PROPERTY CHAMBER
FIRST –TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF NO. 2016/0679

BETWEEN

TREESPAN LIMITED

Applicant

and

JUPITER CONTRACT LIMITED

Respondents

Property address: Land and buildings on the east and west sides of Lumsden Road, Southsea
Title number: HP506912

Before: Judge Daniel Gatty

Sitting at: Portsmouth Magistrates Court
On: 12 and 13 September 2017

ORDER

IT IS ORDERED THAT:

1. The Chief Land Registrar is directed to cancel the Applicant's application dated 18 March 2016 for the entry of restrictions on the above title.

2. Any application for costs should be made in writing accompanied by a schedule of costs and evidence of the disbursements claimed and served on the Tribunal and the other party by 4.30 pm on 20 November 2017.

3. Any response to an application for costs should be served on the Tribunal and the other party by 4.30 pm on 11 December 2017.

4. Any reply to a response to an application for costs should be served on the Tribunal and the other party by 4.30 pm on 2 January 2018.

JUDGE DANIEL GATTY

PROPERTY CHAMBER LAND REGISTRATION

Dated this 23rd day of October 2017

[2017] UKFTT 0807 (PC)

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Applicant Representation:	Philip Jones of counsel instructed by Mackrell Turner Garrett, Solicitors
Respondent Representation:	Matthew Dale-Harris of counsel instructed by Berlad Graham, Solicitors

DECISION

Cases referred to:
Hughmans Solicitors v Central Stream Services Ltd [2012] EWCA Civ 1720, [2013] 1 EGLR 27

1. This matter was referred to the First-tier Tribunal on 25 August 2016. It concerns an application dated 18 March 2016 to HM Land Registry by the Applicant for a restriction to be entered against the title to land and buildings on the east and west sides of Lumsden Road, Southsea, title number HP506912 ("the Land"). The Respondent is the registered freehold proprietor of the Land. The Applicant is a shareholder in the Respondent. The Applicant alleges it has a beneficial interest in the Land arising from either a shareholders' agreement dated 21 March 2011 ("SA1") or a shareholder's agreement dated 22 December 2011 ("SA2"). The existence of SA2 as a concluded agreement is denied by the Respondent.

2. The hearing of this reference took place before me, sitting at Portsmouth Magistrates Court, on 12 and 13 September 2017, although in reality the whole hearing took place on 13 September. The Applicant appeared on 12 September but the Respondent did not attend due to a mistake about dates made by the its solicitors. Once the cause of the Respondent's absence was established, I adjourned the hearing to the following day (with the Applicant's agreement). The Respondents appeared on 13 September and, happily, it was possible to complete the evidence and submissions on that day. The parties were each represented by counsel – Mr Phillip Jones for the Applicant and Mr Matthew Dale-Harris for the Respondent. I am grateful to them both for their assistance.

The factual background

3. The Respondent was incorporated on 29 September 2010. The Land was acquired by the Respondent on 4 January 2011. The shareholders in the Respondent at that time were Mrs Ross, George John Pounds and Michael Dalton. Mr Dalton, now deceased, was a solicitor acting as nominee for Mr Farid Yageneh. Mrs Ross was represented in

all dealings concerning the Land and the Respondent company by her husband, Kenneth Ross.

4. The background to the acquisition is uncontroversial. Mrs Ross, Mr Ross, Mr Pounds and Mr Yageneh were all owed money by a company in which they were interested, Arcade Properties (Eastneigh) Ltd ("Arcade"). Arcade owned the Land but was insolvent and in the process of being dissolved. Mrs Ross had a charge over the Land granted by Arcade. Mr Pounds and Mr Yageneh did not. Between them they were owed over £1.65 m. The Land was not worth that amount.

5. It was agreed between Mr Ross (for Mrs Ross), Mr Pounds and Mr Yageneh that the Respondent would be acquired and would acquire the Land in the hope that eventually it would be worth enough to repay them. Because the Land was worth less than the amounts owed to Mrs Ross, Mr Pounds and Mr Yageneh, but they might wish the Respondent to secure a bank loan or similar against it, it was inappropriate for the Respondent to grant them charges over the Land. Instead, a shareholders' agreement (SA1) was entered into by Mrs Ross, Mr Pounds and Mr Dalton in March 2011 to regulate how any proceeds of sale or income from the Property would be shared amongst the shareholders. The key provision of SA1 was clause 5 which reads:

> "5. Arcade and the Property
>
> 5.1 The Shareholders previously had an interest in Arcade and are each owed monies by Arcade for which they hold no security.
>
> 5.2 For the purposes of record, the Shareholders agree that the sum involved is £1,650,000 apportioned between them as follows:-
>
> 5.2.1 Shareholder A [Mr Pounds] £150,000
>
> 5.2.2 Shareholder B [Mrs Ross] £1,100,000
>
> 5.2.3 Shareholder C [Mr Dalton, nominee for Mr Yageneh] £400,000
>
> 5.3 It is the intention of the Shareholders that these monies will be repaid to them by the Company [the Respondent] from the income from the Property and/or the net proceeds of sale thereof in such manner and on such terms as to timing as the Shareholders shall agree save that it is agreed that the payments will be made in the following order of priorities:-

5.3.1 as to the first £700,000 to Shareholder B

5.3.2 as the next £500,000 between Shareholder B and Shareholder C in equal shares

5.3.3 as to the balance of £450,000 between all the Shareholders in equal shares."

6. Cl. 7 of SA1 contains restrictions on what the Respondent should do without the consent of all shareholders. It provides that:

> "The Shareholders shall, for as long as they hold shares in the capital of the Company, procure (so far as is possible in the exercise of their rights and powers) that the Company shall not without the prior written consent of all Shareholders..."

There then follows a list of 18 things that the Respondent is not to do without the shareholders' consent including at 7.1.4:

> "sell or otherwise dispose of the whole or any part of its undertaking, property, assets, or any interest therein or contract to do so whether or not for valuable consideration".

7. SA1 was signed by the three shareholders even though clause 3 which was intended to identify the Respondent's auditors, bankers, registered address, accounting reference date and company secretary contained square brackets which had not been completed with any of those names or details.

8. Minutes of a board meeting of the Respondent held on 22 June 2011 record that Mrs Ross was in the process of disposing of her shares in the Respondent and in another company, South Coast Management Ltd, and that any consequential change to SA1 was to be agreed and documented by the shareholders, with Mr Dalton to administer the changes. Apparently, Mr Ross wished to distance his name from the Respondent because he had developed an unhelpful reputation in the local business world.

9. Minutes of a meeting held on 10 October 2011 attended by, amongst others, Mr Pounds, Mr Ross, an associate of Mr Yageneh with an accounting background named Greg Carter and a representative of Mr Dalton (probably Mr Yageneh) recorded:

"It was voted to adopt the company structure presented by Greg [Carter]. This being George Pounds, Treespan Ltd and Michael Daultons Representative [*sic*] to each hold one of the three shares in Jupiter Contracts Ltd..."

10. On 24 October 2011, Mr Dalton emailed to Mr Carter a "revised draft Shareholders Agreement for approval". He asked Mr Carter to confirm that the revised draft was agreed, saying he would then produce final versions for signature. Mr Carter made some revisions to the draft and on 25 October 2011 emailed it to Mr Pounds, Mr Yageneh and Mr Ross, asking for their agreement to it. I was provided with a copy draft revised shareholders agreement which I understand to be what was attached to that email. It can be seen that, like SA1, it was prepared by Daltons Solicitors (Mr Dalton's firm). The parties to the draft agreement are Mr Pounds, the Applicant, Mr Dalton and the Respondent. It is substantially the same as SA1 with the name of the Applicant substituted for Mrs Ross. Cl. 5 is amended to read:

"5. Arcade and the Property

5.1 The Shareholders, or their predecessors in title, previously had an interest in Arcade and are each owed monies by Arcade for which they hold no security.

5.2 For the purposes of record, the Shareholders agree that the sum involved is £1,1650,000 apportioned between them as follows:-

5.2.1 Shareholder A £150,000

5.2.2 Shareholder B [the Applicant] £1,100,000

5.2.3 Shareholder C £400,000

5.3 It is the intention of the Shareholders that these monies will be repaid to them by the Company from the income from the Property and/or the net proceeds of sale thereof in such manner and on such terms as to timing as the Shareholders shall agree save that it is agreed that the payments will be made in the following order of priorities:-

5.3.1 as to the first £700,000 to Shareholder B

5.3.2 as the next £500,000 between Shareholder B and Shareholder C in equal shares

5.3.3 as to the balance of £450,000 between all the Shareholders in equal shares." [emphasis added]

11. It can be seen that the only change to cl. 5 in SA1 is the inclusion of a reference to predecessors in title.

12. On 3 November 2011 Mr Carter emailed Mr Dalton, saying:

> "While I'm waiting for the shareholders to agree the new agreement draft you prepared, I have been asked if you can issue paperwork they can sign that allows RR to transfer her share to Treespan Ltd as soon as possible."

13. Also on 3 November 2011 a meeting took place attended by Mr Ross, Mr Pounds, Mr Carter and Russell Swanton and Caroline Duncan in which there was discussion about varying SA1 "with regard to the transfer of Rachael Ross's holding in Jupiter to Treespan Ltd".

14. Mr Dalton replied to Mr Carter's email of 3 November on 7 November 2011 saying that:

> "I do not think that anything further is required to confirm RR can transfer her share to Treespan Limited. I would say that all parties' consent is evidenced by the fact that they will, assuming it to be the case, all sign the new shareholders agreement"

15. Minutes of a meeting on 17 November 2011 attended by Mr Dalton's representative (unnamed but probably Mr Yageneh), Mrs Ross's representative (Mr Ross), Mr Pounds, Mr Carter and Russell Swanton and Caroline Duncan contain the following paragraph:

> 2. **Jupiter Contracts Ltd:** Agreement was reached to vary the final executed shareholders agreement to reflect the new shareholder/s. Shareholders/representatives to try to find a word copy of the agreement which we can either amend or have amended, draft to be approved by all."

16. It is curious that those minutes referred to an attempt to find a word copy of SA1 to amend when Mr Carter, who was at the meeting, had circulated a draft revised agreement three and a half weeks earlier which was clearly based upon SA1. I was not provided with an explanation for that by any of the parties. The same sentence also

appears in minutes for meetings that apparently took place on 23 and 30 November 2011.

17. Minutes of a meeting on 1 December 2011 attended by Mr Dalton's representative (not named), Mrs Ross's representative (Mr Ross), Mr Pounds, Mr Carter and Russell Swanton contain the following:

> "6. Shareholder Agreement: It was agreed between all parties that in respect of the Travellers Joy development that Jupiter Contracts have agreed in principle to partially fund the project, the £100k projected profit from the project is to be divided as follows.
>
> Shareholder A-40%
>
> Shareholder B-50%
>
> Shareholder C-10%
>
> This formula being a variation in the terms set out in the shareholder agreement, but a variation that all parties have discussed and agreed clause 5.3 of the shareholders agreement to be amended accordingly.
>
> Draft shareholder agreement to be prepared and reviewed by all parties. Russ/Greg to liaise."

18. In the course of giving evidence, Mr Ross acknowledged that this showed that the substantive terms of SA2 were still under discussion as at the date of that meeting, albeit he had no specific recollection of the meeting.

19. I heard evidence from Mr David Honey, a Jersey based director of the Applicant. He told me that the shares in the Applicant are held on trust for Mr Ross's mother and children. In the bundle is a copy of the revised shareholder agreement in the same form as the draft emailed by Mr Carter on 24 October 2011 but dated 22 December 2011 and signed by Mr Honey on behalf of the Applicant (SA2). It is not signed by or on behalf Mr Pounds or Mr Dalton. Mr Honey, whose evidence went unchallenged and which I accept, told me that having dated and signed SA2, he posted it to one of Mr Carter or Mr Dalton.

20. On 13 January 2012 the transfer of Mrs Ross's shares in the Respondent to the Applicant was registered at Companies House.

21. There is a further reference to updates/amendments to the shareholder agreement in the agenda for a meeting dated 18 January 2012. The minutes of that meeting recorded that, "All parties given a copy of the current word version [of the shareholder agreement] for perusal and comments/amendments". The persons present at that meeting included Mr Ross, Mr Yageneh and Mr Carter.

22. The agendas for further meeting on 25 January 2012 and 2 February 2012 also refer to "shareholder agreement updates/amendment" as a matter to be discussed. I was not provided with the minutes for those meetings. It was common ground, however, that there is no version of SA2 which was signed by Mr Pounds or Mr Dalton. Mr Pounds and Mr Yageneh deny any recollection of SA2 or negotiations about it.

23. Subsequently there was a falling out between Mr Ross on the one hand and Messrs Pounds and Yageneh on the other. In 2015 Mr Pounds and Mr Yageneh launched an unsuccessful attempt to force the Applicant to sell them its shares in the Respondent. In 2016 an option to buy the Property was granted by the Respondent to a company named Brightlaser Ltd. I have not seen a copy of the option agreement but it was common ground that it existed and had been entered into without the Respondent's knowledge or consent despite cl. 7.1.14 of SA1 (and SA2). Mr Pounds and Mr Yageneh are directors of Brightlaser Ltd and the shareholders of that company are Mr Pounds' sister and Mr Carter. Mr Pounds denied that his sister was a nominee for himself or that Mr Carter was a nominee for Mr Yageneh but I find that hard to believe. Indeed, although beneficial ownership of Brightlaser Ltd is of marginal relevance at most to the issue I have to decide, I do not believe it. An agreed notice in respect of the option agreement was applied for on 7 April 2016. Presumably that application is held up at the Land Registry awaiting the outcome of the Applicant's application for a restriction.

24. On 18 March 2016 the Applicant made the application for restrictions on the title to the Property which is the subject of this reference. The restrictions sought are in standard forms A, and II:

> *Form A (Restriction on dispositions by sole proprietor)*
>
> No disposition by a sole proprietor of the registered estate (except a trust corporation) under which capital money arises is to be registered unless authorised by an order of the court.

Form II (Beneficial interest that is a right or claim in relation to a registered estate)

No disposition of the registered estate, other than a disposition by the proprietor of any registered charge registered before the entry of this restriction, is to be registered without a certificate signed by the applicant for registration or their conveyancer that written notice of the disposition was given to Mackrell Turner Garrett, Savoy Hill House, Savoy Hill, London WC2R 0BU.

25. The Respondent objected and in due course the application was referred to this Tribunal.

26. Meanwhile, on 15 June 2016 Mrs Ross executed as a deed an assignment of her rights under SA1 to the Applicant. Notices dated 17 June 2016 of that assignment were sent to all interested parties.

The Issues

27. The Applicant's right to apply for a restriction depends on it having an interest in the Property rather than merely in the Respondent. Its case is that the Respondent holds the Property on trust for itself (and the other shareholders, presumably) as a result of SA2 or that the Respondent held the Property on trust for Mrs Ross (and the other shareholders) under SA1 and that her interest under the trust has been assigned to the Applicant. Accordingly, the issues that fall to be decided are:

(1) Was SA2 concluded?

(2) If yes to (1), did the Applicant acquire a beneficial interest in the Property under SA2?

(3) Were Mrs Ross's rights under SA1 effectively assigned to the Applicant?

(4) If yes to (3), did those rights include a beneficial interest in the Property?

(5) If yes to (2) and/or (4), should the restrictions sought be entered on the register?

The witnesses

28. As mentioned above, I heard evidence from Mr Ross and Mr Honey on behalf of the Applicant. The Respondent called Mr Pounds and Mr Yageneh. Only one of the issues mentioned above might turn to any real extent on the oral evidence given – whether SA2 was concluded. I found Mr Ross and Mr Honey far more convincing witnesses than Mr Pounds and Mr Yageneh. Mr Honey's evidence was uncontroversial and not

challenged. Mr Ross gave his evidence in a straightforward fashion and volunteered the concession mentioned in paragraph 18 above which was contrary to the Applicant's interests. I formed the view that his evidence was truthful and given to the best of his recollection. In contrast, I am afraid to say, I formed the view that neither Mr Pounds nor Mr Yageneh were doing their best to assist the Court with their true recollections. Mr Pounds denied any knowledge even of discussions about SA2 when it is plain from the documents that there were some. He was evasive and unwilling to concede even matters that were obvious from the documents. I could not attribute his denial of discussions about SA2 merely to his memory fading with the passage of time. Mr Yageneh first said that it was actually agreed that the Applicant was not to be party to the shareholders agreement then, when questioned by me about that statement, conceded that there was no such agreement that it should not be a party. He too appeared to be to be tailoring his evidence to suit the Respondent's case. Nevertheless, for the reasons that I shall explain below, I have concluded that SA2 remained an uncompleted draft agreement.

Discussion

29. It is apparent from the documents mentioned above that once Mr Ross had decided that Mrs Ross's shares in the Respondent were to be transferred to the Applicant, he raised with the other interested parties, including Mr Pounds and Mr Yageneh, the prospect of SA1 being replaced with a new shareholders' agreement based on SA1 but with the Applicant as a party to it instead of Mrs Ross. Mr Dalton prepared a draft of such an agreement and Mr Carter amended that draft. The results of their efforts is SA2, which was circulated to all parties and discussed at various meetings. However, SA2 was only ever signed by Mr Honey on behalf of the Applicant. Discussions about its terms continued after Mr Honey had signed it in December 2011. For reasons apparently lost in the mists of time, those discussions did not reach a conclusion, but it is clear from the minutes of the meeting on 1 December 2011 that matters of substance remained to be agreed into 2012. I find as a fact that the terms of SA2 never were finally agreed with Mr Pounds (in his personal capacity or in his capacity as director of the Respondent) and with the decision maker regarding Mr Dalton's shares, Mr Yageneh. Accordingly, I find that the document which is SA2 remained a draft for discussion. It was not an offer that could be accepted, nor was it accepted. Mr Jones was unable to point to any

actions taken by Mr Pounds, Mr Yageneh (or Mr Dalton) nor the Respondent which amounted to acceptance of an offer to enter into SA2. I do not consider that their silence could have constituted acceptance, even if they had been silent about SA2 following receipt of the version signed by Mr Honey. There does not appear to have been silence on their parts, in any event. It seems that there were discussions about the terms of SA2 after Mr Honey signed SA2 and posted it to Mr Carter or Mr Dalton.

30. That does not ultimately matter very much, however, because Mr Dale-Harris accepted on behalf of the Respondent that if SA1 vested Mrs Ross with a beneficial interest in the Property, that interest has been assigned to the Applicant. That the assignment took place after the Applicant had made this application for restrictions does not seem to me to be of any legal consequence and Mr Dale-Harris did not submit that it was. I find as a fact that notice of that assignment was given to all relevant parties so that the assignment took effect in law, if there was a beneficial interest to assign.

31. This reference turns, therefore, on the question whether the Respondent held the Property on trust for the shareholders following their entry into SA1. The Applicant's case is that it did because cl. 5 of SA1 appropriates the whole of the Property to repayment of the sums mentioned in cl. 5. Mr Jones submits that this case falls within a principle emerging from the Court of Appeal's decision in *Hughmans Solicitors v Central Stream Services Ltd* [2012] EWCA Civ 1720, [2013] 1 EGLR 27.

32. In *Hughmans* the court had to determine "whether a contract compromising legal proceedings created a proprietary interest in property" (Ward LJ giving the judgment of the whole court at para. 1). The contract provided for the sale of a property with the net proceeds of sale being applied to pay the creditor £100,000 in settlement of its claims against the debtor. In the course of his judgment Ward LJ said:

> "19 In his submissions on this appeal, as before the Judge, counsel for Hughmans stressed the need for clear words in order to create a proprietary interest. In *Tradegro (UK) Ltd v Wigmore Street Investments Ltd* [2011] EWCA Civ 268, [2011] BCLC 616 Lord Neuberger MR said at [36]:
>
> > "…. the courts are not too ready to hold that, where A and B agree an arrangement whereby A's money is held in a specific account, or by a third party, to protect B's prospective claim, the money is to be treated as held on trust for B, or as security for B's claim. Clear words are needed to show that this was the intention of the arrangement before the court will hold that is its effect".

20 Tradegro concerned an undertaking to hold money on deposit and not to take any steps to transfer or otherwise deal with it until the satisfaction in full of additional consideration under a sale agreement. Like a freezing order, it was a classic case of an obligation restraining the use of money without a positive obligation to pay the debt out of it: see also *Flightline Ltd v Edwards* [2003] 1 WLR 1200 .

21 Although in the passage cited above, the Master of the Rolls is referring to arrangements for the protection of prospective claims, the need for an intention to create a proprietary interest to be clearly shown is of general application. The general proposition that the creation of a trust or the creation of equitable interests will not readily be found in a commercial context is important, for at least two reasons. First, the creation of such interests runs counter to the rateable distribution of assets on an insolvency, which is for the most part the occasion on which the creation or otherwise of proprietary interests will be of significance. Secondly, there is a "general disinclination of the courts to see the intricacies and doctrines connected with trusts introduced into everyday commercial transactions": *Neste Oy v Lloyds Bank Plc* [1983] 2 Lloyds LR 658 at 655 per Bingham J. See also Snell's Equity (32nd ed.) at para. 22-015.

....

24 We consider that the principles which must guide the resolution of this issue appear in a short passage in the judgment of Lord Wrenbury in *Palmer v Carey* [1926] AC 703, a decision of the Privy Council on appeal from the High Court of Australia. It was cited to the Judge in this case and relied on by both parties. The issue was whether a commercial lender had security over goods purchased by the borrower with the monies advanced by it and over the proceeds of sale of such goods. The borrower became bankrupt and the Privy Council, reversing the decision of the High Court of Australia, held that the particular agreement did not create an equitable charge in favour of the lender. The general principle was stated by Lord Wrenbury at pp 706–707:

> "An agreement for valuable consideration that a fund shall be applied in a particular way may found an injunction to restrain its application in another way. But if there be nothing more, such a stipulation will not amount to an equitable assignment. It is necessary to find, further, that an obligation has been imposed in favour of the creditor to pay the debt out of the fund. This is but an increase of a familiar doctrine of equity that a contract for valuable consideration to transfer or charge a subject matter passes a beneficial interest by way of property in that subject matter if the contract is one of which a Court of equity will decree specific performance".

25 This passage is expressed as applying to the payment of debts out of a fund and is therefore directly addressing the issue of the creation of an equitable charge to secure the debts. We agree with the Judge's conclusion that the agreement in this case cannot be analysed as creating an equitable charge, for the simple reason that there was no debt due from Mr Davidson to the company for which a charge could stand as security. The agreement did not impose an obligation on Mr Davidson to pay a particular sum of money to the company, which could then be secured by a charge. If it had done, it would have been open to Mr Davidson to pay the debt from some other source, upon which any charge

of or interest in the property in favour of the company would be discharged. The agreement creates not a debt, but an obligation to sell the property and to apply its proceeds in a particular manner. Even the requirement under clause 6.2 to pay the sum of £100,000 to the company is not a free-standing obligation but arises solely as part of the obligation to apply the proceeds of sale of the property.

26 Nonetheless, the passage from *Palmer v Carey* [1926] AC 703 illustrates a more general principle that if for valuable consideration the owner of a property agrees to hold the property on terms which appropriate it for the benefit of another party, and the agreement is one which the court will enforce by an order for specific performance, the effect of the agreement is to create an equitable interest in the property in favour of the latter party …

27. If, as is clearly the case, an equitable charge creates an equitable interest in the charged property, it would be strange indeed if the agreement in this case did not also create an equitable interest in favour of the company. The essential element of an equitable charge is that, in the event of a default by the debtor in the payment of his debt, the chargee is entitled to an order for the sale of the charged property and for the payment of his debt out of the proceeds of sale. As earlier noted, the debtor nonetheless remains free to discharge the debt out of other resources, thereby automatically releasing the charge. The present case is in our view a stronger case for the creation of an equitable interest. The obligation under the agreement is an unqualified one to sell the property and to pay the proceeds of sale to the company, subject to other calls upon those proceeds, in settlement of the company's claim against Mr Davidson. The property is wholly appropriated to that settlement."

33. I draw from the decision in *Hughmans* and the cases referred to in the passages quoted above the following principles:

(1) The creation of a trust or the creation of equitable interests will not readily be found to have arisen from a commercial agreement. Clear words are needed to show that this was the intention of the arrangement.

(2) An obligation restraining the use of money (or a property) without a positive obligation to pay a debt out of it will not usually have the effect that the money is held on trust for the creditor.

(3) An agreement for valuable consideration that a fund is to be applied in a particular way may found an injunction to restrain its application in another way. But if there be nothing more, such a stipulation will not give rise to a trust or vest anyone with a beneficial interest in the fund. If, however, there is an agreement that a fund is to be applied in a particular way and an obligation has been imposed to pay a debt out of the fund, the fund will be held on trust for the creditor so that he has a beneficial interest in it.

(4) By application (or perhaps extension) of the principle described at (3) above, if for valuable consideration the owner of a property agrees to hold the property on terms which appropriate it for the benefit of another party, and the agreement is one which the court will enforce by an order for specific performance, the effect of the agreement is to create an equitable interest in the property in favour of the latter party.

34. Mr Dale-Harris submitted that there were a number of points of distinction between SA1 and the agreement in *Hughmans*:

(a) For the *Hughmans* principle to apply, the Property must be wholly appropriated for the benefit of the party or parties in question. The Property is not wholly appropriated to payment of the £1,650,000 due from Arcade to the shareholders as broken down in cl. 5.2. The shareholders were hoping that the Property might increase in value as a result of the grant of planning permission to the extent that it would be worth more than £1,650,000, allowing them to be repaid. So, cl. 5 merely provided for the debts owed by Arcade to be repaid out of a future income stream.

(b) In *Hughmans* there was a requirement to sell the Property in order to pay the creditor. Not so here. The agreement in *Hughmans* was tantamount to a trust for sale. Here there is a flexibility in cl. 5 as to how the Property is to be dealt with, i.e. when and if it is to be sold, that is inconsistent with the shareholders acquiring equitable interests in the Property.

(c) If SA1 created equitable interests in the shareholders that would reach around the corporate structure of the Respondent which could not have been intended and would have required express words. If SA1 had created equitable interests in the Property in favour of the shareholders that would have affected the Respondent's ability to raise money by borrowing against the Property which the parties wished the Respondent to be able to do.

35. Mr Jones pointed out that in *Hughmans* the property in question was not wholly appropriated to payment of the creditor company. The agreement in that case provided for payment of the mortgage secured against the Property prior to payment of the creditor company and then listed a series of other debts owed by the proprietor to other companies which were to be paid out of whatever remained of the proceeds of sale. He submitted that although there was an obligation to sell in *Hughmans* that was not vital

to the operation of the principle identified by Ward LJ at para. 26 of the *Hughmans* judgment. It is enough that an injunction might be granted to restrain dealings with the Property in breach of cl. 5. He further submitted that the property rights that the Applicant contends for are complimentary to the corporate structure and that the mere existence of a corporate structure does not negate what the Applicant contends would otherwise be the effect of the agreement.

36. Applying the principle described in para. 26 of *Hughmans*, the key issue is whether SA1, looked at as a whole, creates a specifically enforceable agreement by which the Respondent appropriated the Property to the payment of the debts owed to Mrs Ross (and Mr Pounds and Mr Dalton) by Arcade for valuable consideration. I have concluded that it does not do so for the following reasons:

(1) I consider it an important component of the Court of Appeal's reasoning in *Hughmans* that the agreement required sale of the property. If a property is truly to be said to be appropriated to the payment of a debt, the creditor must be entitled to sell the property in order to recover the sum owed to him – not necessarily immediately but at some foreseeable point.

(2) Cl. 5 of SA1 does not require the Respondent to sell the Property at the request of any one of the shareholders. Mrs Ross could not successfully have sued the Respondent for an order that it sell the Property in order to repay her the monies she was owed by Arcade.

(3) Cl. 5.2 records an intention on the part of the shareholders that they be repaid out of either income generated by the Property or its sale. It does not state an intention to sell, still less contain an agreement to sell. The only obligation contained in cl. 5 concerns how any income or sale proceeds from the Property should be distributed amongst the shareholders, if there is income or sale proceeds to distribute.

(4) Recital A to SA1 records that, "The Shareholders have agreed to enter into this Agreement for the purpose of controlling their capacity as shareholders of the Company". So, SA1 was expressly intended to control how the three shareholders exercise their rights as shareholders in the Respondent, not to impose obligations on the Respondent itself. See also cl. 15 of SA entitled "Status of this Agreement and the Parties' Obligations".

(5) The constraint in cl. 7 on various things being done, including selling or disposing of the Property, without the consent of all three shareholders applies only so long as they hold shares in the company and "so far as is possible in the exercise of their rights and powers". Hence, the constraint on dealing with the Property imposed by SA1 specifically controls the ways in which the shareholders exercise their voting rights. It is not a contractual obligation imposed upon the Respondent itself.

(6) It is noteworthy that it was not thought necessary to have SA1 executed by the Respondent. The three signatories are the three shareholders. Although Mr Pounds was also the (only) director of the Respondent, he does not purport to sign on the companies' behalf. So, the party that needs to have agreed to appropriate the Property on the Applicant's analysis, the Respondent, did not separately execute SA1. Whatever else that signifies, it does not suggest an intention that the Respondent itself was entering into any obligations by the making of SA1.

(7) As appears from paras. 19, 20 and 24 of *Hughmans*, it is not enough that a negative injunction to prevent distribution of income or the proceeds of sale contrary to cl. 5 might be obtained, nor that a negative injunction might have been obtained to prevent sale or other dispositions without Mrs Ross's consent. In any event, it is not at all clear that such an injunction could be obtained against the Respondent as opposed to the other shareholders for the reasons mentioned above.

37. I therefore conclude that SA1 did not vest Mrs Ross with an equitable interest in the Property. Whatever rights under SA1 she has assigned to the Applicant, they do not include a property interest in the Property itself. And if SA2 had been executed by all the necessary parties, it would not have vested the Applicant with a property interest in the Property either.

38. By s. 42 of the Land Registration Act 2002, a restriction may be entered when it would be necessary or desirable for the purpose of

> (a) preventing invalidity or unlawfulness in relation to dispositions of a registered estate or charge,
>
> (b) securing that interests which are capable of being overreached on a disposition of a registered estate or charge are overreached, or
>
> (c) protecting a right or claim in relation to a registered estate or charge.

39. Because neither SA1 as assigned nor SA2 vested the Applicant with a property interest in the Property, it is not necessary or desirable for the restrictions sought by the Applicant to be entered for any of those purposes.

Decision

40. For the reasons that I have sought to explain above, I will direct that the Applicant's application to enter restrictions against the title of the Property be cancelled.

41. The usual rule in this jurisdiction is that costs follow the event: the loser pays the winner's costs. The Applicant has been the loser in these proceedings. However, that is not the invariable rule. By para. 9.1 (b) of the Practice Directions, Property Chamber, First-Tier Tribunal, Land Registration I can make a different order and by para. 9.1(c) I can have regard to, for example, the parties' conduct when deciding whether to do so. I have not yet heard any submissions on any of those matters. So, if either party wishes to apply for costs they should make a reasoned application in writing, including a schedule of costs and evidence of the costs incurred, within 28 days. Such an application should be served on the other party who will then have 21 days to respond to the application by way of written submissions sent to the Tribunal, copying any submissions to the applying party or parties. Any response to such submissions should be provided to the Tribunal and the other party or parties within 14 days of receipt of the submissions.

JUDGE DANIEL GATTY

PROPERTY CHAMBER LAND REGISTRATION

Dated this 23rd day of October 2017