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CASE NUMBER PT-2021-000834

Royal Courts of Justice, Strand, London, WC2A 2LL

Date: 18 May 2023

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)
B E T W E E N :

(1) MR ROBERT COLICCI
(2) MS ROSANNA MARIA COLICCI
(3) MS JOSEPHINE COLICCI

Claimants

- and -

(1) MS NORA MIKHAILOVNA GRINBERG
as executrix of the estate of ERNESTO COLICCI deceased
(2) ECSI LIMITED

Defendants

Before Recorder Mark Anderson KC acting as a judge of the High Court pursuant to section 9(1) Senior Courts Act 1981

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Penelope Reed KC (instructed by Charles Russell Speechlys LLP) for the claimants
Angeline Welsh KC (instructed by iLaw Solicitors Limited) for the first defendant

Hearing dates: 13, 14, 15 and 16 March 2023

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JUDGMENT

This judgment was handed down remotely at 10.30 a.m. on 18 May 2023 by circulation to the parties or their representatives by email and by release to The National Archives

Recorder Mark Anderson KC :

Introduction

1. Ernesto Colicci died unexpectedly on 18 January 2021, aged 66. The claimants are his first family. Josephine Colicci is his former wife. They divorced in 2011. Robert and Rosanna Colicci, born in 1983 and 1986, are their children.

2. The first defendant, Nora Grinberg, is Ernesto's widow. They married in 2014. She is sued as executrix of his will.

3. ECSI Limited was established and managed by Ernesto and Josephine as the vehicle for their catering business, which they carried on before and after their divorce until his death. I will refer to it as the **Company** and to its shares as the **Shares**. The Company was not represented and did not participate in the trial.

4. I will refer to Josephine, Robert and Rosanna Colicci collectively as the **claimants**, and to Robert and Rosanna as the **adult children**. I will refer to the participants individually by their first names, though sometimes I will refer to Ms Grinberg as the **defendant**.

5. The claim is based on a contract between Ernesto and the claimants made by deed on 1 June 2016 (the **2016 Deed**), in which Ernesto and Josephine covenanted that any Shares they still held in the Company when they died would pass to Robert and Rosanna. They promised to make wills to that effect.

6. Ernesto did not comply with this promise, but made a will dated 12 April 2017 which left his Shares to Nora. By this claim, the claimants seek to enforce the 2016 Deed. Nora's answer is that the 2016 Deed ceased in force when the same parties made a new written agreement on 1 March 2017 (the **2017 Agreement**). The claimants say that the 2017 Agreement left the 2016 Deed in force, alternatively that the 2017 Agreement should be rectified to that end. Nora resists the claim for rectification.

The Background

7. The business was started by Ernesto and Josephine after they married in 1982. It started with selling ice cream from vans and now operates catering outlets in public places. The Company was incorporated in 2003 and the business transferred into it. The Shares were held equally by the spouses. The Articles of Association adopted Table A, with bespoke amendments including a pre-emption provision which prevented one spouse from selling to

outsiders without first offering the Shares to the other for fair value. There was no shareholders' agreement until 2011.

8. The adult children joined the business as employees after finishing their formal educations. In 2017 Robert was appointed as a director. Rosanna now runs her own business from the same premises as the Company and in friendly cooperation with it. Until about 2019 she continued to help out in the accounts department without remuneration.

Shareholders' Agreement 2011

9. Ernesto and Josephine divorced in 2011. They negotiated a clean-break settlement. Josephine was represented by **Anthony Sebastian** of Sebastians, Ernesto by **Sarah Lambert** of Bowles & Co. They remained in business together after the divorce. As part of the settlement they entered into the **2011 Agreement**, a Shareholders' Agreement dated 8 December 2011. The Recitals read as follows:

> *(A) GC and EC each hold 50 shares in [the Company]* [GC is Josephine, who is also known as Giuseppina].
>
> *(B) It has been agreed that with effect from the date of this Agreement the Company shall carry on business on the terms and conditions of this Agreement.*
>
> *(C) GC and EC shall exercise their rights in relation to the Company on the terms and conditions of this Agreement.*

10. The Agreement provided for the Articles to be amended to designate the Shares as A Shares (Josephine) and B Shares (Ernesto). Clause 5 allocated certain duties to Josephine and others to Ernesto, clause 6 listed matters which required unanimity and clauses 9 and 10 provided a deadlock resolution process.

11. Clauses 11 and 12 contained restrictions on what the parties could do with their Shares in lifetime and upon death:

> *11. Transfer of shares*
>
> *11.1 No party nor their personal representatives shall transfer, grant any security interest over, or otherwise dispose of, or give any person any rights in or over any share or interest in any share in the Company unless he or she is permitted or required to do so under this Agreement.*
>
> *11.2 Except as permitted by clause 11.4, the voluntary transfer, grant of any security interest over, or the other disposal of, or giving of any rights in or over any share or interest in any share in the Company to a person*

who is not a party to this Agreement is not permitted under this Agreement.

11.3 A party may do anything prohibited by this clause if all the other parties have consented to it in writing.

11.4 Either GC or EC or her or his personal representatives may transfer some or all of her or his shares to one or both of GC and EC's children or to a trust the sole beneficiaries or potential beneficiaries of which are GC or EC and/or GC and EC's children. Any such transfer shall be conditional on the transferee entering into a shareholder agreement in all material respects identical to this Agreement.

11.5 Where a party ceases to hold any shares in the Company then he or she shall forthwith resign as a director (and if he or she is an employee of the Company also resign as an employee) and shall not seek or be entitled to any compensation for loss of office or redundancy, unfair dismissal or wrongful dismissal. Provided that nothing in this Agreement shall affect that party's statutory rights and entitlements.

12. Obligatory transfer

12.1 If anything mentioned in this clause 12.1 happens to a party it is an Obligatory Transfer Event …

(a) Death (but only in respect of shares which will not pass to a person to whom the party is entitled to transfer shares under clause 11.4);

(b) bankruptcy or the entering into force of an individual voluntary arrangement or other composition with creditors;
(c) ceasing to be a director or employee of the Company or becoming (whether through accident or illness) permanently incapable of working in the Company ….

12.2 Where an Obligatory Transfer Event happens to a party he or she (or … his or her personal representatives… or … trustee in bankruptcy) … is deemed to have given notice of it ….

12.3 The party receiving notice of an Obligatory Transfer Event (in this clause "the Buyer") has the right, within … [certain timescales] …, to offer to buy all the shares of the other party…

12. Clause 12 went on to provide the mechanism for determining the price at which the Buyer would acquire the Shares. If not agreed the price was to be a Fair Value (as defined), to be determined by the Company's accountants.

13. In summary, clauses 11 and 12 allowed Ernesto and Josephine to transfer their Shares during their lifetime to the adult children (or to trusts for their benefit) but prohibited lifetime

transfer to anyone else except by consent of both shareholders. Upon the death of the first of them, the survivor had the right to acquire, at full value, any of the deceased's Shares which would not pass in accordance with clause 11.4.

14. Clause 16.2 stated "If any provision in the articles of association of the Company conflicts with any provision of this Agreement, this Agreement shall prevail". Thus the pre-emption provisions of clause 12 prevailed over those contained in the Articles of Association.

Ernesto's and Nora's marriage

15. Ernesto and Nora married in 2014. Ernesto and Josephine remained on good terms and the business continued to flourish. Josephine and Nora were also on good terms.

16. However the claimants became concerned lest Ernesto bequeath the B Shares to Nora. It is common ground that the claimants were motivated to keep control of the Company within Ernesto's first family. To that end, Josephine and Robert began to persuade Ernesto to leave the B Shares by will to Robert and Rosanna.

17. On 24 March 2014, just before his wedding to Nora, Sebastians wrote to Ernesto in the following terms:

> *Josephine … has asked me to write to you with regard to your respective shareholdings in ECSI Limited. As I understand it, you are both agreed that your shares are to pass eventually to your children (either during your lifetime or when you die) and Josephine thinks, and I have advised, that this should be recorded in the existing Shareholders Agreement so as to avoid any misunderstanding in the future. At present the Shareholders Agreement provides for you and Josephine at any point during your respective lives to give or sell some or all of your shares to each other and/or the children but to nobody else. However, if, when you die, you still own any shares, those shares remain in your respective estates and do not automatically pass to the children. A similar situation would exist if either you or Josephine were made bankrupt. To ensure that the Shareholders Agreement reflects your current thinking, I have suggested that your children should each: 1. be made a party to the Agreement, although they will not be given any shares now, unless either of you want to do so and 2. be given an option exercisable on your and Josephine's death or bankruptcy to acquire, at a nominal figure of 1p per share, any shares which either you or she hold at that time*

18. Josephine said in evidence that Ernesto had already told her that he agreed with these proposals before they were put to him by Sebastians, and Mr Sebastian confirmed that those were his instructions. I accept that Ernesto had said that to Josephine. However Ernesto did not

reply to Sebastians' email despite several chasers, until in March 2015 Ms Lambert replied on Ernesto's behalf:

> *I think there has been a misunderstanding in relation to communication. My understanding is that Ernie and Pina were going to speak to one another and Ernie was in agreement with the matters as set out in your e-mail of the 24th March 2014. Obviously we would have to consider the matter in more detail once we had your proposed Agreement for approval. I note that you were firstly going to liaise with the Company's accountant to advise upon any tax consequences and I look forward to hearing from you further.*

19. However Josephine's solicitors and tax advisers could not settle on the right mechanism to propose, and the matter drifted through 2015.

Family expansion and Ernesto's first will

20. In 2015 Nora and Ernesto made plans for a child, expected in April 2016. Josephine made a similar plan with her new partner. Her infant was expected in July 2016. Josephine and Nora talked to each other about their plans, but, although Josephine and Ernesto remained close to the adult children, they agreed with Nora not to tell them that they were about to acquire two half siblings.

21. In December 2015 Nora and Ernesto instructed **Rita Bhargava** of Russell-Cooke Solicitors to draft wills for both of them. They did not have wills before that. At a meeting on 28 January 2016 Ernesto's instructions to Ms Bhargava were that he wanted to leave the B Shares (and two properties) equally between Robert, Rosanna and his forthcoming infant, and the residue of his estate to Nora.

22. This resulted in a will in those terms which Ernesto made on 9 March 2016. This will did not contain the provisions which Ernesto had given Josephine to understand he was prepared to make (paragraph 18 above), and Ernesto did not tell the claimants that he had made a will at all. However relations between Josephine, Ernesto and Nora remained outwardly close, and Ernesto's and Nora's wills appointed Josephine to be their new child's guardian (though, not having told her that he had made a will, Ernesto cannot have obtained her agreement to this).

23. To accompany the will Ernesto made a statement, to be read only after his death, which explained his motives. It said:

> *I make this statement of sound mind and having considered all implications and potential claims against my estate. In my Will I have left the following specific legacies to my three children equally:*

1 My property in New Malden

2 My property in Mitcham

3 My shares in ECSI Ltd.

I have left all my other assets on residue to my wife, Nora Grinberg.

In the event of her predeceasing me, I have left half of my residue to [my infant child] and half to Roberto and Rosanna equally. [My infant child] in this case will therefore receive more of the residue than either Robert or Rosanna individually.

I love Roberto and Rosanna very much and this split is no reflection on how I feel about them. I have provided both with significant funds in their lifetimes, and I have set them up with properties, rental properties, and provided them with careers in my company, ECSI Ltd. They are independent adults now with financial security. I have left them interests in my rental properties, and my company, which is my most substantial asset in terms of financial value. I consider this more than sufficient provision for Roberto and Rosanna.

My [infant child] is due to be born April 2016 …. [He/she] will not have had the benefit of my generosity in her lifetime as Roberto and Rosanna have. It is for these reasons, which I consider fair and just, that I have left my residue as I have.

24. The adult children first heard of the addition of a new child to Ernesto's family from an employee of the Company, who had heard it on the grapevine. Only then did Josephine tell the adult children about her forthcoming infant. It upset the adult children to learn that both their parents had secretly decided to have children with their new partners. Rosanna says that this caused uproar. Josephine says in her statement that she felt she had made a big mistake and had shown poor judgment, and repeatedly apologised to the adult children. Josephine sought to blame Nora for the secrecy, which she now regretted, and this appears to have led to a rapid decline in the relationship between Josephine and Nora, though Josephine and Ernesto remained on good terms.

25. The adult children and Nora were never on good terms, and the adult children have not formed a relationship with Ernesto's and Nora's child. This last fact was mentioned by Ernesto as influencing his third and final will, as will be seen.

Ernesto's second will

26. The relations between Josephine and Nora having soured, on 12 May 2016 Nora and Ernesto made new wills which removed Josephine as their child's guardian. This new will

otherwise retained the provisions of the first will (see paragraphs 21-22 above). Again, Ernesto did not tell the claimants he had made it.

The 2016 Deed

27. Meanwhile, in light of the new additions to Josephine's and Ernesto's families, Robert renewed his efforts to ensure that he and Rosanna would inherit both parents' Shares in due course. He discussed this with his parents, neither of whom expressed disagreement. Josephine instructed Mr Sebastian with a view to drafting an agreement with Ernesto. On 22 April 2016 Ernesto attended a meeting with Josephine and Mr Sebastian, and gave them to understand that he would be willing to make a will leaving his Shares to the adult children. He did not tell them that he had already made a will on 9 March (see paragraph 22 above), which left his infant child one third of them.

28. Only three weeks after making that will, and without revealing its existence to the claimants, Ernesto entered into the 2016 Deed, the material terms of which were as follows:

> *1. Mr Colicci and Mrs Colicci for themselves and their personal representatives agree with each other and separately with Robert and Rosanna that if on their respective deaths each of them still hold the shares in ECSIL the ownership of those shares will pass without cost and free of all taxes to Robert and Rosanna in equal parts or to the survivor of them.*
>
> *2. In pursuance of the aforementioned agreement Mr Colicci and Mrs Colicci for themselves and their personal representative each covenant with each other and separately with Robert and Rosanna that (a) each of them will forthwith make a will or codicil leaving the shares free of all taxes to such of Robert and Rosanna as shall survive them and if both the shares shall be divided equally between them and (b) neither of them will revoke or in any way change the aforementioned bequests…*

29. Just as he did not tell the claimants about his existing will, it is Nora's unchallenged evidence that he did not tell her about the 2016 Deed.

Ernesto's understanding of the 2016 Deed

30. Ernesto's signature to the 2016 Deed was procured by Josephine, who gave no evidence as to the circumstances in which he signed it, nor what he said to her about it, or she to him. Since the original validity of the 2016 Deed is not challenged, Josephine did not need to give any such evidence and was not asked about these matters in cross examination.

31. Mr Sebastian's evidence was that he gave advice about the binding legal effect of the (proposed) 2016 Deed, at a meeting with Josephine and Ernesto on 22 April 2016. However I am unable to accept that evidence because his note of the meeting and his email to counsel three days later show that Mr Sebastian himself did not know whether a contract between Ernesto and Josephine to bequeath their Shares would be legally enforceable, and needed counsel's advice on the matter. At most Ernesto would have left the meeting with the impression that Mr Sebastian was exploring the legal position.

32. Having taken counsel's advice, Mr Sebastian sent an email to Josephine on 25 May 2016 enclosing a draft of the 2016 Deed for signature. This email did give firm advice about the effect of the proposed Deed, but, though addressed "Dear Josephine and Ernesto", the email was not sent to Ernesto's email account, and Josephine gave no evidence that he saw it. The email said that Ernesto should take independent legal advice before signing the 2016 Deed, but Josephine did not say in evidence that she conveyed this to Ernesto and it does not appear that he took any advice.

33. However, after signing the 2016 Deed Ernesto did send a copy of it to his solicitor Ms Lambert. I do not have the communication by which he sent the Deed, but I do have her response of 8 June 2016 which included the following:

> *I note you have agreed to make a will forthwith and to leave your shares free of all taxes to the children, Robert and Rosie. In view of this and your new arrival you will need to ensure you make a will.*

34. I find that Ernesto knew what the 2016 Deed required him to do. Its terms are plain and would have caused him no confusion. If there was any doubt, Ms Lambert's email would have dispelled it. He knew, having been told in simple terms by his own solicitor, that the 2016 Deed required him to make a new will to leave his Shares to his adult children. And although they did not know about Ms Lambert's email, the claimants were entitled to assume, and I have no reason to doubt that they did assume, that Ernesto understood the obligation which he had accepted in entering into the 2016 Deed.

35. Subject to certain matters discussed in paragraphs 118 to 120 below, the parties are agreed as to the legal effect of the 2016 Deed. It is that, to the extent that the B Shares are not required to pay debts, Nora (as executor) will hold the Shares on bare trust for, and will be ordered to transfer them to, the adult children. Ernesto and the claimants would not have understood that legal nuance, but they would have appreciated that Ernesto's will would be open to challenge if it did not comply with the 2016 Deed.

The 2017 Agreement

36. The 2016 Deed obliged Ernesto and Josephine to leave the Shares to the adult children by will if they still owned them when they died. However it remained open to them (if both agreed) to sell the Company during their joint lifetime, and the 2016 Deed imposed no obligations on either of them to leave the proceeds of such a sale to anyone in particular.

37. Robert, though working in the business, had no stake in the equity, and was not a director. He wanted change on both fronts, and made that clear to his parents. On 9 October 2016 Robert sent them an email making proposals, mentioning that he had already talked to them about the issue 10 days earlier. The email said "As we're doing such great things at the moment and the unity of the family transmits a lot of confidence in clients, I agree with pups [Ernesto], it does seem crazy to break that". Robert's proposals were for increased remuneration, a place on the Board and a stake in the equity or a share of the profits. His reference to the "unity of the family" indicates that he was considering his future in the business, as he confirmed in evidence.

38. This proposal was followed by negotiations which resulted in an agreement signed on 1 March 2017. I shall have to deal with the negotiations in some detail for the purpose of the rectification claim, but most of the details are not relevant to the issue of interpretation and can be left to one side for now.

39. The outcome of the negotiations was that Ernesto and Josephine decided to gift 10 per cent shareholdings to each of the adult children. Robert would become a director, and would receive 10 C Shares, which would rank evenly for dividend purposes with the A and B Shares already held by his parents. Rosanna would receive 10 D Shares, which would not carry equal dividend rights because she was not an employee and had her own business. Josephine would retain 40 A Shares and Ernesto 40 B Shares.

The terms of the 2017 Agreement

40. The 2017 Agreement was drafted by Mr Alex Gerver, the company/commercial partner in Sebastians, whose retainer on this occasion was with the Company. Mr Gerver's approach was to take the 2011 Agreement as his starting point and to update it to reflect the changes mentioned in the preceding paragraph. Mr Gerver gave evidence to that effect, but even without his evidence his method is apparent from comparison of the two documents. The only substantive changes made to the 2011 Agreement were those necessitated by the addition of

two new shareholders and corresponding classes of Shares, and the addition of Robert as a new director (there was also an irrelevant numbering change which caused clauses 11 and 12 of the 2011 Agreement to be numbered 10 and 11 the 2017 version).

41. The recitals read as follows:

> *(A) GC EC each hold 40 shares, designated as A Shares and B Shares respectively, in [the Company]. Robert and Rosanna each hold 10 shares, designated as C Shares and D Shares respectively, in the Company.*
>
> *(B) It has been agreed that with effect from the date of this Agreement the Company shall carry on business on the terms and conditions of this Agreement.*
>
> *(C) GC and EC shall exercise their rights in relation to the Company on the terms and conditions of this Agreement.*

42. Clause 10 of the 2017 Agreement read as follows:

> *10.1 No party nor their personal representatives shall transfer, grant any security interest over, or otherwise dispose of, or give any person any rights in or over any share or interest in any share in the Company unless he or she is permitted or required to do so under this Agreement.*
>
> *10.2 Except as permitted by clause 10.5, the voluntary transfer, grant of any security interest over, or the other disposal of, or giving of any rights in or over any share or interest in any share in the Company to a person who is not a party to this Agreement is not permitted under this Agreement.*
>
> *10.3 Neither Robert nor Rosanna may transfer any of his or her shares without the prior written consent of both GC and EC except pursuant to clause 11 or clause 12.*
>
> *10.4 A party may do anything prohibited by this clause if all the other parties have consented to it in writing.*
>
> *10.5 Either GC or EC or her or his personal representatives may transfer some or all of her or his shares to one or both of Robert and Rosanna or to a trust the sole beneficiaries or potential beneficiaries of which are GC or EC and/or Robert and Rosanna. Any such transfer shall be conditional on the transferee entering into a shareholder agreement in all material respects identical to this Agreement.*
>
> *10.6 Where a party ceases to hold any shares in the Company then he or she shall forthwith resign as a director (and if he or she is an employee of the Company also resign as an employee) and shall not seek or be entitled to any compensation for loss of office or redundancy,*

unfair dismissal or wrongful dismissal. Provided that nothing in this Agreement shall affect that party's statutory rights and entitlements.

43. The changes from clause 11 of the 2011 Agreement were the insertion of clause 10.3, and the substitution (twice) of the words "Robert and Rosanna" for "GC and EC's children" in clause 10.5. This latter change reflected the fact that Josephine and Ernesto now had another child each, and made clear that the exception contained in clause 10.5 was not to permit Ernesto or Josephine to make lifetime transfers of their Shares in favour of their infant children. The Shares were to remain within Ernesto's first family.

44. Clause 11 of the 2017 Agreement read as follows:

11. Obligatory transfer

12.1 If anything mentioned in this clause 11.1 happens to a party it is an Obligatory Transfer Event …

(a) Death (but only in respect of shares which will not pass to a person to whom the party is entitled to transfer shares under clause 10.5);

(b) bankruptcy or the entering into force of an individual voluntary arrangement or other composition with creditors; (c) if that party is EC or GC and he or she is ceasing to be a director or employee of the Company or becoming (whether through accident or illness) permanently incapable of working in the Company ….

11.2 Where an Obligatory Transfer Event happens to a party he or she (or … his or her personal representatives… or … trustee in bankruptcy) … is deemed to have given notice of it ….

11.3 Each party receiving notice of an Obligatory Transfer Event (in this clause "the Buyer") has the right, within … [certain timescales] …, to offer to buy all the shares of the other party…

45. Clause 11 went on to provide the mechanism for determining the price at which the Buyer would acquire the Shares, with no changes from the corresponding mechanism in the 2011 Agreement.

46. The changes to clause 11 between the 2011 and 2017 Agreements were to reflect that there were now four shareholders instead of two. Thus 11.2 provided for notice of an obligatory Transfer Event to be deemed to have been given on the day upon which 'any' (as opposed to 'the') other party became aware of it, and clause 11.3 began with 'Each party' instead of 'The party'. There was also a change to clause 11.1(c), exempting Robert from the compulsory transfer regime if he ceased to be a director.

47. There were substantive changes to other clauses, all necessitated by the addition of new shareholders and a new director. In particular, there was a new clause 12 providing drag-along rights in favour of Ernesto and Josephine, to prevent either of the new minority shareholders from blocking a sale of the Company.

48. Clause 18 of the 2017 Agreement provided as follows:

> *18.1 This Agreement, and any documents referred to in it, constitute the whole agreement between the parties and supersede any arrangements, understanding or previous agreement between them relating to the subject matter they cover, including the Shareholders Agreement between GC and EC dated 8 December 2011.*

49. That was identical to the corresponding provision in the 2011 Agreement, except of course for the words after the final comma.

The issue of interpretation

50. I have to decide whether clause 18 revoked the 2016 Deed.

The evidence

51. I heard evidence from each of the claimants, from the defendant, and from three further witnesses called by the claimants: Mr Anthony Sebastian and Mr Alex Gerver, both of Sebastians, and Mr Michael Dobrin, an accountant with Alexander James & Co. Mr Sebastian deals principally with private client work, Mr Gerver with company and commercial drafting. Mr Dobrin's firm were the Company's accountants and dealt also with Ernesto's and Josephine's tax returns.

52. Nora gave evidence about her own financial background and circumstances, and of the probate values of the assets contained in Ernesto's estate. However she gave no evidence of the extent to which the claimants knew details of her financial circumstances, nor up-to-date details of Ernesto's, nor is there evidence that such facts as the claimants did know would have signalled anything about Ernesto's intentions when making the 2017 Agreement.

53. My narrative in paragraphs 1 to 49 above and 83 to 106 below is derived largely from the documents, supplemented to a minor extent by the witness evidence. I accept the witness evidence to the extent that it is reflected in the narrative. I will make further findings as I discuss the issues which I have to decide.

The parties' submissions on interpretation

Defendant

54. For the defendant Ms Welsh KC submitted that clause 18 contained an acknowledgement by the parties that the full contractual terms to which they agreed to be bound, as regards what happens to the Shares of a party who dies, are to be found in the 2017 Agreement and nowhere else. Clause 18 states in plain terms that the 2017 Agreement supersedes any previous agreement between the same parties relating to the same subject matter. The 2016 Deed was an agreement "relating to" what happens to the Shares of a party who dies.

55. Ms Welsh pointed out that clause 11.1(a) is not confined to what happens if one of the adult children dies. It also covers what happens if Ernesto or Josephine dies. She argues that if the parties had intended the 2016 Deed to remain in effect, they would have acknowledged its continuation by excluding Ernesto and Josephine from clause 11.1(a) just as they excluded the adult children from clause 11.1(c).

56. Ms Welsh also pointed to the requirement in the final sentence of clause 10.5 that any transfer of the Shares to the adult children or trustees must be conditional on the transferee entering into a shareholder agreement in identical terms to the 2017 Agreement. She argued that this requirement cannot be reconciled with the continuance of the obligation under the 2016 Deed to transfer of Shares to the adult children, which did not require compliance with the final sentence of clause 10.5.

57. Ms Welsh also argued that the fundamental aim of the claimants, to keep the Shares within their family to the exclusion of Ernesto's second family, was achieved via the pre-emption provisions of clause 11, so that the 2016 Deed was not needed for this purpose. The fact that the surviving shareholder would have to pay fair value for the Shares does not matter. It was control of the Company that the family was concerned about, not the monetary value of the Shares. She reinforced this argument with the point that the 2016 Deed did not oblige Josephine and Ernesto to retain the Shares until the death of the first of them. They were at liberty to sell the Company and had no obligation to leave the proceeds to their children. Their collective ambition was to keep the Shares within the family. It was not about money.

Claimants

58. I can most conveniently summarise Ms Reed KC's arguments by reference to her skeleton argument, in which she provided a number of reasons why the 2017 Agreement did not supersede the 2016 Deed:

a. The words "relating to the subject matter they cover" in clause 18.1 make it clear that it is only agreements relating to the subject matter covered by the 2017 Agreement which are superseded. The subject matter of the 2017 Agreement is the rights and obligations which the parties have vis-à-vis one another qua shareholders whereas the 2016 Deed concerns something quite different: a commitment to make a will.

b. The 2017 Agreement and the 2016 Deed are entirely compatible with one another.

c. The specific reference to the 2011 Agreement in clause 18.1 suggests that the draftsman did not have in mind any variation to the 2016 Deed when drafting this clause and the existence of the 2016 Deed was part of the factual matrix known to the parties. If it was to be revoked, it makes no sense for it not to be mentioned, and the same firm drafted both documents.

d. The argument that the provisions of clause 11 do not have any effect if the 2016 Deed continues in existence is not correct as clause 11 would cover the Shares held by the adult children and it would have always been open to all the parties to the 2016 Deed to agree to its revocation at some point in the future, in which case the clause 11 provisions would apply.

e. In interpreting the effect of clause 18, the Court can consider the interpretation which makes most business sense. The 2017 Shareholders Agreement arose out of Robert being concerned to protect his position working for the Company. It therefore would have made no sense for him to negotiate an agreement leaving him much less secure. If the defendant is right about the meaning of the 2017 Agreement, he would no longer have any entitlement to one half of his parents' Shares when they died but would have had to hope they would benefit him (when both had new partners and children). Potentially he would be left to pay for the Shares under clause 11.l.

f. The fact that Ernesto had by that time not complied with his obligations to make a Will in accordance with the 2016 Deed is neither here nor there. That was a fact known only to him and so cannot be part of the factual matrix to which the Court will have regard in interpreting clause 18.

Decision on interpretation

Clause 18

59. The words relied on by the defendant as superseding the 2016 Deed are those of clause 18 which I have already quoted in paragraph 48 above. The central phrase of that clause is "relating to the subject matter they cover", "they" being a reference back to "This Agreement and any documents referred to in it" (of which there were none relevant to this dispute, so "they" is a reference to "this Agreement"). The issue is therefore whether the 2016 Deed related to the subject matter covered by the 2017 Agreement, specifically for present purposes clauses 10 and 11.

The principles of interpretation

60. The parties were agreed as to the principles applicable to the interpretation of clause 18. I have reminded myself of them by re-reading Section 3 of Part 5 of Chapter 15 of Chitty on Contracts (34th Ed), headed "Construction of Terms". My attention was also drawn to Section 16 of Chapter 3 of The Interpretation of Contracts (7th Ed) by Sir Kim Lewison, which is headed "Entire Agreement Clauses". I will not set out passages from these works, nor (with one exception) from the cases they cite, but I have them firmly in mind.

61. The principles were summarised by Popplewell J in Lukoil Asia Pacific Pte Ltd v Ocean Tankers (The "Ocean Neptune") [2018] EWHC 163 (Comm) in the following terms:

> *The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a*

> *balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.*

The available background

62. Not all of the narrative set out in paragraphs 1 to 49 above is relevant to the issue of interpretation. In particular the fact that Ernesto made two wills and a statement to accompany them is irrelevant, because those facts were not known to the claimants. Many of the other facts are of high-level background relevance only.

63. A practical difficulty arises in that this is a Part 8 claim without statements of case. Had the parties pleaded their cases, I would have expected them to set out the salient aspects of the available background which they say are important to interpretation of the words used in the 2017 Agreement. Doing my best, it seems to me that the chief aspects of the available background were that

a. Ernesto and Josephine had made the 2011 Agreement. Its purpose, as Ms Welsh accepted, was to ensure following their divorce that Ernesto and Josephine had joint control over the Shares and to prevent outsiders acquiring claims to them. Since the 2011 Agreement is specifically mentioned in clause 18 of the 2017 Agreement, this was background fact available to all the parties to the 2017 Agreement.

b. The parties had entered into the 2016 Deed. By doing so both Ernesto and Josephine indicated that they intended the adult children to inherit all their Shares in due course. Neither of them had indicated a change of heart.

c. Following the 2016 Deed, Robert still wanted to improve his position in the Company, and raised the possibility of leaving the business.

d. The claimants and Ernesto thought it would be good for business if they all stayed together in it.

e. Ernesto had married Nora and they had an infant, and therefore had assumed new obligations. Ernesto was a relatively elderly father.

f. Josephine also had an infant with her new partner.

g. Ernesto felt paternal affection for his adult children as well as for his new child and for Nora. He also remained friendly with Josephine.

h. Although Ernesto's statement to accompany his first will was not shared with the claimants, it was not suggested to me that this was an insincere statement, and its broad point, that he had brought the adult children up in comfort and had helped them financially, was known to all.

64. These factors are not all of equal weight. In particular, (b) tends to weigh more heavily than (d) to (h), because the 2016 Deed was made with knowledge of (d) to (h), but those paragraphs could still be relevant to Ernesto's attitude, and the claimants would have appreciated that possibility.

Subject matter of both agreements

65. The subject matter of the 2016 Deed was a mutual promise that any Shares still held by Ernesto and Josephine at death would pass to the adult children, and a promise to make wills to that effect. It created testamentary obligations. It removed Ernesto's and Josephine's freedom to dispose of their Shares on death.

66. Unlike the 2016 Deed, clauses 10 and 11 of the 2017 Agreement did not impinge on Ernesto's and Josephine's freedom to dispose of their Shares on death. Those clauses left the parties free to leave the Shares to whom they chose. Although clause 11 made the death of Ernesto and Josephine an Obligatory Transfer Event, it did not interfere with the automatic transfer of the Shares to a personal representative to be held on the terms of a will or intestacy, even if the beneficiary was not within the class of persons identified in clause 10.5. The pre-emption provisions entitled Ernesto or Josephine to acquire any such Shares, but the personal representatives would still hold the proceeds for the chosen beneficiary.

67. For these reasons I accept Ms Reed's submission that the 2016 Deed imposes obligations on Ernesto and Josephine as testators, and confers benefits upon the adult children as beneficiaries, which are different from the subject matter of the 2017 Agreement, which

concerns the rights and obligations of the parties as shareholders. The 2016 Deed was not a "previous agreement … relating to the subject matter" covered by clause 11.1(a).

68. Clause 11.4 of the 2011 Agreement permitted a transfer of Shares to the adult children on the death of a parent, but did not mandate it. Clause 12 provided what would happen if a deceased parent's Shares were not left to the adult children. The 2016 Deed did not contradict or qualify this regime. It made mandatory upon Ernesto's or Josephine's death that which clause 11.4 of the 2011 Agreement already permitted.

69. Anyone reading the 2017 Agreement with knowledge of the terms of the 2011 Agreement would conclude that the purpose of the 2017 Agreement was to change the 2011 regime to accommodate the introduction of two new shareholders and a new director. The 2016 Deed could work alongside the 2017 Agreement just as readily as it had worked alongside the 2011 Agreement.

70. To achieve the interpretation contended for by the defendant, it would be necessary to read clause 18 as meaning that clause 11 superseded all agreements about the transfer of Shares on death, even those the aim of which was to exclude Shares from the clause 11 regime (or rather, from that of its predecessor clause 12 in the 2011 version). I do not think that clause 18 can bear such weight. It would have required more explicit words to do that.

71. Furthermore clause 18 of the 2017 Agreement explicitly mentions that the 2011 Agreement is intended to be superseded, whilst making no mention of the 2016 Deed. Since the parties chose to spell out that the 2011 Agreement was superseded, I would have expected them to be equally explicit in respect of the 2016 Deed if they had intended to revoke it. To my mind it is inconceivable that the parties would mention one revoked agreement without mentioning another of comparable importance.

72. I accept that one might also have expected them to say explicitly that the 2016 Deed was *not* revoked, but that is outweighed by the explicit revocation of the 2011 Agreement. The absence of a saving provision for the 2016 Deed is less significant in the absence of other saving provisions.

Ms Welsh's arguments

73. Ms Welsh argues that since clause 11.1(a) does not exclude the deaths of Ernesto and Josephine as Obligatory Transfer Events, the 2017 Agreement must contemplate the possibility that upon the death of Ernesto and Josephine some of their Shares will not pass in accordance

with clause 10.5. She says that that contemplation is inconsistent with the continuation in force of the 2016 Deed, which, if still in force, would prevent the contemplated possibility. I reject this argument. There were in fact circumstances in which the 2016 Deed would not mandate the transfer of Shares in accordance with clause 10.5; namely, if the adult children both predeceased one of their parents. In that event, Ernesto and Josephine would be the only surviving shareholders and clause 11.1(a) would become relevant to them as it was before 2016.

74. Even assuming that the adult children would survive their parents, there was no reason to spell out that clause 11.1(a) did not apply on the death of a parent, because the 2016 Deed rendered clause 11 irrelevant anyway in those circumstances. By contrast the explicit exclusion of the adult children from clause 11.1(c) was necessary because that subclause would otherwise have applied to Robert, which the parties did not intend.

75. As to Ms Welsh's argument based on the final sentence of clause 10.5, this overlooks that the adult children were parties to the 2017 Agreement, so that sentence cannot apply to them as transferees. It could only apply to a trustee to whom the Shares are transferred. But since the adult children would be the beneficiaries of that trust, and were already parties to the 2017 Agreement, I struggle to imagine any circumstances in which the final sentence of clause 10.5 could ever stand in the way of a bequest in accordance with the 2016 Deed. Still less is the final sentence of clause 10.5 irreconcilable with the continuing force of the 2016 Deed.

The implications of the rival interpretations

76. Ms Welsh submitted that the pre-emption provisions of clause 11 were enough to satisfy Ernesto's and the claimants' shared aim to keep the Shares within Ernesto's first family to the exclusion of his second family. To the opposite effect, Ms Reed argued that the defendant's interpretation of the 2017 Agreement would render it so commercially unattractive to Robert that he would never have entered into it. I do not find either polarity particularly persuasive. Ms Reed's argument is dented by the fact that the 2016 Deed never guaranteed the adult children to inherit their father's interest in the business in full. They would only do so if the business was not sold before the first parent died. So there was some uncertainty. From the 2017 Agreement, even interpreted as the defendant would, the adult children obtained a shareholding of 10 per cent each, and Robert a place on the Board with better remuneration. And the adult children were still likely to receive their mother's Shares in due course. I find it impossible to conclude that that was so obviously bad a deal that the adult children would not have accepted it.

77. On the other hand, I do not accept that the 2017 Agreement, interpreted as the defendant contends, would obviously achieve the shared aim mentioned in the first sentence of the preceding paragraph. One possibility was that Josephine would predecease Ernesto. It is by no means clear that clause 11 confers pre-emption rights upon the adult children in these circumstances, because clause 11.2 mentions only Ernesto and Josephine as the recipients of notice of an Obligatory Transfer Event. But even if it is possible to read clause 11 in a way which would overcome this difficulty for the adult children, I have no evidence that the parties contemplated that the adult children would have been in a position to exercise the pre-emption rights at full value. Therefore I do not accept that such pre-emption rights would have been considered by the parties to guarantee that the Shares would remain in the first family, nor that they would have been regarded by the parties to the 2017 Agreement as an adequate means of achieving that shared aim.

Outcome

78. For the reasons given above, I prefer the interpretation for which the claimants contend. Clause 18 of the 2017 Agreement did not supersede or revoke the 2016 Deed. That disposes of the claim in the claimants' favour, subject to the matters set out in paragraphs 116 to 120 below.

Rectification

79. If I had decided against the claimants in respect of construction of the 2017 Agreement, then they would have applied for rectification of clause 18 by the addition of the words: "*save that the deed made by all the parties to this Shareholders Agreement dated 1 June 2016 shall remain in full force and effect.*" I heard full argument on the issue, and most of the evidence was directed at it. I will therefore indicate how I would have decided it if the construction issue had gone the other way.

80. Ms Reed relies on mutual mistake. She says that when the parties executed the 2017 Agreement, they shared a common intention that the 2016 Deed should remain in force. If I am wrong on the construction issue, the document did not achieve that common intention and that happened by mistake. Ms Reed accepts that it must be shown that each party to the contract shared, and understood each other to share, the same actual intention.

81. The parties agreed that the leading authority is FSHC Group Holdings Ltd v GLAS Trust [2020] Ch 365 (CA). I derive from it the following principles relevant to this case:

a. In order to achieve rectification based on a common mistake it is necessary to show that at the time of executing the written contract the parties had a common intention (even if not amounting to a binding agreement) which, as a result of mistake on the part of both parties, the document failed accurately to record.

b. This requires convincing proof to displace the natural presumption that the written contract is an accurate record of what the parties agreed.

c. The principles are based on the requirement of good faith. It is contrary to good faith for a party to take advantage of a mistake made in drawing up a written contract by seeking to apply the contract inconsistently with what that party knew to be the common intention of the parties when the document was executed.

d. It is necessary but not sufficient to prove that the written instrument did not reflect what each party subjectively intended. It is also necessary to show that the written instrument did not represent the real agreement between the parties with regard to the matter in issue. 'Agreement' connotes some outward expression of accord, so that the parties not only each held the relevant true intention but understood each other to share it as a result of communication between them.

e. This need not involve expressly declaring the shared intention. It may be tacit. The parties might come to know of each other's intention through various means other than direct statements. An accord may include understandings that are so obvious as to go without saying, or that were reached without being spelled out in so many words. The fact that an intention or understanding is shared may even be apparent from the fact that nothing is said.

f. However the court is concerned with what the parties actually communicated to each other, and not with identifying their presumed intention by means of an officious bystander test.

82. I must therefore consider what evidence exists as to the subjective intention of each of the parties to the 2017 Agreement on the issue of whether that agreement would terminate the 2016 Deed, and as to what they thought about each other's understanding as a result of the communications between them.

Negotiation of the 2017 Agreement

83. Josephine and Ernesto attended a meeting with Mr Gerver and Mr Sebastian on 25 October, and Mr Gerver recorded their instructions in an email the following day. This is an important email from which I must quote at length:

> *You wish to transfer a total of 10% of the company's shares to each of Rob and Rosie from your current 50% shareholdings, leaving you with 40% each. You wish to ensure, however, that the company effectively remains deadlocked between the two of you and that neither of you can be out-voted by the other and the children. You also wish to ensure that should you both decide to sell your shares in the company to a third party that you can require the children to sell their shares on the same terms at the same time. Because Rob works in the business and Rosie does not, you wish to be able (at your discretion) to declare dividends on your and Rob's shares but not on Rosie's shares. As with your own shares, none of the shares held by the children are to be freely transferable and in particular will be subject to compulsory transfer in particularly circumstances, including death. Rob is also to be made a director of the company.*
>
> *Rob's initial proposal in relation to his shareholding and directorship was not acceptable to you and Josephine is going to put your counter-proposal to Rob in the next few days. Once agreement has been reached on a set of Heads of Terms you will forward these to us so we can prepare the appropriate documentation.*
>
> *You wish the new structure to be in place by the end of December this year.*
>
> *INITIAL ADVICE*
>
> *Based on our discussion and assuming Rob agrees to the proposal you will be making to him, I recommend that I prepare a new Shareholders Agreement to be signed by all four of you. I will also prepare director and shareholder resolutions to create two new classes of shares ("C Shares" and "D Shares") for Rob and Rosie to exist alongside your existing A Shares and B Shares. This will enable you to declare different rates of dividend on the different shareholdings.*
>
> *As we discussed, provided Rob owns his shares for a sufficient period of time before selling them it may be possible for him to claim entrepreneur's relief on a sale and so pay capital gains tax at 10% (assuming the current rate remains the same). I understand that Michael is looking into what we would need to do to ensure that Rob's shares qualified for this treatment and I look forward to hearing from him on this in due course.*
>
> *We also discussed The Royal Parks contract and its importance to the business and on the basis that it probably contains a change of control*

> *provision, which could conceivably be triggered by a transfer of shares to Rob and Rosie, I would recommend that I should review the document(s) before we finalise the new arrangements. Understanding the terms of the change of control provision will also be essential should you decide to sell the company, which I understand you may wish to do within the next few years.*
>
> *Finally, I recommend that I review Rob's terms of employment and amend them as required to reflect his new position as a director of the company. The simplest way of doing this may be to prepare a new director's service contract for him.*
>
> *You will also ensure that both Rob and Rosie contact Anthony to make wills!*

84. Mr Gerver's witness statement confirms that the instructions set out in that email match his recollection. He said "I recall quite clearly that nobody present at the 25 October 2016 meeting nor at any other meeting I attended expressed a wish to change the effect of the 2016 Deed nor indicated that they had any issue in relation to it".

85. Mr Sebastian's witness statement includes the following evidence:

> *I was not involved in the drafting of the 2017 shareholders agreement, which was undertaken by Alex Gerver, although some of the emails prepared largely by Alex Gerver were sent to the parties under my name. However, I did take part in some of the more general non-technical discussions that arose. In particular, I attended two face-to-face meetings with Josephine, Ernie, Michael Dobrin and Alex Gerver on 25th October 2016 and 18th January 2017, the first at my office and the second at ECSI's premises. I can recall saying at the first of those meetings that the new proposed shareholders' agreement had nothing to do with and did not affect or invalidate the 2016 Deed, which dealt solely with what would happen if either Josephine or Ernie still held shares in ECSI at their respective deaths and would continue to govern that situation. I went on to explain that the new shareholders agreement was simply about giving Robert and Rosanna a stake in ECSI. Both Ernie and Josephine indicated that they understood this and were content to proceed on that basis.*

86. There is no contemporaneous note of that advice, and Mr Gerver's follow-up email did not mention the 2016 Deed at all. When asked about this in re-examination, Mr Sebastian, I think intending to explain why the advice he recollected was not recorded in the email, said that the email recorded the conclusions reached at the end of the meeting whereas "my contribution to that meeting was simply at the very beginning, to say to everybody, 'Look, this doesn't affect the 2016 deed'". He added that he did not get involved in the meeting thereafter because he was not a corporate lawyer.

87. The meeting was a preliminary meeting for Sebastians to take instructions as to what Ernesto and Josephine were going to propose to Robert. It would have been odd for Mr Sebastian to tell his clients at the beginning of such a meeting what his firm would be aiming to achieve. It would not have made sense for Mr Sebastian to give detailed advice as to what the new Shareholders' Agreement did and did not achieve before Mr Gerver had even drafted it, and certainly not as a preliminary announcement at the beginning of a meeting in which Mr Sebastian was to take no further part. There is no support for Mr Sebastian's recollection from any of the other three witnesses who were present at the meeting (Josephine, Mr Dobrin and Mr Gerver). If anything, Mr Gerver's evidence, quoted above, contradicts it, as does Josephine's evidence that "I don't remember any discussion about the relationship between the two agreements [the 2016 Deed and the 2017 Agreement]".

88. I therefore cannot accept Mr Sebastian's evidence that he gave the advice which he thinks he gave at the meeting of 25 October. In addition to the considerations mentioned above, I do not accept that his memory of that meeting would have been sufficiently reliable to recall such a detail when he made his witness statement in August 2021, nearly 5 years later. I prefer to rely on Mr Gerver's evidence and in particular the follow-up email as to what was discussed at the meeting. That email did not mention the 2016 Deed, and included the following sentence: "As with your own shares, none of the shares held by the children are to be freely transferable and in particular will be subject to compulsory transfer in particularly circumstances, including death". That sentence was at best equivocal as to whether the proposed agreement was to supersede the 2016 Deed in dealing with the transmission of Ernesto's and Josephine's Shares on their deaths.

89. Ms Welsh did not specifically suggest to Mr Sebastian that his recollection was wrong, but Mr Sebastian was given a proper opportunity to deal with the problems in his evidence in re-examination and I do not think it unfair to the claimants to reject his evidence on this point just because there was no specific cross examination about it.

90. I have dealt with this meeting at some length because Mr Sebastian's evidence, if accepted, would have given the claimants a platform from which they might have established some common understanding, based on communications between the parties, that the 2016 Deed was to remain in force. Even then, a common understanding in October 2016 might not have been strong evidence of such an understanding four months later, but no such common understanding has been established even at the earlier point in time.

91. On 3 December Mr Gerver sent Josephine and Ernesto a draft of the 2017 Agreement. The accompanying email gave a short commentary about the important terms. It did not mention the 2016 Deed.

92. There was a meeting on 18 January, which Mr Sebastian says was attended by both Josephine and Ernesto. There is no note of the meeting, but on 31 January it was followed by an email from Mr Sebastian to Josephine, copied to Ernesto and Mr Dobrin, attaching the latest draft of the Agreement, a note of explanation entitled "Shareholders Agreement Summary" and a checklist for compiling a service contract for Robert. The Shareholders Agreement Summary included advice about clause 11 as follows:

> *On the death of either Mr or Mrs Colicci, his or her shares will be transferred to Robert and Rosie in accordance with the Deed dated 1 June 2016.*

93. Though copied to Ernesto, the email did not address him (beginning "Dear Josephine") and the only reference to the Shareholders Agreement Summary in the body of the email was this:

> *if you and Ernie are content with these changes (as to which, please confirm), I will email a clean copy of the agreement to both Rob and Rosie for their approval, with a copy of the attached summary …*

94. So the email did not ask Ernesto to read the Shareholders Agreement Summary, which was said to be destined for Robert and Rosanna, and there is no evidence that he did read it beyond the fact that he was copied in. There is no convention that everyone copied into emails will read them, let alone their attachments. Moreover Sebastians' retainer was with the Company and, having attended two meetings to give instructions, Ernesto would have thought (rightly, as Robert also thought) that they were acting for the Company in negotiating with Robert. As Josephine said in her witness statement (of Ernesto's attitude to lawyers), "Ernie was very trusting and would assume that everything had been done properly". Josephine's evidence in cross examination, more than once, was that Ernesto trusted her "with everything in business and paperwork" and that he was "not a reader or an emailer but he left it all to me and then I would relay it to him. He trusted me. We were married 27 years. He trusted me with everything". Josephine did not give evidence that she drew to Ernesto's attention the contents of the Shareholders Agreement Summary, and in particular does not claim that she conveyed to him the advice that "On the death of either Mr or Mrs Colicci, his or her shares will be transferred to Robert and Rosie in accordance with the Deed dated 1 June 2016".

95. Mr Sebastian's email concluded by inviting Josephine and Ernesto to say whether they were content with the draft agreement. Mr Sebastian agreed in evidence that he received no such confirmation from Ernesto. Consistently with Josephine's own evidence about their way of working in the business (see paragraph 94 above), that confirmation came from Josephine alone, in an email to Mr Sebastian which was not copied to Ernesto.

96. I am not satisfied that Ernesto read the Shareholders Agreement Summary, and certainly not in sufficient detail to take in the advice about clause 11 which I have quoted above, and I am not satisfied that any of the claimants would have thought that he had done so. He had not been asked to read it by Mr Sebastian, the claimants did not give evidence that they had discussed it with him, and he was not the type of person who paid attention to detail or who scrutinised lawyers' work for accuracy.

97. On 31 January 2017 Mr Sebastian emailed Robert with the draft shareholder agreement and the Shareholders Agreement Summary. Ernesto was copied in, but all my observations in paragraphs 93 to 96 above apply equally to this communication.

98. Mr Sebastian also posted a letter in identical terms and with the same enclosures to Robert and Rosanna. After hearing back with some comments from Robert, Mr Sebastian emailed Josephine and Ernesto on 10 February 2017 to take their instructions. On 14 February Josephine emailed Mr Sebastian (not copying in Ernesto) instructing him to agree Robert's changes, and confirming that Ernesto was in agreement. Again, Josephine did not give any evidence of any discussion she had had with Ernesto to enable her to confirm his agreement.

99. On 22 February Mr Sebastian wrote a letter to Josephine enclosing signature copies of the Agreement and asked her to get it signed by the parties to it. This was done on 1 March 2017.

The period after the 2017 Agreement

100. The claim for rectification requires the claimants to prove Ernesto's subjective understanding of the 2017 Agreement at the moment that he signed it, and that he had by then reached an accord with the other parties about that understanding. However his understanding at a later date may provide evidence of what he thought earlier in time, and later events might provide evidence of an accord reached earlier in time. So the admissible evidence may properly extend to events occurring after the Agreement was signed.

101. Ernesto met his solicitor Ms Bhargava on 6 April 2017, five weeks after he signed the 2017 Agreement, and again a week later. I have detailed attendance notes made by Ms Bhargava. Ernesto and Nora were going on a foreign holiday and wanted to make new wills before their departure. It will be recalled that Ernesto's will made in May of the previous year included a specific bequest of the B Shares equally between Robert, Rosanna and his infant child. Now, in April 2017, Ernesto wanted to delete this bequest and leave the Shares as part of his residual estate, for the benefit of Nora alone.

102. Ms Bhargava recorded Ernesto's instructions as follows:

> *He said he had been through the terms of the business ESCI Ltd (his catering business of which he and Pina are Directors) and according to the shareholders agreement his share passes to Roberto and Rosanna. I advised I would need to show it to a commercial/ business lawyer to confirm this and Ernie said I didn't need to he had checked it with his accountant. The business is worth £3m but Ernie said it could change. He wasn't concerned with checking if the business benefitted from BPR and said I didn't need to see the shareholder's agreement. Rita Bhargava said I could not advise him in respect of this asset.*

103. However this version of his understanding of the contractual position was not repeated when he met Ms Bhargava just a week later, on 12 April 2017. They met to go through the will which the solicitor had now drafted. Ms Bhargava warned Ernesto that his new will might cause the adult children to feel aggrieved, and that they might challenge it. This time Ernesto did not mention the Shareholders Agreement, and did not repeat his previous instructions that the Shares would pass to the adult children on his death. He said the adult children had already had a lot from him and would get Josephine's Shares anyway.

104. Some twenty months later, in December 2018, Ernesto met Ms Bhargava again, having asked her to draft a statement to accompany and explain his April 2017 will. Ms Bhargava's attendance note includes the following:

> *I explained to him that if he didn't do anything at the moment, then his entire estate went to Nora on his death and if Nora wasn't here, it went to [his infant child], which means his children from his first marriage would get nothing. Ernie was not concerned by this. He said he and his ex-wife had done a shareholders agreement whereby should anything happen to either of them, their children, Rose and Roberto, got their shares in ECSI Limited but he said he couldn't remember the details and he couldn't remember where the agreement was, who did it, or in fact even if it was valid. …*

> *In respect of the business … [he] fully appreciated that this may go to Nora if he hasn't done a shareholders agreement or if the shareholders agreement is invalid but equally he said if the shareholders agreement is valid, it will go to his two children and he wasn't concerned either way.*

105. Ms Bhargava drafted a "Statement to accompany my will dated 12 April 2017" which Ernesto signed on 18 December 2018. It included the following:

> *I have not included my children Roberto and Rosanna (from my first marriage) in my Will. I love Roberto and Rosanna very much and my Will is no reflection on how I feel about them. I have provided both of them with significant financial funds in their lifetimes, and I have set them up with properties, rental properties, and provided them with careers. They are independent adults now with financial security. I consider this more than sufficient financial provision for both Roberto and Rosanna.*
>
> *My wife Nora is in greater financial need then Roberto and Rosanna and my concern is therefore to provide for her and my [infant] … (who was only born in April 2016) [and] will also not have had the benefit of my generosity in [his/her] lifetime as Roberto and Rosanna have.*
>
> *It is for these reasons, which I consider fair and just, that I have left my estate as I have and I hope Roberto and Rosanna will not challenge my Will and respect my wishes*

106. There was another meeting in December 2019 between Ernesto and Ms Bhargava. Ernesto repeated that "an agreement had been done for the business was such that his children inherited should anything happen to him or his ex-wife". At a meeting in June 2020, he said that he was not sure what would happen to the Shares upon his death and wanted to take advice about it. He never did.

Decision

107. Each of the claimants gave evidence about their own understanding that the 2017 Agreement left the 2016 Deed in force. I accept that evidence. They had been so advised in Mr Gerver's Shareholder Agreement Summary. For them, it would have made no sense to enter into an agreement in 2017 which cancelled the 2016 Deed.

108. Ernesto's subjective intention as to the effect of the 2017 Agreement on the 2016 Deed is not easy to discern. Beyond the intentions to be found in the three wills and the two statements which accompanied them, there is very limited evidence about Ernesto's state of mind about any of the matters relevant to this dispute. He was conspicuously uncommunicative.

There is not a single email from him in evidence, and neither was he forthcoming in face-to-face communications. For example, despite advice by Ms Bhargava to discuss his will with the adult children, he never did so. He never told Nora about the 2016 Deed or about the 2017 Agreement. He was even reluctant to share information with his lawyers, as some of Ms Bhargava's attendance notes specifically record.

109. In my judgment Ernesto had no reason to think that the 2017 Agreement superseded the 2016 Deed and so probably did not think that. I think it is unlikely that he gave the matter any thought at all.

110. Anyway I have found no evidence as to what Ernesto thought the claimants thought was the effect of the 2017 Agreement on the 2016 Deed, still less any evidence of an accord, tacit or otherwise. I have already explained why I do not accept that the issue was discussed at the meeting of 25 October 2016, nor, if it had been, that such discussion would reveal a continuing accord when the agreement was signed. As also already explained, I am not satisfied that Ernesto was shown Mr Gerver's Shareholder Agreement Summary, nor that he would have read it even if shown it, nor that the other parties would have believed that he had read it. Indeed, none of them gave evidence that they did think that he had read it. The claimants had no basis for any particular view as to what Ernesto thought about that issue, and none of the claimants allege that they did form any particular view. Therefore it is impossible that they were in accord with him. The matter was not discussed between them and there is no basis for finding any sort of tacit accord.

111. Coming to the April 2017 meetings with Ms Bhargava, her attendance note records that *according to the shareholders agreement his share passes to Roberto and Rosanna*. That was only a few weeks after he had signed the 2017 Agreement. The claimants submit that it shows that Ernesto believed that the 2017 Agreement must have preserved his obligation under the 2016 Deed. I do not accept that it shows anything as specific as that, but in any event Ernesto also told Ms Bhargava that he had been discussing the matter with his accountant. If that was true, it would be unsafe to rely on his understanding at the time of the meeting as indicating his state of understanding when he signed the Agreement. It would only reflect his understanding following the meeting with his accountant. If it was untrue that he had been speaking with his accountant, then what he told Ms Bhargava ceases to be reliable at all.

112. When he met Ms Bhargava the following week, on 12 April, Ernesto did not repeat his understanding that the Shares would pass to the adult children under a shareholder agreement.

This further diminishes my ability to rely on what he told Ms Bhargava. It is difficult to see how he could have believed that one week but not the next.

113. Ernesto's description in Ms Bhargava's attendance note of December 2018 of a shareholders agreement whereby "should anything happen to either of them, their children, Rose and Roberto, got their shares in ECSI Limited" may be a reference to the 2016 Deed but I am unable to conclude from this that Ernesto thought that that Deed was still in force, because his instructions were vague and heavily qualified by uncertainty as to whether there was a valid agreement at all, and a profession not to care one way or the other. Moreover the "Statement to accompany my will" which resulted from that meeting did not say that the Shares would pass to the adult children outside the will. If Ernesto had thought they would, that would have provided strong justification for the will and I would have expected it to be mentioned.

114. Still less could I rely on this note (or, in light of its contents, any later pronouncements of Ernesto) as revealing what Ernesto had thought when he entered the 2017 Agreement. And it provides no support for any expression of accord with the claimants. So taken in the round, Ernesto's instructions in December 2018 tell me nothing which would assist a claim for rectification.

115. For these reasons, if the 2017 Agreement, properly construed, means what the defendant contends it to mean, the remedy of rectification is not available to the claimants.

Financial evidence and its relevance

116. In all three of her witness statements Nora gave evidence of the value of Ernesto's estate, and some details of her personal financial position. According to the values attributed for probate purposes, without the B Shares the estate has assets worth £4.9m (including a warehouse jointly owned with Josephine) with liabilities of £3.6m. The assets include the family home, valued at £2.1m. Nora says that she cannot keep the family home since it will be needed to pay the debts of the estate. Although most of the liabilities of the estate are secured on the family home and one other investment property, she has to settle those mortgages since she does not have sufficient income to keep up the payments and the lenders would not accept her as sole mortgagor. She has tried to find a lender without success.

117. I have already observed that this evidence did not help me with the issue of construction (see paragraph 52 above). More generally, it is impossible to make findings about Nora's financial problems because the evidence she has given is so limited. She says nothing about

her own capital position except that she owns a flat in Hampton which yields a small income. Even that asset was not mentioned in her first statement, which wrongly asserted that the three rent-yielding properties in the estate were "our only source of income and capital assets, which will be supporting both [my child] and myself". I am prepared to accept that this was a slip, as she said in evidence, but that does not alter that her statements do not tell me whether she has other assets or expectations and lack the detail required for me to make any findings about the adequacy of the provision made by Ernesto's will. It is relevant in this regard that she has given no financial disclosure so far as I am aware.

118. More importantly, Nora's financial position is not relevant to any of the issues which I have to decide. In opening the defence, Ms Welsh told me that she would be submitting that Nora had materially altered her position by giving up a very successful career, in reliance on promises made by Ernesto to provide for her and their infant. Leaving aside the absence of disclosure of documents about her career or when, how or why she gave it up, any claim based on a failure by Ernesto to keep his promise would be against the estate of which she is the executor, not against the claimants. Ms Welsh submitted that I should take these issues into account in deciding whether to make an order that the defendant transfer the B Shares to the adult children, which she said was an equitable remedy. I cannot do that because Ernesto's alleged equitable wrongdoing, which is far from proved, would not affect the conscience of the adult children, who were not party to it.

119. Ms Welsh also submitted that Nora does not hold the B Shares on trust to give effect to the 2016 Deed because they are needed to satisfy the debts of the estate, thus providing a recognised exception to the general rule (see paragraph 35 above). This is factually and legally wrong. Most of the liabilities of the estate are secured on specific assets, and must be satisfied out of those assets (Administration of Estates Act 1925, section 35). The remaining liabilities are exceeded by the remaining assets.

120. Ms Welsh finally submitted that I should withhold an order to transfer the B Shares pending the issue of proceedings under the Inheritance (Provision for Family and Dependants) Act 1975. Such a claim has not been issued because, explains Ms Welsh, it will not be necessary to bring one if the defendant successfully defends the present claim. But if the defendant fails in her defence, she will bring proceedings under the 1975 Act and will seek an order under section 11 thereof, which enables the court to set aside the 2016 Deed if Ernesto entered into it with the intention of defeating an application for financial provision under section 2 of the Act.

I am not prepared to grant a stay of my order on these grounds because I am not satisfied for present purposes (i) that a claim under the 1975 Act will be made, (ii) that it would have reasonable prospects of success, (iii) that there is a good reason for not bringing it before now, (iv) that a stay is necessary to prevent injustice.

121. Nothing in the preceding paragraph is intended as a finding relevant to any issue except whether I should stay the outcome of this claim. At Ms Welsh's invitation I make clear that "any issue" includes any claim that may be brought under the 1975 Act or whether permission for such a claim should be granted.