Neutral Citation Number: [2023] EWHC 2143 (Ch)

Case No: CR-2021-000818

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

IN THE MATTER OF TELLISFORD UK LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

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

Date: 29/08/2023

Before :

INSOLVENCY AND COMPANIES COURT JUDGE BURTON

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Between :

(1) EARL AUGUST KRAUSE **(2) BOSTON TRUST COMPANY LIMITED** **(3) BOSTON FIDUCIARY MANAGEMENT LIMITED** **in their capacities as trustees of the Erutuf Trust)**	**Claimants**
- and - **(1) TELLISFORD UK LIMITED** **(2) WARTHOG INVESTMENTS LIMITED** **(3) DAVID MAUGHAN**	**Defendants**

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Chantelle Staynings (instructed by **Osborne Clarke LLP**) for the **Claimants**
Timothy Carlisle (instructed by **Woodroffes Solicitors**) for the **Second Defendant**
The Third Defendant in person

Hearing dates: 18-20 April 2023

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Approved Judgment

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

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INSOLVENCY AND COMPANIES COURT JUDGE BURTON

ICC Judge Burton :

1. The Claimants seek a declaration that they acquired an equitable interest in, and are entitled to be registered in the Company's register of members as the holder of 50% of 32,117 shares in Tellisford UK Limited (the "Company").

2. The Company's two directors are the First Claimant, Earl Krause, and Gordon Verhoef. The Company is an intermediate holding company in a group known as the Szerelmey Group which carries out a successful stonework and restoration business. The ultimate principal stakeholders of the companies in the Szerelmey Group are the Krause and Verhoef families through their respective family trusts. The Second and Third Claimants (the "Erutuf Trustees") are the trustees of Mr Krause's family trust. The Second Defendant, Warthog Investments Limited ("Warthog") represents Mr Verhoef's interests.

3. The Company's shares are held 68.64% by Tellisford Limited ("TL"). 50% of TL's shares are held by each of the Erutuf Trustees and Warthog. TL's directors are Mr Krause, his son Anton Krause, Mr Verhoef and his wife Celia Verhoef.

4. 9.94% of the remaining shares in the Company were held by an entity described as Dune Trust.

5. The remaining 21.41% voting rights in the Company represented by 32,117 shares (the "Disputed Shares") were at one time acquired by the Third Defendant, Mr Maughan who also formerly held 5% of the shares in TL.

6. By their Part 7 claim form, the Claimants claim that Messrs Krause, Verhoef and Maughan agreed to work towards a sale of half of the Disputed Shares to each of Mr Krause and Mr Verhoef, at a price to be agreed once the shares had been formally valued. Mr Krause purchased half the shares in TL and the transfer was recorded in TL's register of members. In late October 2019 or early 2020, Mr Krause entered into an agreement with Mr Maughan to purchase 50% of the Disputed Shares for £51,474 which represented half of their agreed value (the "Krause Acquisition"). On 5 March 2020, he transferred the South African Rand equivalent of £51,474 to Mr Maughan. The Claimants' case is that the Erutuf Trustees thus acquired an equitable interest in 50% of the Disputed Shares. They claim that Mr Verhoef was not authorised to, and should not unilaterally have amended the Register, at some time after the Krause Acquisition, to record Warthog as the holder of all of the Disputed Shares.

7. The declaratory relief sought by the Claimants includes:

   i) that the Erutuf Trustees are entitled to be entered in the Register as the joint legal holders of 16,059 ordinary shares of £1 each or alternatively, declarations that they should be registered as the holders of 16,058 shares, with Mr Maughan being registered as the legal holder of the remaining one share, with 50% of the beneficial interest in that share being held by Mr Krause or the Erutuf Trustees;

   ii) a declaration that an agreement between Mr Maughan and Warthog dated 27 January 2021, together with a power of attorney executed in connection with that agreement, are void for mistake or alternatively an order rectifying the

documents executed in connection with that agreement to substitute 16,058 as the number of shares purchased by Warthog in place of 32,117; and

iii) an order pursuant to section 125 of the Act rectifying the Register in order to give effect to the orders made by the Court.

Mr Maughan has not filed a defence. He is acting as a litigant in person. Warthog filed a contribution notice against him which has been stayed pending this trial of the issues between the Claimants and Warthog.

Witness evidence

8. At the start of the trial, Mr Carlisle asked the Court to consider an application, filed with the Court less than 24 hours earlier, to admit evidence on behalf of Warthog. For the reasons set out in a separate judgment, in the exercise of the Court's case-management powers, I refused to consider the application and the trial commenced.

9. Mr Krause and Mr Maughan are both based in South Africa. Both were permitted to give evidence by video link.

10. Mr Krause is 84 years old. He recognises in his witness statement that his memory is not as good as it used to be, and that his ability to recall details of matters that took place some years ago has deteriorated since this litigation commenced. His first witness statement in these proceedings was dated 6 May 2021. It was not a trial witness statement, but Mr Krause refers in his trial witness statement to his better recollection of events at the time that earlier statement was made.

11. Overall, I assess Mr Krause's evidence as honestly given. However, as noted by Leggatt J in *Gestmin SGPS S.A. v Credit Suisse* [2013] EWCA 3560 (Comm), human memory is fallible and particularly unreliable when it comes to recalling past beliefs. Leggatt J noted that:

> "The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events."

And at paragraph 22 of his judgment:

> "the best approach for a Judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts."

12. The case before me is just one of several disputes between Messrs Krause and Verhoef. A key point underlying the disputes between them is that Mr Verhoef does not accept Mr Krause's assertion that their global interests were held subject to a 50:50 partnership agreement.

13. Mr Krause's admission that his memory has deteriorated and his unwavering determination, at every opportunity, sometimes regardless of the question put to him,

to say that he and Mr Verhoef agreed that their interests in the Company and the group were to be as equal partners, suggests to me that I should treat his evidence with caution. An example arose at the start of cross-examination. Having stated that he was responsible for looking after Mr Verhoef's interests in South Africa and that Mr Verhoef looked after Mr Krause's interests in the United Kingdom, Mr Carlisle asked him to confirm that there was nevertheless no worldwide partnership agreement. Mr Krause insisted that there was such an agreement, that it is in writing and that he could provide a copy. Mr Carlisle put to him that he was referring to a shareholders' agreement, that he had not referred to in his first or second witness statements (and which, according to Mr Carlisle, he may not have seen for some years until after making his witness statements) regarding TL. That agreement was entered into in 2004, nearly four years before the Company was incorporated. When Mr Carlisle pointed out that the shareholders agreement relates to TL and not the Company and highlighted the discrepancy in dates, Mr Krause said that he did not remember the date of incorporation of the Company, but that the holding company (which I took to be a reference to TL) is responsible for the whole group and so the agreement was for the whole group and that as a result, Mr Verhoef and he were to hold a 50:50 interest throughout the whole group. Whilst that may have been his understanding, it is not reflected in the express wording of the shareholders' agreement, a contemporaneous document.

14. My assessment of Mr Maughan as a witness is positive. At the start of cross-examination, Mr Carlisle asked Mr Maughan who prepared his witness statement. According to my note, Mr Maughan replied:

> "I did it myself with my attorney brother, Tim."

15. Mr Carlisle then stated that the words used in Mr Maughan's statement appeared to him not to be the sort of language used by a "normal person". Mr Carlisle suggested that Mr Maughan's brother Tim ("Tim Maughan") had written the statement for Mr Maughan. Mr Maughan's replies were, in my judgment, consistent with his first response: he wrote the statement but he relied on his brother to help to put it into its current form.

16. I found Mr Maughan's account of his understanding of the agreement he reached with Mr Verhoef regarding the latter's purchase of the Disputed Shares to be reliable. Other than the letter prepared by Tim Maughan which ultimately formed the sale agreement, there is no evidence of Mr Maughan being aware of the number of shares he held. I find credible his account that he concentrated only on the percentage value of the Disputed Shares and, having received the valuation report prepared by the Company's valuers/auditors and agreed what he considered to be a fair discount for his minority interest, his understanding of what would be transferred to each of Mr Krause and Mr Verhoef, was determined, as far as he was concerned, solely by reference to his understanding that each would buy half the Disputed Shares and each would pay half the agreed price.

17. Ms Staynings urges me to draw adverse inferences from the absence of any witness evidence on behalf of Warthog. She reminds the Court of the guidance set out by Lord Leggatt JSC in *Royal Mail Group Ltd v Efobi* [2021] UKSC 33, where he stated at paragaph 41:

> "The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules."

18. In my judgment, the circumstances of this case entitle the Court to attach significance to the absence of any evidence in chief on behalf of Warthog. The Court provided a generous timetable to provide evidence of fact and Warthog had a number of opportunities since the issue of proceedings to provide evidence. I infer that its failure to do so was deliberate. The trial date was known to the parties well in advance. Although, on 21 February 2022, Warthog returned to its original solicitors, Woodroffes (after briefly instructing another firm), it must swiftly have become apparent to them that Warthog's defence relies heavily on disputed issues of fact and on Mr Verhoef's knowledge and understanding at the relevant times. At that stage, Warthog still had more than seven weeks within which its solicitors could prepare for trial. Woodroffes will have known that a failure to comply with the agreed directions for evidence would result in relief from sanctions being required and that the odds would be against the Court being prepared to permit such important evidence to be entered on the day of trial, potentially ambushing the Claimants who would have had almost no time to consider it.

Issue 1: Was the Register validly amended in 2021 to show Warthog as the holder of all of the Disputed Shares? If so, when did Warthog acquire legal title to the Disputed Shares?

19. Section 113 of the Companies Act 2006 requires a company to keep a register of members.

20. The Company's articles of association incorporate Table A from the Schedule to the Companies (Table A to F) Regulations 1985 (as amended) and thus provide, at Regulation 70, that subject to the provisions of the Act, the memorandum and articles

and to any directions given by special resolution, the Company's business shall be managed by its directors and:

> "… a meeting of directors at which a quorum is present may exercise all powers exercisable by the directors."

21. Regulation 89 provides that the quorum may be fixed by the directors and unless so fixed at any other number, shall be two.

22. Article 21 of the Company's articles entitles the directors, in their absolute discretion, to decline to register a transfer of a share. They need not give any reasons for their decision to do so.

23. In *Société Générale de Paris v Walker* (1884) 14 Q.B.D. 424 (CA) Cotton LJ explained [445]:

> "where [directors] are asked to register a transfer which from circumstances in fact known to them at the time would be in violation of the rights of others, … they cannot, either safely to themselves or without disregard of their duty, register the transfer, at least without allowing time for inquiry and for the assertion of the equitable rights, if any, inconsistent with the claim

24. I did not understand Warthog to dispute that business conducted without a quorum is anything other than void (see also *Re Greymouth Point Elizabeth Railway and Coal Co Ltd* [1904] 1 Ch 32).

25. Initially it appeared not to be in dispute that legal title to shares is acquired upon registration in the relevant company's register of members. In closing, a different position was adopted by reference to *Ireland v Hart* [1902] 522 where Joyce J said [529]:

> "It is established by *Société Générale de Paris v Walker, Boots v Williamson,* and *Moore v North Western Bank* that, where the articles are in the form in which they are in the present case, a legal title is not acquired as against an equitable owner before registration, or at all events until the date when the person seeking to register has a present absolute and unconditional right to have the transfer registered. I am not called upon to define the meaning of a 'present absolute and unconditional right, but, as it appears to me, I am not sure that anything short of registration would do except under very special circumstances."

26. Joyce J explained [526] that the articles of the company in question gave no power to the directors to refuse to register a transfer of shares. The same is not true of the Company's articles. As this was the only basis for contending that legal title to shares is not acquired upon registration in the relevant company's register of members, I see no reason to stray from the generally recognised requirement for a member's interest

to be included in the company's register in order for that member to acquire legal title to the share(s) registered against his name.

27. Warthog's defence states that Mr Verhoef instructed Springfield Secretaries to pay the requisite stamp duty and register the transfer, that Mr Verhoef held a power of attorney on behalf of Mr Maughan, and that there was an informal board meeting comprising the only director to whom notice of that meeting had to be given. Its defence does not say when the Register was altered or by whom.

28. The defence refers to Regulation 88 of Table A. It contends that as Mr Krause was not in the United Kingdom at the time of the meeting at which the board purportedly resolved to register the transfer of the Disputed Shares to Warthog, and as Mr Krause had not provided an address and/or telex and/or fax transmission number to which, pursuant to Article 18(ii), notice of such meetings could be sent, it was not necessary for him to be given notice of the meeting.

29. Warthog submits that it was not unusual within the Szerelmey group of companies for shareholders' names to be entered on a company's register of members on presentation of a signed stock transfer form. It refers in its defence, to Mr Krause's instructions by email dated 7 December 2017, without a prior board meeting or resolution to that effect, to Tim Somers, of the group's auditors, Trevor Jones LLP "to effect the transfer of the 5 [TL] shares bought from Mr Maughan" and that the Claimants' particulars of claim demonstrate that Mr Krause had no intention to call a meeting of the Company's board to resolve to register the Company shares he had bought from Mr Maughan.

30. Warthog thus claims that an estoppel by convention arises and that it would be unconscionable for Mr Krause and the Claimants to rely on any alleged breach of Article 89 of Table A regarding a quorum.

31. Warthog further claims that even if the registration was invalid, as Warthog had acquired good title to the Disputed Shares from Mr Maughan, given the sale agreement pursuant to which the contracted payments were made, and the power of attorney, that upon presentation of the signed stock transfer form, the Company's directors would have had no proper reason, on re-application, to refuse to register the transfer.

32. In my judgment, the Register was not validly amended in 2021 to show Warthog as the holder of the Disputed Shares.

33. There is no provision in the Company's articles reducing the quorum from two in circumstances where a director is not entitled to notice of a meeting. It is not suggested in Warthog's defence that a sole director was entitled under the articles to resolve to reduce the quorum from two, there is no evidence of a resolution to that effect having been passed, nor was it put to Mr Krause during cross-examination that such a resolution had been passed.

34. In my judgment, the fact that Mr Krause was outside the UK and not entitled to notice of the meeting cannot, without express provision in the articles or other resolution to that effect, alter the quorum requirements.

35. The pleaded estoppel by convention fails. There is no evidence of the parties having regulated their conduct in accordance with an agreed or understood convention, nor of Mr Verhoef having relied upon such a convention/shared assumption to his detriment. The only example cited in Warthog's defence refers to an entirely different company, TL. The evidence fails to address what dealings constituted conduct for the purpose of raising the defence in respect of the Company. Moreover, it is clear from Mr Krause's letter to Mr Verhoef dated 4 March 2021 that (a) the registration of the Erutuf Trustees as members of TL was only effected following an application to court; and (b) by that same letter, he proposed that both he and Mr Verhoef should formalise "the remaining transfers" which I understand to be a reference to the Company shares which Mr Krause had purchased from Mr Maughan and the remaining 50% of those shares which, Mr Krause stated in the letter, he understood Mr Verhoef recently to have bought. The letter contradicts any understanding on Mr Krause's part of the alleged convention.

Issue 2: Who holds the beneficial interest in the Disputed Shares?

(i) Did Mr Verhoef acquire a prior equitable interest in the Disputed Shares by entering into an agreement with Mr Maughan on or around 14 February 2017 to buy out all of Mr Maughan's interests in TL and the Company?

36. I find that no binding agreement was entered into between Mr Maughan and Mr Verhoef on or around 14 February 2017 for Mr Verhoef to buy all of Mr Maughan's shares in TL and the Disputed Shares.

37. I find that Mr Maughan intended, at all times, to transfer both his shareholding in TL and the Disputed Shares equally to Mr Krause and Mr Verhoef (or to the party/ies nominated by them). On this issue the evidence in chief was not undermined during cross-examination and is largely, although not uniformly, supported by the documentary evidence including the following:

i) Mr Krause's email to Mr Verhoef dated 18 November 2016 which refers to David Maughan and Hans Klein approaching him "regarding *us* buying them out of the Szerelmey Group in the UK" and asking Mr Verhoef to ask the auditors in London to value the shares "and *we* can buy them out accordingly" (*my emphasis*).

ii) The reference in Mr Maughan's witness statement to a meeting on 31 January 2017 at Lowry Road in Cape Town, attended by all three of them at which:

> "it was agreed that I would sell my shares to them jointly, at a price to be agreed between us"

which was followed by a note of the meeting, dated 2 February 2017, prepared by Mr Krause and addressed to Mr Maughan confirming:

> "that Gordon Verhoef and myself have agreed jointly to purchase your shares in the Szerelmey Group once a price has been established/agreed between the three of us".

iii) Mr Verhoef's own diary entries refer to him saying to Mr Maughan, at the meeting between the two of them on 14 February 2017 in Cape Town, when Mr Maughan handed him a copy of the auditor's valuation, that:

> "*we* would pay him £75,000 for his 5% share in [TL]";

and:

> "I told him *we* must wait with [the Company's] Purchase until I see the money needed or available" (*my emphasis*).

iv) Tim Maughan's email to Mr Corin dated 22 October 2019 stating, inter alia

> "So, it looks that what is available for sale to Gordon is 50% of the shares …"; and

v) Mr Maughan's handwritten note dated 17 January 2020 recording his discussions in 2016 and 2017:

> "When the payment for [TL] was not forthcoming I phoned Gordon in July and asked if he could please arrange payment. I then told him that Earl had paid his half to which he was most upset and I again confirmed that I was selling equally to him and Earl and had confirmed that at our meeting at his home."

38. I find it striking that if, as Warthog contends, Mr Verhoef had genuinely believed that Mr Maughan had agreed on or around 14 February 2017 to sell all of his Szerelmey group shares to him alone, there is no documentary evidence reminding Mr Maughan of this agreement or accusing him of acting in breach of such an agreement and even more striking, no evidence of him warning Mr Maughan not, similarly, to seek to sell half, or perhaps all, of his shares in the Company to Mr Krause. Instead, there appears to have been no reply from Mr Verhoef to Mr Krause's letter of 16 May 2017 asking whether the Company was now going to buy Mr Maughan's shares instead of them both, nor to his similar enquiry on 5 June 2017:

> "David Maughan phoned me this morning regarding the repurchase of his shares as we arranged with him.
>
> … Are we personally buying or our company."

39. In cross-examination, Mr Carlisle asked Mr Maughan about the meeting on 14 February 2017 and the alleged agreement with Mr Krause. He was asked whether the agreement was born from the failure of Mr Verhoef to pay the agreed sum promptly. Mr Maughan's response to this suggestion is consistent with the terms of the agreement first reached in December 2016 for the sale to be 50:50 to Messrs Krause and Verhoef and consistent with Mr Maughan's actions: namely that he informed Mr Verhoef that Mr Krause had already paid his half and sought to obtain the payment which he considered to be due to him for the remaining half of the TL shares from Mr Verhoef.

40. It was at that point that he learned that the sale to Mr Krause apparently angered Mr Verhoef. In closing, Mr Carlisle placed considerable emphasis on Mr Maughan seeking to explain Mr Verhoef's annoyance by saying that Mr Verhoef must have misunderstood the proposed agreement. However, I attach no weight to Mr Maughan's speculative answer when asked why he thought Mr Verhoef was angered by this news.

41. Among the noticeably few documents that could be interpreted as supporting a conclusion that such an agreement was entered into in February 2017 are:

i) ***Mr Maughan's letter dated 28 February 2017 confirming the discussions on 14 February 2017.***

a) Whilst this letter was addressed only to Mr Verhoef, Mr Maughan explained during cross-examination, credibly in my view, that the main purpose of the meeting was to agree the discount that would be applied to the value of the shares and that when he told Mr Krause he was meeting Mr Verhoef, Mr Krause said he would be happy with whatever discount Mr Maughan and Mr Verhoef agreed upon.

b) When Mr Carlisle suggested that the agreement with Mr Verhoef went further than that, as the letter of 28 February 2017 refers only to Mr Verhoef paying for the shares, Mr Maughan's explanation, that was not undermined in cross-examination, was that this was because Mr Verhoef controlled the finances in England. Mr Maughan conceded that the letter did not refer to Messrs Krause and Verhoef jointly buying the shares and that the letter could have been clearer. He did not accept, however, that this was any indication that at that meeting he supposedly entered into an entirely new agreement to sell all of the shares to Mr Verhoef alone.

ii) ***Mr Maughan's email sent at 2.55pm on 24 August 2017 to Mr Corin***

a) This email concludes:

> "… given that a deal has already been done with Gordon and all that is outstanding is payment".

b) I have found credible Mr Maughan's explanation that he considered that his discussions with Mr Verhoef on 14 February 2017 regarding the value of his shares were just part of the negotiations for his proposed sale of his shares in TL and the Company to Messrs Verhoef and Krause equally.

c) I note further Mr Corin's email to Tim Maughan at 17.10 on 23 August 2017 stating, inter alia:

> "As I understand it, Earl refused to allow GV to buy all of David's shares saying (I think) that he wanted in on half of the shares.

> … I'll keep you posted and if David in the meantime can talk some sense into Earl so that we all get to a deal, then that would be a win-win-win, don't you think?"

Mr Corin's reference to them being able to "get to a deal" appears, in my judgment, to be a clear recognition that at the date of the email (23 August 2017) no concluded agreement had been reached between Mr Maughan and Mr Verhoef.

iii) ***Mr Maughan's email sent at 14.47 on 14 October 2019 to Mr Corin and Mr Corin's email sent at 12.27 on 16 October 2019***

a) The former states:

> "… Gordon must have told you that I met with him at his home on 14th February 2017 and it was agreed between us that against payment to me of £70007 I would transfer to him my [TL] shares which I paid for many years ago.
>
> On [the Company] it was agreed at this meeting that the sale price for my shares was £102948 but he indicated that they were a little tight on cash and would pay later."; and

b) the latter states:

> "I have managed to persuade Gordon to complete the purchase of your shares in [the Company] at the price you mention in your email below".

c) When asked during cross-examination about this exchange of emails in October 2019, Mr Maughan explained that whilst he was indeed dealing with Mr Verhoef, he was doing so on behalf of himself and Mr Krause, that he told Mr Verhoef at the meeting that the sale would be to both of them and that Mr Verhoef knew by then that he had already sold half the TL shares to Mr Krause so he could not possibly have been suggesting that they could all still be purchased by Mr Verhoef. He accepted that whilst he should have included reference to Mr Krause in the email, he assumed that everyone knew the sales were to be to both of them.

iv) ***Mr Corin's email to a Mike Charles sent at 10:34 on 21 October 2019***

a) In this email Mr Corin states:

> "I confirm my discussion with you on Friday when I told you that Gordon has bought David Maughan's shares in [the Company] for £102 948"
>
> … Tim will hold this money in trust until David has delivered the signed stock transfer form to Gordon at Szerelmey in London.".

b) When asked about this email, Mr Maughan replied that a couple of days later, Tim Maughan sent a letter to Mr Corin clearly explaining that Mr Verhoef already knew that Mr Krause had bought half of the TL shares, that Mr Krause wanted to take up 50% of the Company shares valued at £102,948 and that all that was therefore available for sale to Mr Verhoef was the remaining 50% of his Company shares. This is the same letter dated 22 October 2019 referred to at paragraph 44 above.

v) ***Mr Corin's email of 23 October 2019 in reply to Tim Maughan's email of 22 October 2019***

a) Mr Corin's reply states:

> "David's email sets out his agreement with Gordon.
>
> David's email sets out the 2017 agreement between him and Gordon.
>
> Nothing in that email is said about selling half his shares to Earl.
>
> …The proposed "offering" of half the [Disputed Shares] to Earl is contrary to what was agreed and unacceptable to Gordon.
>
> Incidentally, Earl and Gordon are not equal partners in the UK and their respective equity interests throughout the group are roughly one-third Earl and two-thirds Gordon."

b) During cross-examination, Mr Carlisle put it to Mr Maughan that this email makes it clear that until Tim Maughan's email the day earlier, Mr Verhoef's and consequently Mr Corin's understanding was that Mr Verhoef would be buying all of the Disputed Shares.

c) According to my notes, Mr Maughan replied:

> "No, I don't see it like that".

And to a further question in relation to the same point:

> "It's not how I see it. We always said 50:50 and they each pay 50% of the value."

d) In closing, Mr Carlisle submitted that these responses demonstrate that Mr Maughan refused to accept that the words set down on the page carried their normal meanings and, as a result, that his evidence cannot be relied upon. That was not how I understood Mr Maughan's evidence on the issue. He did not adamantly refuse that anyone could

read the emails in the way contended for. He said that was not the way he read them.

e) The difficulty throughout all the parties' written communications is that very little of the detail was set out in full. Each letter or email appears to have been written against an assumed understanding of the background. Mr Maughan considered his conversations with Mr Verhoef, and his brother's communications with Mr Verhoef's representative, Mr Corin, related to the directors' purchase of 50% each of his shares in TL and the Company. That, in my judgment, is why Mr Maughan reasonably and credibly answered that he did not read the exchanges on 22 and 23 October 2016 in the same way as Mr Carlisle stated to be the literal meaning of the words used in each. To him, his "agreement with Gordon" was his agreement with Mr Verhoef on behalf of himself and Mr Krause who were to divide the shares between them.

(ii) Did Mr Krause / the Trustees acquire an equitable interest in 50% of the Disputed Shares from Mr Maughan by around March 2020?

42. Yes. As no concluded agreement had been reached between Messrs Verhoef and Maughan in February 2017, by March 2020, Mr Verhoef had not acquired an equitable interest in the Disputed Shares. Mr Krause was therefore able to acquire an equitable interest in 50% of the Disputed Shares for which he paid £51,474 in March 2020. Whilst the deposit slip for the payment made by Mr Krause to Mr Maughan is not in evidence, both gave witness evidence that the payment was made. This is supported by documentary evidence in the form of an email from Mr Krause to Mr Maughan dated 3 March 2020 stating that it enclosed a copy of the deposit slip (not in evidence) and an email from Mr Maughan dated 6 March 2020 acknowledging receipt of one million and twenty thousand Rand being the Rand equivalent of £51,474.

(iii) If the legal interest in the Disputed Shares has vested in Warthog, is Warthog entitled to raise a defence on the basis that it is a bona fide purchaser for value without notice of the Claimants' prior equitable interest as a result of an agreement entered into with Mr Maughan to purchase all of the Disputed Shares in January 2021?

43. This issue no longer falls to be decided. However, in case I am wrong regarding the vesting of the legal interest in the Disputed Shares in Warthog, and bearing in mind the contribution notice served on Mr Maughan, it may be of assistance to the parties for me to explain why I am of the view, on the balance of probabilities, that:

i) Mr Verhoef (whose knowledge is to be imputed to Warthog) had notice of the Claimants' equitable interest in 50% of the Disputed Shares before it was entered on the Register as the purported holder of 100% of the Disputed Shares; and

ii) Mr Verhoef was not a bona fide purchaser for value of 100% of the Disputed Shares.

44. In relation to (i), in my judgment it is significant that there was before the Court no evidence of *when* Warthog was entered in the Register in respect of the Disputed Shares. The entries are dated 26 January 2021 but it is clear from Mr Verhoef's letter to Trevor Jones & Partnership dated 28 January 2021 that the Register had not been amended by that date as he instructed them:

> "Once the tax is paid and you receive back the stamped stock transfer form, I will ask you to amend the members' registers accordingly to reflect Warthog as the new shareholder of these shares."

45. On 9 March 2021, Mr Krause wrote to Springfield Secretaries Ltd ("SS") asking for a copy of the Register. SS's reply dated 17 March 2021 referred only to filed confirmation statements. Mr Krause asked for it again on 24 March 2021.

46. The Register was ultimately not produced to the Claimants until 6 May 2021 by which time Warthog had been given express notice of the Krause Acquisition.

47. In relation to (ii), even if the Register was validly amended before the date on which Warthog had express notice of the Krause Acquisition, it is clear to me that Mr Verhoef was aware, from 2017 when the valuation evidence had been obtained and the discount agreed, that the full price for the Disputed Shares was £102,948 of which £51,474 was precisely half. There is no evidence of any attempt to renegotiate the price. Despite this, Mr Verhoef has not sought to explain in evidence how or why he considered Mr Maughan would suddenly be prepared to sell 100% of the Disputed Shares for half their value. I infer from his failure to do so that he knows his evidence would not withstand scrutiny under cross-examination.

48. In my judgment, on the evidence before me, it is more likely than not that whilst, in January 2021 Mr Verhoef may not have known that a deal had already been concluded for half the shares with Mr Krause, he did know that Mr Maughan only ever intended, for £51.474 to sell him 50% of the Disputed Shares. Tim Maughan's letter to Mr Corin, dated 22 October 2019 clearly stated that Mr Maughan did not wish to become embroiled in the dispute between Messrs Krause and Verhoef, that Mr Krause had said he wanted to take up 50% of the Disputed Shares and that as a result, all that was available for Mr Verhoef was the remaining 50%. In January 2020, Tim Maughan sent Mr Corin a copy of Mr Krause's letter from November 2016 commencing the discussions for the purchase jointly by him and Mr Verhoef and also a copy of Mr Maughan's handwritten note dated 17 January 2020 recording Mr Maughan's meeting with Mr Verhoef on 14 February 2017 when, according to the handwritten note, Mr Maughan "confirmed" that he was selling equally to both of them.

49. When the letter dated 27 January 2021 comprising the sale agreement, drafted by Tim Maughan set out "my brother's final offer" expressly stating that the subject matter of the deal was:

> " – David's [TL] shares namely: 5 B-Class non-voting ordinary shares of £1.00 each; and

> - David's [Company] shares namely: 32 117 ordinary shares of £1,00 each"

nothing was sent in return to double check that the stated number of shares was correct.

50. There are many documents setting out Mr Krause's understanding, and Mr Maughan's intention, that his shares in both companies were to be purchased jointly, in equal shares by Messrs Krause and Verhoef. In each case, right up until the email sent on his behalf by Mr Corin dated 23 October 2019, there is no documented retort from Mr Verhoef to say that that was not his understanding, or that he considered Mr Maughan had already entered into a binding agreement with him in February 2017 to sell them all of the TL Shares and the Disputed Shares to him. This is in stark comparison to Mr Verhoef's reaction in March 2021 when he received a letter from Mr Krause dated 4 March 2021 informing him that he had bought 50% of the shares in both companies, leaving the remaining 50% for Mr Verhoef to buy. Mr Verhoef responded by letter dated 8 March 2021 saying:

> "Regarding David's shares: [Warthog] owns David's last five shares in [TL] and all of his shares in [the Company]. I also point out there is no agreement between you and me as you suggest."

51. There are no documents or messages between Mr Verhoef and Mr Corin, asking Mr Corin to affirm that Mr Maughan was prepared to sell Warthog all of the Disputed Shares for precisely half the value agreed upon in 2017. The messages I have referred to and the absence of evidence in chief regarding Mr Verhoef's understanding at the time, lead me to infer that when Mr Verhoef entered into the sale agreement, he knew of Mr Maughan's mistake. In my judgment Mr Verhoef knew the value of the Disputed Shares and that Mr Maughan was operating under a mistake of fact as he knew that the specified price for the Disputed Shares was 50% of their value. He deliberately chose to "keep his head down" and not to inform Mr Maughan of the mistake.

Relief

52. I shall make an order rectifying the Register to delete the entry dated 2021 that shows Warthog as the holder of the Disputed Shares.

53. Mr Krause purchased, for the Erutruf Trustees, half the Disputed Shares. It is apparent that neither he nor Mr Maughan gave any thought to how this would be recorded in practice when the total number of shares was an odd number. I see no basis upon which to declare that the Erutruf Trustees should be entitled to be entered into the Register for more than half of the Disputed Shares. Nor am I persuaded that it is necessary, to give efficacy to the agreement, to imply into the contract between Mr Maughan and Mr Krause, a term that the Erutruf Trustees hold 50% of the equitable interest in one share on trust for Mr Maughan (or his preferred nominee).

54. The appropriate solution, in my judgment, is for the Court to declare that the Erutruf Trustees are entitled to be entered in the Register as the joint legal holders of 16,058 of the Disputed Shares, with Mr Maughan holding 50% of one of the Disputed Shares

on trust for the Erutruf Trustees. The parties failed to make express provision for this final share to be transferred and as a result, it remains in Mr Maughan's name.

55. I shall make an order, consequent upon these declarations, pursuant to section 125 of the Act, rectifying the Register to show the Erutruf Trustees as the holders of 16,058 of the Disputed Shares from 6 March 2020 (when Mr Maughan acknowledged receipt of the monies sent to him by Mr Krause).

56. I have set out, at paragraphs 48 to 51 above, my reasons for concluding, on the balance of probabilities from the evidence before me that Mr Verhoef knew that Mr Maughan was operating under a mistake of fact when he entered into the sale agreement purporting to sell the Disputed Shares for half the amount the parties had previously agreed should be attributed to them. Neither Mr Krause nor the Erutruf Trustees were a party to the sale agreement between Messrs Maughan and Verhoef. Mr Carlisle submits that the Claimants consequently have no locus standi to seek a declaration in respect of the sale agreement.

57. Ms Staynings referred the Court to the breadth of section 125(3) of the Act and, in relation to the standing of non-parties to a contract to seek declaratory relief in respect of a contract, to the Court of Appeal's decision in *Milebush Properties Limited v Tameside Metropolitan Borough Council* [2011] EWCA Civ 270 where, at paragraph 88, Moore-Bick LJ stated:

> "In my view the authorities show that the jurisprudence has now developed to the point at which it is recognised that the court may in an appropriate case grant declaratory relief even though the rights or obligations which are the subject of the declaration are not vested in either party to the proceedings. That was certainly the view of the court in *In re S* and it is also the clear implication of the observations in *Feetum v Levy* and the *Rolls-Royce* case that things have moved on since *Meadows*. In the *Mercury* case it was not considered relevant that BT had rights under the licence and it was no bar to the proceedings that Mercury did not. To that extent the position is mirrored in this case, in which Tameside has obligations under the agreement but Milebush has no rights. I can see no reason in principle why the nature of the underlying obligation should be critical, although there may well be other reasons why in the particular case a declaration should not be granted. The most important consideration is likely to be whether the parties have a legitimate interest in obtaining the relief sought, whether to grant relief by way of declaration would serve any practical purpose and whether to do so would prejudice the interests of parties who are not before the court."

58. Ms Staynings submits that there would be real utility in this case, in the Court making a declaration that the sale agreement is void for mistake. It affects not only the sale agreement but also the power of attorney.

59. Whilst there may be some utility, from the Claimants' perspective, in the Court making a declaration regarding the validity of the sale agreement, as recognised by

the Court of Appeal in *Milebush* there are cases where the Court concludes that a declaration should not be granted.

60. In contrast to the facts before the Court in *Milebush,* both Mr Maughan and Mr Verhoef *are* parties to these proceedings. And yet Mr Maughan has not entered a defence and does not seek an order rectifying the agreement. In these circumstances, and notwithstanding my findings of fact regarding Mr Maughan's mistake, it would, in my judgment, unnecessarily exceed the Court's jurisdiction to make such a declaration when the party directly affected by it, is before the Court but has not sought it. I decline to do so.