notice, so as to engage the expert determination clause, is a dispute over which the court will have exclusive jurisdiction under Clause 24.2 of the Agreement.

21. By Article 14.2, there is a Defaulting Shareholder if a Compulsory Transfer Event has occurred. By Article 14.1, a Compulsory Transfer Event has occurred if one of the events specified in Articles 14.1.1 to 14.1.6 has occurred. The putative Non-Defaulting Shareholder's belief is not referred to and does not come into it. The putative Non-Defaulting Shareholder's belief might be relevant if there was a claim that it acted in breach of contract, for example in breach of an express or implied term of good faith, in sending a purported Default Transfer Notice where no Compulsory Transfer Event had occurred, but that is a separate matter. I am dealing only with whether a mistaken belief that one of the events listed in Articles 14.1.1 to 14.1.6 has occurred means that there is a Defaulting Shareholder, although that is not how Article 14.1 is expressed.

22. It is a commonplace, familiar type of contractual regime, to specify a list of trigger events and to provide that if one or more of those events occurs, certain consequences follow. It is as simple as that, and there is no arguable need to read the contract differently, or to read into it something that is not there.

23. Mr Griffiths contended that because a Compulsory Transfer Event entitles the unaffected party to a forced buy-out of the affected party, and because the price for any such forced buy-out is to be fixed (if not agreed) by expert determination under

Article 14.5, rather than by litigation, the parties have freely contracted for "*separation at an expert determined fair value, permitting an orderly exit*" as a means of resolving disputes. He cited *Barclays Bank plc v Nylon Capital LLP* [2011] EWCA Civ 826 for its analysis of the distinction between contractual conditions for the existence of an expert determination mandate and matters within the competence of an expert who has a contractual mandate, and for its discussion of how to manage the practical issues arising where there is a dispute as to the satisfaction of conditions of the former type. That authority provides no support for Mr Griffiths' contention that where the language of a contract specifies that a certain event must occur before an expert determination is required, that can or should be read as meaning that an honest but mistaken belief that the specified event has occurred is sufficient.

24. By his further written submissions, Mr Griffiths contended that there is a reasonable argument for saying that:

    (i) Article 14 is designed "*to provide a comprehensive, self contained set of prescriptive mechanisms to regulate the Parties' affairs in connection with inter alia possessing and dispossessing shares in the Company*". But that is only to say, so far as material, that Article 14 creates a code identifying events which, should one of them occur, are to entitle one of the parties to buy the other out of the Company via a Default Transfer Notice.

    (ii) There is a real prospect that, if read with that purpose in mind, the court might say that Article 14 means to provide "*a way to resolve a fundamental shift in the Parties' positions qua shareholders of the company, be that when one of them ceases to carry on a business, becomes insolvent, or importantly in the case of 14.1.1* ***when one of them considers the other to have committed*** *"a material or persistent breach of any shareholders' agreement"*" (**bold** for my added emphasis).

25. In my view, step (ii) is not sensibly arguable, where it reads the emphasised words into Article 14.1.1. The asserted purpose (step (i)) does not arguably lead to the conclusion that a Shareholder can force a buy-out via a Default Transfer Notice where none of the specified trigger events has occurred. The asserted conclusion (step (ii)) contrasts two of the Article 14 trigger events other than material breach, conceding in their case that they must have occurred for Article 14 consequences to be triggered, with the trigger event of material breach that is relied on, for which it is asserted that the court might read the contract differently, saying that the specified event need not have occurred. No reason is identified why that distinction might arguably be drawn.

26. It is said that the prescribed process under Article 14 can be summarised as: "*hold a party in breach, serve a notice, require remedy within 14 days, if unremedied serve a default transfer notice (Article 14.3), deem removal of relevant directors (Article 14.4), valuation and sale of shares (Article 14.5 and 14.6)*". That may be right, so far as it goes, as to the process to be followed if it is triggered, but it just begs the issue. Article 14 says, so far as material, that the process is triggered if a Shareholder commits a material or persistent breach (and, if relevant, fails to remedy it), not if the other Shareholder erroneously thinks that such a breach has been committed (or that it has not been remedied).

27. The other strand of reasoning in Mr Griffiths' written submissions tilted at a windmill. It said that on the defendant's construction there is no Defaulting Shareholder (with specified consequences) until there has been a final determination by the court that a material or persistent breach has occurred (and, if relevant, has gone unremedied), so as to argue that since that is not what the contract says, at least arguably there may be something wrong with the defendant's construction. But that is not a consequence of the defendant's construction, which proposes only that Article 14.1.1 means what it says. If the specified trigger event has occurred, the consequences follow. If it has not, they do not. A dispute between the parties over whether the specified trigger event has occurred may mean that they are consequentially in dispute over whether the specified consequences followed and, therefore, over whether certain steps that may have been taken have had any legal effect. That is not arguably a reason for reading Article 14.1.1 as if it says that a Shareholder is a Defaulting Shareholder if the other Shareholder wrongly thinks that a material or persistent breach has occurred and gone unremedied.

28. Mr Griffiths drew my attention to an observation of Leggatt J (as he was then), in *Tartsinis v Navona Management Company* [2015] EWHC 57 (Comm), that "*it is seldom, if ever, helpful in deciding how to interpret particular contractual provisions to refer to a case in which a court has interpreted different provisions of a differently worded contract in a different factual context.*" I do not disagree. It remains striking nonetheless that Mr Griffiths was unable to cite any authority in which the trigger in a contractual termination regime, expressed in the form of an event having to occur, has been said to require only a belief (even an erroneous belief) that the specified event occurred. Without, he said, losing sight of Leggatt J's *dictum*, Mr Griffiths cited *Aiteo Eastern E&P Company Ltd v Shell Western Supply and Trading Limited* [2022] EWHC 2912 (Comm), a decision of Foxton J. In that case, two facility agreements included arbitration agreements expressed to be subject to a right to opt for court instead (in which case, provision was made for the courts of England, in the case of one of the facilities, or those of the Federal Republic of Nigeria, in the case of the other facility, to have exclusive jurisdiction). Foxton J decided that on the proper construction of the relevant provisions, and given the facts that had occurred, there had been an effectual election to arbitrate such that the right to opt for litigation instead could not be exercised thereafter. That decision has nothing to say on whether Article 14.1 of the Articles should be read as if it said that there is a Compulsory Transfer Event when one of the Shareholders considers (rightly or wrongly) that a listed event has occurred.

29. As I said in paragraphs 21.-above, the operative provisions of the Articles are simple, plain, clear and familiar. The *claimant's* solicitors put it quite neatly in a letter dated 24 January 2023, saying that "*it is trite law that if Party A breaches a contract (as Bells has done), Party B can take other steps permitted under said contract (as our client has done).*" Separating the legal analysis from the asserted application of it in the instant case, the position thus stated by the claimant's solicitors was:

    (i) correct, as a matter of legal analysis, to the effect that "*it is trite law that if Party A breaches a contract …, Party B can take other steps permitted under said contract [in respect of the breach]*". That is indeed trite law. It could not sensibly be disputed, and is not disputed by the defendant;

(ii) clear, as a matter of assertion, to the effect that the claimant said the defendant had acted in breach of contract. That of course is disputed;

(iii) clear, by way of conclusion, to the effect that therefore, so the claimant would say, it had been entitled by contract to take various steps it had taken. That is likewise disputed, because of the dispute at stage (ii) (and, it may be, for other reasons also, but that does not matter for present purposes).

30. Issuing this Part 8 Claim some months later, asserting instead an unarguable legal analysis, did not offer any prospect of resolving the parties' dispute. There is no real prospect of the court granting the declaration sought.

31. Finally, I said I would explain my observation about the claimant's choice of court. This is by nature a straightforward shareholder dispute in relation to an accountancy company whose value Mr Griffiths was unable to suggest might be more than £1 million, 40% of which the claimant owns, the other 60% of which it is asserting a right to acquire for fair value. The claims and cross-claims relating to the parties' conduct, and whether as a result the defendant has or has not committed, or (if relevant) failed to remedy, a material or persistent breach, may be somewhat involved, but that does not detract from what I have just said about the nature of the dispute or the value at stake.

32. The Commercial Court is not the right venue for any litigation that cannot be avoided. At the hearing, I suggested provisionally that if the Part 8 Claim proceeded, I might transfer it to the London Circuit Commercial Court ('the LCCC'). On reflection, considering the value at stake and the nature of the dispute, I see no reason why any Claim that is brought hereafter should not be commenced in the County Court; and I think it realistic to expect that if proceedings were brought in the LCCC, they would find themselves transferred to the Central London County Court, or another County Court venue convenient to the parties.

33. Wherever any Claim might be brought, litigating the parties' dispute to a trial and final judgment will surely present the prospect of aggregate costs that rapidly come to equal or exceed the effective value at stake, and might even come to equal or exceed the entire value of the Company. I urge the parties to try their utmost to find a way to resolve their differences without resort to further litigation.