Neutral Citation Number: [2015] EWCA Civ 1023

Case No: A3/2014/1974 & 1975

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CHANCERY DIVISION
OF THE HIGH COURT
MS LESLEY ANDERSON QC
Sitting as a Deputy Judge of the High Court
HC12D01365

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/10/2015

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE JACKSON
and
MR JUSTICE HILDYARD

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Between :

CHRISTOPHER CHARLES DIXON **EFI (LOUGHTON) LIMITED**	**Appellants**
- and -	
BLINDLEY HEATH INVESTMENTS LIMITED	**Respondent/ Cross-Appellant**
PETER BASS **ANNETTE BASS** **ROBERT BASS** **CATHERINE ANNE BASS** **MICHAEL BASHFORD** **SUZANNE BASHFORD** **DAVID JAMES MINGAY**	**Respondents to the Cross Appeal**
GERALD FRED CLARKE **RICHARD PHILIP WELLS**	**Respondents as to costs only**

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Mr Bernard Weatherill QC (instructed by **Kenneth Elliott & Rowe**) for the **Appellants**
Mr Robin Hollington QC and **Mr Hashim Reza** (instructed by **JP Fletcher & Co**) for the **Respondent/Cross-Appellant**
Mr Timothy Carlisle (instructed by **Summit Law LLP**) for the **First to Seventh Defendants**
Mr Dov Ohrenstein (instructed on a Direct Access basis) for the **Ninth and Tenth Defendants**

Hearing dates: 16 & 17 June 2015
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Judgment

The Hon. Mr Justice Hildyard :

1. This is the judgment of the Court to which we have all contributed.

Nature and scope of the appeal

2. This case relates to a struggle for control of EFI (Loughton) Ltd ("the Company") and, in particular, a transfer of 200 shares in the Company by the first to seventh Defendants below (as vendors) to a body corporate registered in the British Virgin Islands and now called Blindley Heath Investments Limited ("BHIL", the Claimant below) as purchaser pursuant to a share purchase agreement dated 7 October 2011 ("the SPA").

3. The Appellants are Mr Christopher Charles Dixon (individually, "Mr Dixon") and the Company. It is the Appellants' case that the transfer was made in breach of valid rights of pre-emption and the transaction should be unwound. If successful, they will secure legal control of the Company.

4. Ms Lesley Anderson QC sitting as a Deputy Judge of the High Court ("the Judge"), after a 10-day trial, found that there were valid pre-emption rights in place, but that (a) Mr Dixon (and his co-directors, Mr Gerald Clarke ("Mr Clarke") and Mr Richard Wells ("Mr Wells") respectively (the ninth and tenth Defendants below and who are now Respondents as to costs only) were in all the circumstances estopped by convention from relying on such rights to prevent the transfer; alternatively, (b) she concluded that the share transfers had been unanimously, though informally, approved and passed at a meeting in October 2011 by the Board of Directors of the Company, who comprised a majority of its shareholders, that their decision to effect registration of the transfers was binding upon all concerned, and its purported revocation at a subsequent Board Meeting in November 2011 was invalid.

5. The Appellants, who appeal with the permission of Briggs LJ given on 21 October 2014, contend that in both respects the Judge was wrong. They submit that the Judge misdirected herself as matter of law as regards her decision on estoppel by convention and as regards the effect of the alleged informal approval of the transfers at the Board Meeting in October 2011. They submit further that the facts as found did not support her conclusion on estoppel, nor was it open to her to find that the Directors had informally agreed and approved the transfers at the meeting in October 2011. The Appellants further submit that on the pleadings and evidence the Judge was not entitled to find that Messrs Dixon, Wells and Clarke did not exercise their powers at the November Board Meeting properly or in good faith.

6. This appeal thus raises issues as to the scope and applicability of the doctrine and principles of estoppel by convention, and as to (a) the revocability of a Board decision at a subsequent Board Meeting, (b) the powers and duties of directors in relation to the passing and registration of share transfers subject to pre-emption rights conferred not in the Articles of Association but (as in this case) in an agreement evidenced by letters between certain of its shareholders, and (c) the well known *Duomatic* principle (further explained below).

7. Also, BHIL cross-appeals against the dismissal of its claims against the vendors (the first to seventh Defendants below) for misrepresentations and breaches of warranty

under the SPA; but its cross-appeal, in which BHIL seeks damages to be assessed in respect of the difference between the value of its beneficial but unregistered interest in the shares it acquired under the SPA and the value of a registered, legal interest in such shares, is contingent on the Appellants succeeding in the main appeal.

8. BHIL has also been granted permission to cross-appeal certain aspects of the Judge's quite complicated and detailed decision on costs, for which she gave reasons in a separate Supplemental Judgment on 16 June 2014 ("the Supplemental Judgment"), in the event of the Appellants succeeding in the main appeal. Additionally, it seeks permission to cross-appeal aspects of the Supplemental Judgment even if the main appeal is dismissed. Briggs LJ refused (in writing) permission for that second and free-standing cross-appeal; but he subsequently directed that any renewed oral application should be made at the hearing of the substantive appeal.

9. The main appeal was presented on behalf of the Appellants by Mr Bernard Weatherill QC. Mr Robin Hollington QC and Mr Hashim Reza represented the Claimant. Mr Dov Ohrenstein represented Mr Clarke and Mr Wells, who adopted a neutral stance in the main appeal but are also interested in the cross-appeals on costs. Mr Timothy Carlisle represented the first to seventh Respondents/Defendants on the cross-appeal.

10. The main appeal occupied the Court for two days. There was not sufficient time to deal with the cross-appeals on costs; but after the conclusion of the main appeal, the Court invited Mr Hollington to provide a written summary of his "best points" on BHIL's self-standing cross-appeal on costs to enable us to determine whether to grant permission to pursue such appeal.

11. We start with a description of the facts.

Summary of facts

12. The Judge set out the facts comprehensively and clearly over the course of some 34 pages in her judgment dated 16 May 2014 ("the Judgment"). It is sufficient for present purposes to set out the following, culled from the Judgment.

13. The Company was incorporated on 8 September 2000 in order to acquire a 125-year lease of land and buildings known as the Loughton Seedbed Centre. The Judge explained at paragraph [3] of the Judgment that "the seedbed centre concept involves the provision of high quality, modern, business accommodation and technical, secretarial and administrative services on licence to small or start-up businesses and is a way of enabling those businesses to share common costs …".

14. The Company's Articles of Association adopt the form in Table A to the Companies (Tables A to F) Regulations 1985 as amended, and include the following provisions:

> Article 4: *"The shares of the Company shall be under the control of the Directors who may allot, grant options over, or otherwise deal with or dispose of any relevant securities (subject to section 80 of the Act) to such persons, on such terms and in such manner as they think fit".*

> Article 6: *"Any shares which are not in the original authorised share capital with which the Company is incorporated and where the Directors propose to issue shall first be offered to the Members in proportion as nearly as may be to the number of the existing shares held by them respectively unless the Company in General Meeting shall by Special Resolution otherwise direct".*
>
> Article 11: *"The Directors may in their absolute discretion and without assigning any reason therefore decline to register the transfer of a Share whether or not it is a fully paid Share".*
>
> Article 31: *"A Director may vote, as a Director in regard to any contract or arrangement in which he is interested or upon any matter arising thereout, and if he shall so vote, his vote shall be counted and he shall be reckoned in estimating a quorum when any such contract or arrangement is under consideration and Clause 94 to 97 inclusive of Table A shall not apply to the Company".*

15. As at 22 November 2000 the directors of the Company were Mr Peter Bass ("Mr Bass", the first Respondent/Defendant), Mr David Mingay ("Mr Mingay", the seventh Respondent/Defendant), Mr Clarke, Mr Wells and the late Mr Mark Dixon (the brother of Mr Dixon, who until his death was in practice with the latter in the solicitors' firm of Kenneth Elliot & Rowe).

16. As at 18 December 2000 the 500 issued Ordinary £1 shares in the Company were held as follows:

    i) 100 shares held by the Bass family (80 shares jointly by Mr Bass and his wife Annette ("Mrs Bass", the second Respondent/Defendant); 10 held by Mr Robert Bass (the third Respondent/Defendant), the son of Mr and Mrs Bass, who is married to Ms Catherine Bass (the fourth Respondent/Defendant); and 10 held by Ms Suzanne Bashford (the sixth Respondent/Defendant), the daughter of Mr and Mrs Bass, who is married to Mr Michael Bashford (the fifth Respondent/Defendant);

    ii) 100 shares held by Mr Mingay;

    iii) 100 shares held by the Clarke family (i.e. 85 held by Mr Clarke and 15 held by Carol White, his wife/partner);

    iv) 100 shares held by the Wells family (i.e. 50 held by Mr Wells and 50 held by Rosemary Wells, his wife); and

    v) 100 shares held by Mr Mark Dixon.

17. Subsequently, in February 2001, Mr Dixon was invited to become a shareholder. He was to subscribe for 100 shares at par in the Company (thereby taking the issued shares to 600) and to make available an interest free loan of £80,000 to enable the other members to reduce their loans to the Company from £50,000 to £40,000 in

connection with the acquisition of the Loughton Seedbed Centre (see paragraph 21 below). Mr Dixon acquired his 100 shares on 21 February 2001. He did not become a director until much later, on 6 November 2007.

18. In early 2001 Mr Dixon drafted an undated document entitled "Terms of Lending" setting out the basis on which he and Mr Mark Dixon were prepared to lend the combined sum of £120,000 to the Company. This had been emailed to Mr Mingay, copied to Mr Mark Dixon, on 18 February 2001. Paragraph 9 provided as follows:

> "No shares in [the Company] to be issued sold or transferred unless offered pro rata to existing members on same terms. May be gifted to immediate family (spouse and children) but further transmissions by those transferees or on death should be required to be offered pro rata at asset value."

19. A meeting of the Company's Board to approve the Seedbed Centre purchase took place in February 2001. The Judge found that a draft of a document which became known as the "February Shareholders' Letter", including certain amendments, was initialled and approved at that meeting by each of the directors of the Company (Mr Bass, Mr Clarke, Mr Mingay, Mr Mark Dixon and Mr Wells). It was not signed by Mr Dixon because he left the meeting early.

20. The February Shareholders' Letter was stated to be from Messrs Mark and Chris Dixon and was addressed to Mr Wells, Mr Clarke, Mr Bass and Mr Mingay. It referred to the "proposed terms of agreement upon which we [Chris Dixon and Mark Dixon] were prepared to make loans to the company, a copy of which agreement is attached".

21. The February Shareholders' Letter, consistently with the Terms of Lending, provided, by clause 3, as follows:

> "No shares may be transferred unless they are first offered *pro rata* to the existing shareholders save that it shall be permitted for any member to transfer their shares to their spouse or immediate children (family transferees) but it shall be a condition of such transfer that any transfer by a family transferee shall not be permitted unless the shares are first offered pro rata to the existing shareholders <u>at proportion of net asset value in every case</u>."

22. The Company purchased the Seedbed Centre on 20 February 2001. The purchase price was £3.1m, which was partly funded by a loan of £2.325m from RBS. The balance of £775,000 was funded through loans of £40,000 to the Company from each of its directors (then Mr Bass, Mr Mingay, Mr Mark Dixon, Mr Clarke and Mr Wells) and Mrs Bass, a loan of £80,000 from Mr Dixon, a loan of £390,000 from EFIAL[1] and the balance from the Company's own funds.

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[1] This was a company which managed the Seedbed Centre and had been formed by a group of local businessmen. Among the members and directors of EFIAL were Peter Bass (D1), Gerald Clarke (D9), Philip Wells (D10), the late Mark Dixon (Chris Dixon's brother) and David Mingay (D7).

23. The next significant event took place in November 2001. On 6 November 2001 Mr Mark Dixon sent separate letters to Mr Mingay, Mr Wells, Mr Clarke, Mr and Mrs Bass, and Mr Dixon, enclosing copies of their respective loan agreements with the Company and a copy of a document which is in substantively the same terms as the February Shareholders' Letter and contained the same restrictions on the issue or transfer of shares without them first being offered to existing shareholders. The Judge referred to this document as the "November Shareholders' Letter".

24. This letter was discussed at the meeting of the Company's Board on 20 November 2001. Mr and Mrs Bass, Mr Mingay, Mr Clarke and Mr Dixon signed their respective copies of the letters before or at the meeting and these were collected by Mr Mark Dixon at the end of the meeting.

25. In April 2004 the Board of the Company agreed that the 80 shares held jointly by Mr and Mrs Bass could be split into individual shareholdings of 40 shares each.

26. The history can then be moved forward to 2009. By then the Company was generally profitable, yielding on average a yearly net profit of approximately £300,000 before tax. Prior to 2009, Mr Dixon, Mr Mark Dixon, Mr Wells and Mr Clarke did not take an active part in the day to day management of the Company, which was left largely to Mr Mingay and Mr Bass. That did not change until 2009 following the sudden death of Mr Mark Dixon on 14 January 2009.

27. As appears in greater detail in paragraphs 27 and 28 of the Judgment, the Judge stated that Mr Mark Dixon's will provided that his 100 shares passed to his widow, Mrs Deirdre Dixon, and Mr Dixon, to be held jointly. The Judge also stated that, in due course, Mrs Deirdre Dixon caused the shares to be registered in her name and then executed a stock transfer form which transferred 50 shares to Mr Dixon, and a copy was sent to the Company on 16 December 2009. She and Mr Dixon also made and signed a written (but undated) declaration of trust to the effect that Deirdre would thereafter hold the shares on trust for herself and Mr Dixon in equal shares.

28. It was common ground between the parties that, from about this time, Mr Dixon in fact controlled Deirdre's shares and that the fact that he did so was not disclosed to the Board of Directors of the Company or its members.

29. The Judge found (at paragraph [28] of the Judgment) that the acquisition of Mrs Deirdre Dixon's shares by Mr Dixon, and the arrangements entered between them, constituted part of a larger plan to acquire control of the Company together with Mr Wells (who, with his wife, held 100 shares in total). As part of this plan, in or around May or June 2010, Mr Dixon, Mr and Mrs Wells, Mrs Deirdre Dixon and "Newco/KER Secretaries Ltd"[2] entered into an agreement the terms of which were intended to regulate the basis on which Mr Dixon and Mr Wells would acquire the remaining share capital in the Company. The Judge referred to this as the "May/June Agreement".

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[2] "Newco" is a reference to MSK 050 Limited, a company which was being formed (and was incorporated on 19 July 2010) for Mr Dixon and Mr Wells to be a vehicle for their anticipated share acquisitions: see paragraph [30] of the Judgment. Its share capital of 200 shares was to be held as to 100 by each of KER Secretaries Ltd and KER Directors Ltd. The shares in KER Secretaries Ltd and KER Directors Ltd were to be held by those companies as nominees on behalf of Mr Dixon and Mr/Mrs Wells respectively.

30. An agreement dated 21 June 2010 was subsequently made between KER Secretaries Limited (as purchaser) and Mr Clarke and Ms White ("the Clarke Agreement"). This provided for the sale of the Clarke/White 100 shares for a price of £375,000. This meant that Messrs Dixon and Wells had 400 of the 600 shares under their control.

31. Further, although Messrs Dixon and Wells had not previously taken an active part in the day to day management of the Company, after Mr Mark Dixon's sudden death that changed.

32. Both the May/June Agreement and the Clarke Agreement were made on terms that they were to be kept confidential. The Judge noted that they were disclosed late on in these proceedings on 6 December 2013 and 14 October 2013, not long before the commencement of the trial in mid-January 2014.

33. At a meeting of the Company's Board on 20 July 2010 the transfer of shares from Mr Clarke and Ms White to MSK 050 Limited was approved by a majority; but Mr Bass abstained. Prior to the meeting, Mr Dixon had written to Mr Bass (whose family held 100 shares), Mr Mingay (who held 100 shares) and Mr Wells to notify them that he had contracted to acquire Mr Clarke's and Ms White's shares through a company incorporated for the purpose of holding those shares (MSK 050 Limited). He also asked whether they would wish to sell any of their shareholdings to him.

34. The Judge drew attention at paragraph [35] of the Judgment to a notable feature of this email: it made no reference to the involvement of Mr and Mrs Wells in MSK 050 Limited. Indeed, the email was sent to Mr Wells and thereby ostensibly contemplated a possible acquisition of his shares.

35. At the meeting itself, Mr Bass argued that the directors were under a duty to consider the interests of all the members and that he was concerned that the transfer of 1/6 shares to someone who already controlled 1/6 required careful consideration. It is common ground that the meeting became heated, and Mr Bass complained also that the minutes did not accurately reflect the discussion.

36. On 12 August 2010 the Company's Board approved the transfer of five shares from Robert Bass to Catherine Bass and the transfer of five shares from Suzanne Bass to Michael Bass, the objective being a perceived capital gains advantage.

37. As set out in paragraph [40] of the Judgment, relations between the Company's Board members had become strained by late 2010, leading to factions forming on the Board. The Judge explained at paragraph [40] that:

> "Mr Dixon had become concerned about Mr Mingay and Mr Bass's day to day stewardship of the Company and believed that they were an impediment to growth in shareholder value. For their part, Mr Bass and Mr Mingay believed that Mr Dixon was orchestrating a takeover of the entire Company and that he was trying to remove them and to use their own appointment as consultants to remove assets from the Company. As well as being a director, Mr Bass was, through his company Moranedd Limited providing accountancy services to the Company. There may be some truth in all of the concerns. An external market

> review of staffing had concluded that there might be savings if the Seedbed Centre manager and assistant manager duties were combined. The email dated 8 October 2010 confirms that Mr Dixon and Mr Wells were indeed contemplating the removal of Mr Bass and Mr Mingay and one of the matters they put before the board meeting held much later on 10 October 2011 was a proposed consultancy agreement appointing Mr Wells and Mr Dixon as consultants in consideration of a monthly fee of £4,000."

38. The Judge found at paragraph [42] of the Judgment that in early 2011 Mr Dixon and Mr Wells had embarked upon a strategy of engineering the purchase of the shareholding of the Bass family and Mr Mingay at asset value, and that part of this strategy was to make their lives as difficult as possible and to intimidate them (including by threatening their removal as directors). The strategy seems to have included taking steps to depress net asset value by re-writing the accounts: in an email dated 27 May 2011 from Mr Dixon to Mr Wells (disclosed only a few days before the commencement of the trial) Mr Dixon noted that as any valuation would be asset based, "*we need to get the value down*", and in setting out steps to acquire shares the method he adumbrated in the same email was *"We require that the accounts be amended to reflect the new valuation"*.

39. The differences within the Board provided the backdrop for the further involvement of the individual who ultimately now controls BHIL, Mr Peter Boam ("Mr Boam"). Mr Boam was already involved in the seedbed centre concept: he had first become involved in the 1980s. Unsurprisingly, given their shared interest in seedbed centres, Mr Boam was known to Mr Bass and Mr Mingay: they had first met in the early 2000s. Mr Boam had never disguised his interest in acquiring all or some of the shares in the Company. In July 2011 Mr Bass emailed Mr Boam, the ultimate controller of the Claimant, to ask if he was still interested in buying into the Seedbed Centre.[3]

40. Mr Boam was indeed interested and indicated this in his response of 25 July 2011. Mr Bass (in an email of the same date) warned him that *"The current situation at Loughton is a little complicated"*, and provided him with management accounts, statutory accounts and a copy of a valuation of the Seedbed Centre. Following further discussions between Mr Boam and Mr Bass and Mr Mingay, on 22 September, Mr Boam offered to purchase all of the shares in the Company for £3.4m. Mr Bass circulated this offer to his fellow directors on 23 September 2011 and implicitly encouraged them to accept the offer: see paragraph [46] of the Judgment. Mr Dixon's response to Mr Bass was to say "If you wish to sell your shares to Mr Boam that is a matter for you" (see paragraph 132(vi) of the Judgment).

41. That offer was discussed at a meeting of the Board on 29 September 2011, but the discussions were inconclusive. The Judge noted that it may not have assisted Mr Boam's cause that on 30 August 2011 he had written to Mrs Deirdre Dixon expressing interest in acquiring her shares and had sent a chasing letter on 6 September 2011; and that there was again no appetite for a sale of the entire company or its property. All this encouraged Mr Boam to focus his attention on acquiring some

[3] The background to Mr Boam's prior interest in the Seedbed Centre is set out in the Judgment at paragraphs [23] to [26].

of the shares in the Company, and in particular, the Bass family shares and those owned by Mr Mingay.

42. On 3 October 2011 Mr Dixon, on behalf of himself and Mr Wells, offered to purchase the 200 shares jointly held by the Bass family and Mr Mingay for £300,000 per block of 100 shares: see paragraph [49].

43. Despite the ostensibly higher Dixon/Wells offer, on 3 October 2011, Mr Bass and Mr Mingay agreed to sell the Bass/Mingay shares (referred to by the Judge and hereafter as the "Sale Shares") for a total of £540,000 to Mr Boam, who retained Mr Fletcher as his solicitor in connection with the deal: see paragraph [50] of the Judgment. Mr Fletcher wrote to Mr Bass and Mr Mingay on 4 October 2011 to ask, *inter alia*, for confirmation that the Sale Shares were not encumbered. Mr Bass and Mr Mingay confirmed that the Sale Shares were not encumbered and that nobody else held legal or beneficial title to them.

44. On 7 October 2011 the Sale Shares were transferred to the Claimant for £540,000 pursuant to a written share purchase agreement ("the SPA"), subject to due formalities. It was common ground that the Claimant was mis-described in the SPA as Blindley Heath Investments Ltd when at that time its name was Blindley Heath Investment Properties Ltd.[4] Its BVI company number and registered office were, however, correctly stated.

45. A Board Meeting of the Company was held on 10 October 2011 ("the October Board Meeting"). All five directors (Mr Bass, Mr Mingay, Mr Dixon, Mr Clarke and Mr Wells) attended. Unbeknown to Mr Dixon, Mr Clarke and Mr Wells, the meeting was surreptitiously recorded by Mr Mingay. The transcript was made available to the Judge (and this Court).

46. Prior to the meeting Mr Boam had sent emails to Mr Dixon, Mr Clarke and Mr Wells informing them that he had recently become a shareholder: see paragraph [58] of the Judgment. During the meeting Mr Bass and Mr Mingay informed the Board of the terms of the SPA and of the sale of the Sale Shares to Mr Boam. During the course of the meeting, and apparently on the footing that he had effectively transferred his shares and should do so, Mr Bass tendered his resignation as a director, which was accepted. Mr Mingay did not tender his resignation because Mr Boam, for the Company, had indicated he wished him to stay on.

47. The Judge expressed herself to be entirely satisfied, with the benefit of having heard the recording and read the transcript, that at the October Board Meeting there was unanimous approval and agreement to the transfer of the Sale Shares subject only to BHIL as purchaser presenting the necessary stock transfer form and share certificates. She considered that this conclusion could be derived from the following (quoting directly from paragraph [146] of the Judgment):

    (1) Mr Bass and Mr Mingay did not simply report that they had sold their shares – Mr Bass asked for a resolution to be passed to transfer the shares;

[4] The Claimant was incorporated in the BVI on 12 July 2010 as Blindley Heath Investment Properties Ltd. Its name was changed to Blindley Heath Investments Ltd (its current name) on 17 September 2013.

(2) Mr Bass and Mr Mingay approved or agreed the transfer by their conduct in asking for the necessary approval of the other members of the Board;

(3) Mr Dixon and Mr Clarke expressly approved or agreed the transfer by stating that they had no objection to it – there is no element of futurity or conditionality to their assent – the futurity relates only to the need for the purchaser to present the necessary paperwork;

(4) Mr Wells said nothing but, in context, his silence is only consistent with his concurrence and agreement in what was being said by Mr Dixon and Mr Clarke and what was being done by Mr Bass and Mr Mingay – if he had an objection, it would have been obvious to any objective bystander that this was the time to raise it and that his failure to do so was consistent only with assent;

(5) The entire mood of this part of the discussion reflects that it was regarded as a done deal.

48. On or around 24 or 25 October 2011, Mr Dixon made (in the Judge's words) "what is, for his and the Company's case, an important discovery". According to Mr Dixon, it was at this juncture that he found the February Shareholders' Letter and versions of the November Shareholders' Letter whilst going through some papers which belonged to Mr Mark Dixon: see paragraph [64] of the Judgment.

49. The re-discovery of the pre-emption provisions in those letters offered Mr Dixon the means of blocking the transfer to Mr Boam. He set about attempting to use these letters (and the rights of pre-emption contained therein) to block the registration of the transfer of the Sale Shares.

50. The way that he chose to advise Mr Boam of the development was a matter of some concern to the Judge. On the day after the "re-discovery" he sent to Mrs Deirdre Dixon by email the first draft of a fax for her to send to Mr Boam. As originally drafted, the proposed fax contained the following statements (ostensibly by Mrs Deirdre Dixon):

> "*Please accept my apologies for not replying to your earlier letters about my shares but my mother is seriously ill and I have not felt able to deal with business matters of late.*
>
> *In addition to my personal issues I wanted to check to see if I was in fact free to sell you my shares and in order to clarify the situation it was necessary to look through lots of my husband's old papers and as you can well imagine no one was too keen to undertake that exercise.*
>
> *Anyway to cut a long story short his papers contained an agreement which dealt with the sale and transfer of shares and even then when I found them I had to get a barrister to let me know what my position was and so on and so on.*

> *Anyway the good news is that although people like Peter and Annette Bass and David Mingay are obliged to offer their shares pro rata to the other shareholders the agreement does not apparently bind me because I didn't sign anything when the shares were transferred to me.*
>
> *That was probably because the transfer of the shares to spouses like me is permitted and I was not asked to sign anything which my barrister says was very silly of the other shareholders as I can now sell my shares to anyone I want…*"

51. Then in an email to Mrs Deirdre Dixon the following day he suggested various amendments; but the statement as to the finder of the letters remained unchanged.

52. In the event, Mr Dixon thought better of this stratagem and the fax was never sent; but the fact remains, as the Judge recorded, that what he had drafted for Mrs Deirdre Dixon to send was

> "simply untrue…It is a matter of concern to me that Mr Dixon, a solicitor, was prepared to draft lies on behalf of Deirdre."

53. The episode is also relevant to a dispute of some importance as to whether the Judge accepted Mr Dixon's version that he had forgotten all about the letters and the pre-emption rights they contained, and that it was only upon their re-discovery in his brother's papers that his memory was reawakened. The Claimant does not accept that version.

54. The difficulty is that at paragraph [114] of the Judgment the Judge said this:

> "…Mr Dixon was not seriously challenged on his evidence that, by 2009, he had forgotten about the 2001 Shareholder's Letters and the evidence of Mr Clarke, Mr Wells, Mr Bass and Mr Mingay was that they had all forgotten about them too."

55. That, at least read alone, appears to indicate that the Judge did accept that Mr Dixon had indeed forgotten all about the pre-emption provisions until his re-discovery of the letters. However, the Claimant contends that "that would be to give far too much credit" to Mr Dixon. On its behalf Mr Hollington QC drew attention to preceding paragraphs in the Judgment suggesting that the weight of the evidence was to the contrary, and especially:

(1) paragraph [100], where the Judge commented of Mr Dixon that

> "he has, even on his own case, somewhat opportunistically changed his position. His case since the third week in October 2011 [when he claimed to have discovered the November Shareholders Letters amongst Mark Dixon's papers] that he believes that binding pre-emption agreements exist is plainly at odds with an email exchange between him and Mark Dixon on 12 December 2006 and his email to Mr Thomas dated 30 April 2009 (which I deal

> with more fully below…) but he did not explain convincingly why that was the case";

(2) her ultimate conclusion on Mr Dixon's credibility (in paragraph [100]) that she could not safely rely upon his evidence at all unless corroborated, based partly on the fact that he arranged for Mrs Deirdre Dixon to claim that it was she who had found the documents.

56. Mr Hollington submitted that paragraph [114] of the Judgment should be read in context and in a way to give it consistency with the preceding facts and conclusions. He proposed as the resolution of any inconsistency that even if Mr Dixon was lucky enough "to re-discover" the physical copies of the November Shareholders' Letters in late October 2011 as he claimed, that was because it was only then that it was in his interests diligently to look for them. Until then, and whilst those pre-emption rights would block his plans to take over the Company, it was in his interests <u>not</u> diligently to look for them.

57. That way of putting the matter is supported by Mr Dixon's claim in his witness statement to have had in mid-2010 a *"vestigial recollection"* of pre-emption rights. It also seems to us to be supported by a later email from Mr Dixon to Mr Bass and Mr Mingay dated 27 October 2011, copied to Mr Boam, and quoted in paragraph [73] of the Judgment. The following extract is telling:

> "…you allegedly sell your shares without first offering them to the rest of us as per the November 01 shareholders agreement which piggy-backed the investor loans.
>
> As both of you are aware I have always assumed Boam is a pal who you used to wind us up with…[but]…I really am beginning to think that you have found someone egotistically bored, rich or blindly ambitious enough to buy a stake in a non divi company who would be dim enough to think that my brother and I would put money into a company without a basic shareholders agreement like the one we have…"

58. Whatever the dispute as to Mr Dixon's version as to how he came to "re-discover" the pre-emption provisions, the Judge was clear as to Mr Dixon's "underlying strategy" as revealed by his email sent on 27 October 2011 to Mr Clarke and Mr Wells:

> "*I think it essential that there are no telephone conversations of any nature with either David or Peter both of whom may well try to make contact once the existence of the shareholder agreements is known.*
>
> *So please DO NOT make take or return calls under any circumstances.*
>
> *At the appropriate time and when the significance has sunk in I will write to suggest negotiations but their initial (hopeful on their part) reaction could be that they hope/believe the agreement to be of no effect or waived etc etc and human*

> *nature being what it is it will take some time and probably legal advice of their own before the matter settles down in their minds.*"

59. After increasingly combative correspondence between Mr Dixon and Mr Boam, after Mr Dixon had asserted rights of pre-emption and objected to any transfer in breach of them, on 3 November 2011 Mr Fletcher sent to the Company duly stamped stock transfer forms, together with the corresponding share certificates in respect of the Sale Shares, and asked that those certificates be cancelled and a new one issued in the name of the Claimant. The transfer forms set out the name of the person to whom the shares were to be transferred as "Blindley Heath Investments Ltd" with a BVI address (but no company registration number). As set out above, at this time the Claimant was called Blindley Heath Investment Properties Ltd. The transfers were not, however, registered.

60. The next Board Meeting took place on 22 November 2011 ("the November Board Meeting"). It was chaired by Mr Clarke and the remaining directors (Mr Dixon, Mr Wells and Mr Mingay) were all present. The Board declined to register the transfer of the Sale Shares and on 23 November 2011 Mr Dixon returned the stock transfer forms to Mr Fletcher.

61. On 2 December 2011 Mr Dixon emailed Mr Fletcher advising him of the Board's decision and, avowedly on the instructions of the Chair (Mr Clarke), setting out the matters that the majority of the Board had taken into account, as follows:

> "(1) The proposed transfer would have been in contravention of an agreement not to do so;
>
> (2) The absence of and refusal to supply beneficial owner information – notwithstanding a request and the obvious problems this would cause to the company
>
> (3) The fact that a Mr Boam had claimed to have acquired the same shares in respect of which registration was sought
>
> (4) The fact that Mr Boam by reason of his business interests and his apparent willingness to be complicit in and or induce a breach of the agreement which governed aspects of the relationship between the members of the company is considered to be unwelcome and contrary to the interests of the company and its members
>
> (5) That Mr Boam had failed to disclose any interest in the proposed transferee
>
> (6) That the proposed transferee's particulars differed from those given when Messrs Bass and Mingay reported that they had sold their shares."

62. In the meantime, on 23 November 2011, Mr Boam had met with Mr Bass and Mr Mingay. They had agreed that neither side wished to rescind their agreement, but on the contrary wanted to continue with efforts to register the transfers of the Sale Shares. Earlier that day, Mr Bass had sent an email to Mr Fletcher, copied to Mr Mingay, in which he had said:

> "I believe these "shareholders agreements" were held by Mark Dixon and just recently dug up by Chris Dixon. At no time were they ever bought (sic) together as a complete package."

63. Accordingly, by the end of 2011, the dispute as to the validity or otherwise of the decision of the Board of Directors at the November Board Meeting to refuse to register the transfer of the Share Sales, was crystallised. Although Mr Mingay remained a director of the Company until he resigned on 9 August 2013, he took no active part in its management after November 2011.

Form of the proceedings and relief sought

64. By its original Claim Form and Particulars of Claim dated 28 March 2012, the Claimant/BHIL sought relief only against the first to seventh Defendants. On 23 January 2013, Mr Dixon, Mr Clarke, Mr Wells and the Company were also joined as parties.

65. As at the commencement of the trial, the principal relief claimed by the Claimant/BHIL was:

    (1) as against the first to seventh Defendants, damages for deceit and/or breach of the terms and warranties in the SPA, alternatively rescission of the SPA;

    (2) as against Mr Dixon, Mr Clarke and Mr Wells, a declaration that as at 7 October 2011 there was no binding, valid or enforceable pre-emption agreement affecting or restricting the transfer of the Sale Shares;

    (3) as against the Company, an order pursuant to section 125 of the Companies Act 2006 ("the CA 2006") that the register of members of the Company may be rectified by striking out the names of the sellers of the Sale Shares and substituting the name of the Claimant/BHIL, and alternatively damages and/or statutory compensation;

    (4) in the case of all Defendants: costs.

66. Throughout, Mr Clarke and Mr Wells have been formally neutral in the sense of neither supporting nor opposing the declaratory relief sought. They did not file pleadings; but they did provide witness statements broadly supportive of Mr Dixon's position.

67. Shortly prior to conclusion of the evidence the Claimant withdrew its claim in deceit against the first seven Defendants.

The Judge's decisions

68. The Judge held that:

(1) Contrary to Mr Bass's and Mr Mingay's case, the November Shareholders' Letters were intended to be and were binding as between their signatory members and conferred "pre-emption rights" on each signatory (although the Judge noted at paragraph [105] of the Judgment that "the rights contended for are more in the nature of a prohibition against transfer").

(2) Contrary to BHIL's contentions, none of the actions of the parties could be said to reveal an intention to abandon the agreement contained in the November Shareholders' Letters.

(3) However, Mr Dixon, Mr Wells and Mr Clarke should be treated as estopped from enforcing the rights contended for (a) because the relevant parties shared a common assumption that there were no valid rights of pre-emption and had conducted themselves on that basis, thus giving rise to an estoppel by convention, and (b) because in circumstances where Mr Dixon, Mr Wells, Mr Clarke, Ms White and Mrs Deirdre Dixon acquired benefits under the respective earlier dealings in 2009 and 2010 at the expense of Mr Bass and Mr Mingay, it was unconscionable and inequitable for them to seek to rely, after their re-discovery in October 2011, on the pre-emption rights as a ground for refusing registration.

(4) Had it been necessary, she would have concluded that Mr Dixon, Mr Clarke and Mr Wells did not exercise their powers properly or in good faith at the November Board Meeting, and accordingly their decision to refuse registration was invalid and of no effect.

(5) The misrepresentation and breach of warranty claims must fail: if no pre-emption rights were enforceable, no misrepresentation or breach of warranty could lie; and even if the rights were enforceable, the Claimant could not establish recoverable loss "because it has the beneficial title to the shares and has not demonstrated that it has suffered any loss as a result of its failure to acquire legal title".

Grounds of Appeal

69. The grounds of appeal are limited (leaving aside issues as to costs) to the Judge's decisions

(1) on estoppel;

(2) as to the effect of the October Board Meeting;

(3) as to the validity of the decision at the November Board Meeting not to register the transfers of the Sale Shares; and

(4) as to the effect of the mis-description of BHIL prior to its formal change of name on 17 September 2013.

70. It is the Appellant's case on appeal that:

(1) As to estoppel:

(a) the Judge erred in holding that there was clear evidence to support a common assumption that there were no valid rights of pre-emption sufficient to support the application of an estoppel by convention;

(b) the Judge erred as a matter of law in failing to hold that an essential assumption of estoppel by convention not to exercise rights in the future could not be made when no one was aware of the relevant rights; and

(c) the Judge misdirected herself insofar as she held that Mr Dixon, Mr Wells, Mr Clarke, Ms White and Mrs Deirdre Dixon were estopped from seeking to rely on their pre-emption rights merely because it was unconscionable and inequitable for them to seek to do so, without more; the Judge should have found on the evidence and/or on the facts as she found them and as matter of law that Mr Dixon, Mr Wells and Mr Clarke were not estopped from asserting their rights, whether by convention or otherwise, and should have dismissed the application for a declaration that as at 7 October 2011 there was no binding, valid or enforceable pre-emption rights affecting or restricting the transfer of the Sale Shares.

(2) As to the effect of the October Board Meeting:

(d) the Judge was wrong in concluding that there was unanimous concurrence and agreement to the transfer to the Claimant at that meeting, and that such transfer was regarded as a "done deal"; and

(e) the Judge erred in failing to hold on the evidence that there was no assent or agreement, formal, informal or otherwise, to register the Claimant as a member of the Company at such meeting, and that if there was any "done deal" it was that there would be a resolution at some point but not at that meeting.

(3) As to the November Board Meeting:

(f) the Judge erred both in law and on the facts in finding that it was not open to the Board to change its mind and decline to register the transfer to the Claimant; and that is so even if the Board had unanimously approved and agreed to register such transfer at the October meeting; and

(g) it was not open to the Judge on the pleadings, nor was there any or any sufficient evidence to find that Mr Dixon, Mr Wells and Mr Clarke did not exercise their powers as directors at the November Board Meeting properly or in good faith.

(4) As to the mis-description of the transferee:

(h) the Judge was wrong in law and fact to treat the mis-description as merely a misnomer; the stated transferee simply did not exist; and

(i) the Judge was wrong in failing to hold that the stock transfer forms accordingly had no effect.

71. We turn to deal with each ground in turn.

Estoppel by convention

72. Estoppel by convention is a form of estoppel that was originally developed by the common law courts (see *Legione v Hately* (1983) 152 CLR 406 at 430) largely in the context of binding parties to agreed recitals in deeds (a paradigm example of "estoppel *in pais*"). Traditionally it was conceived as a rule of evidence that precluded the party estopped from leading evidence to rebut the recital or assumption. However, and especially since the decision of this court in *Amalgamated Investment & Property Co Ltd (in Liquidation) v Texas Commerce International Bank Ltd* [1982] 1 QB 84, its principles have largely been explained in equitable terms and expanded as another variant of equitable estoppel.

73. Estoppel by convention is not founded on a unilateral representation, but rather on mutually manifest conduct by the parties based on a common, but mistaken, assumption of law or fact: its basis is consensual. Its effect is to bind the parties to their shared, even though mistaken, understanding or assumption of the law or facts on which their rights are to be determined (as in the case of estoppel by representation) rather than to provide a cause of action (as in the case of promissory estoppel and proprietary estoppel); and see *Snell's Equity* 33rd ed at 12-012. If and when the common assumption is revealed to be mistaken the parties may nevertheless be estopped from departing from it for the purposes of regulating their rights *inter se* for so long as it would be unconscionable for the party seeking to repudiate the assumption to be permitted to do so (and see, for example, *The "Vistafjord"* [1988] 2 Lloyds Rep 343 at 353 in the judgment of Bingham LJ, as he then was).

74. The Judge began the relevant part of her Judgment by setting out the passage from *Chitty on Contracts* (31st ed.) para 3-107 where the editors state that estoppel by convention arises when the parties have acted on an assumption:

> "the assumption being either shared by both or made by one and acquiesced in by the other. The parties are then precluded from denying the truth of that assumption, if it would be unjust or unconscionable to allow them (or one of them) to go back on it. Such an estoppel differs from estoppel by representation and from promissory estoppel in that it does not depend on any representation or promise. It can arise by virtue of a common assumption which was not induced by the party alleged to be estopped but which was based on a mistake spontaneously made by the party relying on it and acquiesced in by the other party."

75. The Judge reminded herself that the parties must have conducted themselves on the basis of the shared assumption and that the shared assumption must have been communicated between them. It is not sufficient for one or (even) both parties to have acted on the assumption if there is no communication of that assumption, but she pointed out, on the authority of *The Vistafjord* [*supra* at 533], that the necessary

communication may be effected by the conduct of one party which is known to the other, provided that such conduct is

> "very clear conduct crossing the line … of which the other party was fully cognisant."

She might well have added that such communication could, *a fortiori*, be effected when both parties conduct themselves towards each other on the basis of the assumption. She further reminded herself that the estoppel could only operate if it was unconscionable for one or other party to seek to rely on the true position contrary to the parties' assumption.

76. The Judge then proceeded to hold that there was indeed clear evidence to support an assumption, common to both parties, that there were no valid rights of pre-emption in relation to the shares; and in paragraph [132] of the Judgment she instanced seven instances of such assumption being communicated by the conduct of the parties. Some of the instances she identified may for technical reasons be unpersuasive: in particular, dealings by transmission and a declaration or assignment of beneficial interests almost certainly fell outside the restrictions intended under the November Letter (see *Safeguard Industrial Investments Ltd v National Westminster Bank Ltd* [1982] 1 WLR 589). However, no such reservations apply to other obvious instances of the assumption and of its communication across the line that she identified, including the May/June 2010 Agreement, the Clarke Agreement of 21 June 2010 and particularly the Board Meetings of (1) 20 July 2010 approving the transfer of shares from Mr Clarke and Ms White to MSK 050 and of (2) 12 August 2010 approving further transfers of shares. There was also Mr Bass's offer to which Mr Dixon had responded that it was "a matter for you", followed by the Board Meeting of 29 September where the matter was discussed without any reference to the existence of any pre-emption rights.

77. The Judge then held further that in circumstances in which Mr Dixon, Mr Wells, Mr Clarke, Ms White and Mrs Deirdre Dixon had acquired benefits by the transfers of 2009 and 2010 at the expense of Mr Bass and Mr Mingay, it was unconscionable for Mr Dixon to rely on the pre-emption rights in the November 2001 letter as a ground for refusing to register the transfer of shares to BHIL.

78. Mr Weatherill QC for the Appellants attacked this conclusion on two substantial grounds. First, he submitted that the doctrine of estoppel by convention could not apply when both parties had simply forgotten that rights existed; that was entirely different from an assumption adopted by the parties that such rights did not exist. Secondly he submitted that the assumption was not sufficiently clear and unequivocal since the transfers could be explained on the basis that Mr Bass and his family interests did not object to them on a "one-off" basis and/or for reasons unassociated with any assumption.

Forgetfulness

79. It may be that most cases of estoppel by convention arise from a mistake made by the parties or a mistake made by one party and acquiesced in by the other. But the authorities do not suggest that the principle is confined to cases of mistake. Moreover, a mistaken recollection is not, to our minds, legally different from a state of

forgetfulness. The essence of the principle is that the parties have conducted themselves on a conventional basis which is, wittingly or unwittingly, different from the true basis. Whether the true state of things has been misappreciated, misremembered or forgotten should make no difference to whether the parties have in the event mutually adopted a common assumption.

80. As to the requirements for establishing an estoppel by convention, the origins of the modern (and developing) principles (which are self-evidently a matter of good faith and fair dealing) are to be found in the Australian case of *Grundt v Great Boulder Pty. Gold Mines Ltd* (1937) 59 C.L.R. 641 in which both Latham CJ (at 657) and Dixon J (at 676) cited the earlier dictum of Dixon J in *Thompson v Palmer* (1933) 49 C.L.R. at page 547, which set out a number of grounds on which the law permits a party to rely on an estoppel. Before specifying estoppels which arise when there is a duty to speak or a duty of care or a representation has been made, Dixon J said this:

> "The object of estoppel in pais is to prevent an unjust departure by one person from an assumption by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other's detriment. Whether a departure by a party from the assumption should be considered unjust and inadmissible depends on the part taken by him in occasioning its adoption by the other party. He may be required to abide by the assumption because it formed the conventional basis upon which the parties entered into contractual or other mutual relations, such as bailment; or because he has exercised against the other party rights which would exist only if the assumption were correct…"

81. This dictum was then built on in *Grundt*, where the claimants (who were persons entitled to work a mine under a mining lease and were referred to as "tributers") had continued to mine gold after the question had been raised as to whether they were mining outside the ground covered by their tribute agreement. The defendant company had nevertheless, for some time thereafter, acted in such a way as to show that it was content to regulate the relations between itself and the tributers on the basis that the agreement applied to all the gold produced from what was called "the western swing". The High Court did not consider it necessary to decide whether such conventional basis arose from a mistake or forgetfulness or any other reason; it was sufficient that the conventional basis existed and was acted upon by both parties.

82. So far as the modern development in England of the doctrine of estoppel by convention is concerned, the usual starting point is *Amalgamated Investment & Property Co Ltd (in Liquidation) v Texas Commerce International Bank Ltd* [1982] 1 QB 84, although it may be worth noting that Lord Denning MR utilised the doctrine principally as a means of enabling account to be taken of the subsequent conduct of parties to a contract where its interpretation was in issue (see especially at 119G to 120C).

83. In that case the Texas bank had made a first loan to the claimant and a second loan to A.N.P.P., a Bahamian subsidiary of the claimant, secured (*inter alia*) by a guarantee from the claimant to pay "all monies owing [to the Texan bank] by A.N.P.P.". In fact the loan made by the Texas bank was made to its own subsidiary, Portsoken Bank,

who had then itself made the loan to A.N.P.P. In strict terms therefore there was no money "owing to the Texas bank by AN.P.P." since it was owed by A.N.P.P. to the Texas bank's subsidiary Portsoken. This Court held that, if one construed the guarantee in its proper setting and against the contemporary correspondence, it was clear that the claimants had agreed to discharge any indebtedness of A.N.P.P. to Portsoken; but the Court also held that the parties had acted on the agreed (but wrong) assumption that the claimant was liable to the Texas bank for the Portsoken loan; the claimant was therefore estopped by convention from denying that it was bound to discharge the indebtedness of A.N.P.P. to Portsoken.

84. Any mistake which gave rise to the relevant assumption appeared to have been the mistake of the Texas bank in drawing up the guarantee; no doubt the originator of the document could be said to have "forgotten" that the loan was made by Portsoken. But that did not mean that the principle of estoppel by convention did not apply. As Lord Denning MR put it before referring to *Grundt* (page 121C):

> "If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it –on the faith of which each of them – to the knowledge of the other – acts and conducts their mutual affairs – they are bound by that interpretation just as much as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not – or whether they were mistaken or not – or whether they had in mind the original terms or not. Suffice it that they have, by the course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it."

Both Eveleigh and Brandon LJJ based their judgments on a passage at page 157 of the third edition of Spencer Bower and Turner's Estoppel by Representation but we do not read either that passage or their judgments as differing in this respect from the Master of the Rolls, let alone as saying that the principle is not available in case of forgetfulness but only in cases of mistake.

85. Mr Hollington for BHIL submitted that it was, in any event, wrong to characterise the assumption as being that there were no valid rights of pre-emption and then further to characterise the case as being a case where the parties forgot that such rights existed. He said that the correct characterisation of the assumption was that there were no restrictions on the sale of the company's shares and forgetfulness was irrelevant.

86. In this respect he submitted that this case was similar to the conjoined cases of *Taylors Fashion v Liverpool Victoria Trustees Co Ltd* and *Old & Campbell Ltd v Liverpool Victoria Friendly Society* [1982] QB 133, in which in each case a landlord had granted options to renew leases when neither it nor the tenant had appreciated that the options had to be registered as land charges in order to be valid. In the second case Oliver J nevertheless ordered specific performance of a renewal option in a 1963 lease on the basis that both parties had operated on the assumption that the options, granted by the landlord, were valid. Specific performance was only refused in the first of the conjoined cases because on its particular facts (see page 155F) Oliver J could

> "find nothing in the defendants' conduct which can properly be said to have encouraged Taylors to believe in the validity of the option to any greater extent than they had previously been told by their legal advisers."

87. We do not think that this appeal can be determined by the precise characterisation of the assumption, but Mr Hollington's submission does show that ignorance of the legal position can operate as a valid assumption of what the legal position is. If ignorance is enough, forgetfulness must be enough also, if the requirements of both (a) conduct "crossing the line" and (b) unconscionability are also met, as the Judge held that they were (see below).

88. However, the different results in the conjoined cases referred to above exemplify the necessity, if an estoppel by convention is to be established, of demonstrating conduct "crossing the line" and unambiguously giving rise to a clear assumption of fact or law on the faith of which both parties unequivocally proceed.

89. We consider that the real difficulty confronting a party seeking to establish an estoppel on the basis of an assumption contrary to, and in circumstances where the parties have forgotten, the true state of things is not a legal one but an evidential one: it is the problem of showing that something other than forgetfulness played a part in the adoption of the assumption, and that the person sought to be estopped assumed some responsibility for it.

90. Again, Dixon J's judgment in *Grundt* explains the position (and the evidential burden) clearly (see page 675):

> "The justice of an estoppel is not established by the fact in itself that a state of affairs has been assumed as the basis of action or inaction and that a departure from the assumption would turn the action or inaction into a detrimental change of position. It depends also on the manner in which the assumption has been occasioned or induced. Before anyone can be estopped, he must have played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it."

91. Briggs J (as he then was) elaborated on this in *HMRC v Benchdollar Limited and Others* [2009] EWHC 1310 (Ch) when summarising the principles he considered to be applicable to the assertion of an estoppel by convention arising out of non-contractual dealings, which he derived largely from another decision of this Court, namely *Keen v Holland* [1984] 1 WLR 251. His summary was as follows:

> "(i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them.
>
> (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the

other party an understanding that he expected the other party to rely on it.

(iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.

(iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.

(v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."

92. As to (i) above, we do not think there must be expression of accord: agreement to the assumption (rather than merely a coincidence of view, with both proceeding independently on the same false assumption) may be inferred from conduct, or even silence (see *per* Staughton LJ in *"The Indian Grace"* [1996] 2 Lloyds Rep 12 at 20). However, something must be shown to have "crossed the line" sufficient to manifest an assent to the assumption.

93. The question whether the parties manifested assent to the assumption by something said or some conduct which clearly crossed the line is largely a question of fact. The Judge was convinced that such assent was indeed manifested and we see no reason to depart from that conclusion. Indeed, what in the Judgment is described as the "heated discussion" at the Board Meeting of 20 July 2010 about the transfer of shares to MSK 050 which gave effective control of the company to the Dixon interest to the prejudice of the Bass interest, in the course of which Mr Bass sought to raise a number of arguments against approval of the transfer but never raised any question of pre-emption rights, is not explicable except on the basis that all present made manifest their assumption, or at least (in the case of Mr Dixon) were prepared to proceed on the footing, that there was no impediment on which Mr Bass could rely to object to that transfer.

94. Although the Judge was apparently not referred to, and did not separately address, the requirement that the party alleged to be estopped may properly be said to have "assumed some element of responsibility" for the assumption, we consider that in the particular circumstances all parties shared responsibility. In a case of share transfer of a small private company there is every reason for the parties to be thinking of terms of company control and an assumption that there is no way of stopping any change in that control was an assumption that operated on the parties' minds throughout, and was relied on in connection with their subsequent mutual dealings.

95. That feature (of there being every reason for the parties to raise any restriction on changes of control) is also relevant in the context of two cases on which Mr Weatherill placed particular reliance. In his oral argument Mr Weatherill relied on *Bridgestart Properties Limited v London Underground Limited* [2004] EWCA Civ 793 (not cited to the Judge) in which this Court held that the relevant assumption was

not in the parties' minds at all and could not, therefore, operate as an estoppel. That is a different case because there was in that case no reason for the parties to have addressed their minds to the assumption in the first place. In *Bridgestart* there was, moreover, no evidence that such assumption as there was had crossed the line between the parties. In this respect this case is also different from *HIH Casualty & General Insurance Ltd v AXA Corporate Solutions* [2002] EWCA Civ 1253, in which neither side had ever become aware that the insurers had acquired a right to be discharged from liability. There was therefore no operative assumption that they had not been so discharged.

Insufficient clarity of assumption?

96. We consider that the same considerations address and dispose of Mr Weatherill's argument that any assumption was not sufficiently clear and unequivocal since the transfers could be explained on the basis that Mr Bass and his family interests did not object to them on a "one-off" basis and/or for reasons unassociated with any assumption.

97. Again the question is one of fact: what assumption is evident from the mutually manifest conduct of the parties? In this regard, Mr Weatherill sought to depict every aspect of the conduct of the parties relied on by the Judge, if not wholly explained by forgetfulness, then as signifying (or at least being consistent with) acquiescence only in each particular transfer of shares, rather than any unambiguous and unequivocal assumption that there were no pre-emption rights at all.

98. We have already alluded to the seven instances of dealings with shares relied on by the Judge in paragraph [131] of the Judgment as demonstrating such an assumption. Whilst accepting that not all the instances are individually persuasive, it seems to us that the Judge's conclusion that (a) this was not a case of mere silence, inactivity or failure to take the point (unlike the *HIH Casualty* decision) and that (b) between 2004 and 2011 the parties conducted themselves on the basis of a positive assumption that no valid rights of pre-emption existed, was amply justified.

99. It follows that we do not accept Mr Weatherill's submissions on the issue of estoppel by convention.

100. That leaves the question as to whether, in circumstances where Mr Dixon, Mr Wells, and Mr Clarke, (and also Ms White and Mrs Deirdre Dixon) acquired benefits under the respective dealings in 2009 and 2010 at the expense of Mr Bass and Mr Mingay, it was unconscionable and inequitable for them to seek to rely, after their re-discovery in October 2011, on the pre-emption rights in the November Shareholders' Letter as a ground for refusing to register the transfer of shares to the Claimant.

101. The Judge concluded that it was. We see no reason to disturb that conclusion. Indeed, it seems to us that having benefited from the assumption in pursuing their plan to take control of the Company, it would plainly be unconscionable and inequitable to allow them to go back on it in the context of the transfer to BHIL, especially since the agreement to sell and transfer was reached prior to the re-discovery, even if legal transfer was not completed. Both benefit and detriment are clear; and although an estoppel will only apply "for the period of time and to the extent required by the equity which the estoppel has raised" (*per* Ralph Gibson LJ in *Troop v Gibson* (1986)

277 Estates Gazette 1134, as quoted by Bingham LJ in *"The Vistafjord"* at page 352), it will seldom if ever be fair to allow a party who has benefited from the assumption to repudiate it in order to prevent the other party obtaining a like benefit (and see again *"The Vistafjord"* at page 353).

102. We need only add for completeness that we do not think that Mr Weatherill was right to suggest that the Judge may have proceeded on the basis that an estoppel arises simply on the grounds that reliance on certain rights would be unconscionable and inequitable, without otherwise satisfying the criteria for any recognised form of estoppel. In our view, the Judge followed an orthodox approach; and her conclusion that the criteria for estoppel by convention were satisfied in this case cannot, in our judgment, be faulted.

Effect of the October and November Board Meetings

103. The Judge also found (see paragraph [146] of the Judgment) that on the proper construction of the exchanges between those present at the October Board Meeting on 10 October 2011 there was unanimous approval and agreement to the transfer of the Sale Shares pursuant to the SPA, subject only to BHIL as purchaser presenting the necessary stock transfer forms and share certificates. In paragraph [164] of the Judgment she then held that in light of that conclusion it was not open to the Board to change its mind and to decline to register the transfers at the November Board Meeting. On that basis, BHIL was entitled to succeed even if, contrary to her conclusions on estoppel which we have upheld, rights of pre-emption continued to be binding and enforceable by the time of the SPA. Since our conclusion on the issue of estoppel is sufficient to determine the appeal, we shall deal with these points relatively shortly.

The October Board Meeting

104. It was common ground that at the October Board Meeting there was no formal proposal or vote. As explained by the Judge in paragraph [143] of the Judgment, the competing contentions of the parties were (a) BHIL and the first to seventh Defendants' case that there was unanimous approval and agreement, albeit informally against (b) the case of Mr Dixon and the Company (supported by the evidence of Mr Wells and Mr Clarke) that there was no Board approval or agreement to register the transfer of the shares, only an acknowledgment that as and when the purchaser produced the share transfers, what was described at the meeting as the "usual resolution to transfer the shares" would be passed.

105. The Judge records that she took the opportunity of listening to a recording of the Board Meeting a number of times, and she set out in her Judgment a transcription of the relevant parts. We see no reason to depart from her conclusion that there was unanimous approval and agreement to the transfers, subject only to presentation in due course of the stock transfers and share certificates.

106. Furthermore, although it is common to state that transfers have to be passed by the directors, that is simplistic. The Company's Articles of Association provide (in a form usual for private companies) that the "Directors may in their absolute discretion and without assigning any reason therefore decline to register the transfer of a Share whether or not it is a fully paid share", but do not expressly or by necessary

implication make the passing of a transfer a condition precedent to its registration. Indeed, as noted in *Gower and Davies, 'Principles of Modern Company Law'* 8th ed. at page 944, in light of section 771 of the Companies Act 2006 "it is doubtful if the articles could lawfully make the directors' approval a condition precedent". The true position is that the transferee is entitled to be registered unless within a reasonable time (which is prescribed by section 771(1) of the Companies Act 2006 to be a period of not more than two months after lodging of the transfers) the directors resolve as a board to reject. If the board resolves not to reject, or, if the board does nothing, after the expiry of a "reasonable time", the transferee is entitled to registration (and see *In re Zinotty Properties Ltd* [1984] 1 WLR 1249 at 1260-1261).

107. It seems to us to follow that the Appellants' case that there was no formal agreement or resolution to approve the transfers is beside the point: the point is that there was a decision not to reject, and thereafter the transferee was upon presentation of stock transfers and share certificates entitled to require registration.

108. In such circumstances, we do not consider it necessary to consider BHIL's resort to the *Duomatic* principle as an alternative basis for treating the October Board Meeting as binding on the Company. Shortly stated, the *Duomatic* principle, which is sometimes known as "the unanimous consent principle", is that the court will usually treat a company as bound by the unanimous assent of its members, whether they have met or not, and whether the relevant decision was for the shareholders or the board. (There may be exceptions where the Companies Act requires a specific mode of resolution, such as on a reduction of capital.) As further support for her conclusions as previously described, in paragraph [148] of the Judgment the Judge accepted that "any objective observer of the meeting would have concluded from the expression of assent (in the case of Mr Dixon and Mr Clarke) and the tacit acquiescence of Mr Wells that they were agreeing to the proposed transfer and that such assent and acquiescence was being given in their capacity as shareholders as well as directors." The Judge went on to say that the absence of the more remote family members did not prevent the application of the principle since "it is common ground that their respective family interests were represented at all times by those who were present." That latter point involves an extension to the *Duomatic* principle to include proxy or representative assents about which we have some reservations; but we need not explore the matter further in view of our conclusion that the unanimous decision of the directors not to object to the transfers sufficed.

The November Board Meeting

109. Then the question is whether, having resolved not to reject, it was open to the Board of Directors subsequently, but before actual registration, to change its mind and to decline to register the transfer, as it purported to do at the November Board Meeting. The Judge considered that this was not open to the Board; and she noted that Counsel then instructed for Mr Dixon and the Company "did not seek to persuade me otherwise".

110. We are not persuaded that a board may never change its mind, if that is what the Judge supposed. Indeed, it seems to us that circumstances may arise where it would be duty bound to do so; and such circumstances might include if to do so would defeat pre-emption rights conferred by the Articles of Association, and possibly even (as here) pre-emption rights conferred under a shareholders agreement. However, in light

of our conclusion on the issue of estoppel, we need not finally decide the matter, and would prefer not to do so given that the matter appears to have been conceded below, and was never fully argued at any stage.

111. For the same reason, we prefer not to deal substantively with the Appellants' case that it was not open to the Judge on the pleadings to make any finding as regards the motives of the directors responsible for the decision purportedly made at the November Board Meeting, and that even if it was, the evidence did not sustain her finding that Mr Dixon, Mr Clarke and Mr Wells did not exercise their powers properly or in good faith, but instead with the improper motive or collateral purpose of frustrating the registration of the transfer to BHIL in order to improve the prospects of Mr Dixon and Mr Wells acquiring the Sale Shares.

Did mis-description of the transferee invalidate the stock transfer forms?

112. We turn to the Appellants' contention that the Judge was wrong to conclude that there was no substance in their point that the stock transfer forms had no effect since at the time the stock transfer forms were lodged (4 November 2011) there was no company with the name stated therein (and indeed in the SPA) as the transferee, and that furthermore the Claimant could not therefore have standing to seek rectification of the register as a person aggrieved within the meaning of section 125 of the Companies Act 2006.

113. The unchallenged evidence of Mr Boam and Mr Fletcher was that the identification of the transferee as "Blindley Heath Investments Limited" was indeed a mistake. There is no dispute that at that time there was a company registered in the British Virgin Islands with number 1594808 called Blindley Heath Investments Properties Limited, but none with the name Blindley Heath Investments Limited. Only later, on 17 September 2013, did Blindley Heath Investment Properties Limited change its name to Blindley Heath Investments Limited.

114. The Judge treated this as an obvious misnomer. She considered that any objective bystander would have appreciated that the reference, albeit imperfect, was to the same corporate vehicle, there being no other contender. The Appellants say she was wrong. Depicting the stock transfer forms as non-consensual or unilateral documents, they have contended that the only question is what a reasonable person in the same position as the directors of the Company would have thought was the identity of the transferee at the date on which the stock transfer forms were lodged. They have submitted that the directors would not have appreciated that the reference was wrong, but would have been entitled and bound to reject the transfers as being to a non-existent person.

115. We have not found it easy or even possible to accord any substance to the Appellants' argument. The misnomer was clear; enquiry would have revealed that the company intended to be referred to was indeed the company then called Blindley Heath Investment Properties Ltd, there being no other contenders. We see no reason at all to disagree with the Judge's conclusion that the point has neither merit nor legal substance.

Abandonment

116. In Mr Hollington's skeleton argument for the appeal it was submitted that the Judge ought also to have concluded that, on the facts as found, the parties should be taken to have abandoned their rights of pre-emption.

117. However, at the opening of his address, he acknowledged that if his clients succeeded in upholding the Judgment below on the issue of estoppel by convention they had no need to establish abandonment, and if they failed on estoppel they had no realistic prospect of doing so. Mr Hollington therefore confirmed that he would not pursue the abandonment argument and we need say no more about it.

Summary as to conclusions and disposition of the substantive appeal

118. We therefore dismiss the substantive appeal on the ground that we see no reason to disturb, and indeed agree with, the Judge's conclusion that the parties concerned were estopped by convention from relying on and enforcing the pre-emption rights conferred by the February and November Shareholders' Letters to prevent the transfers provided for by the SPA.

119. We also agree with the Judge that the effect of the discussions at the October Board Meeting was that the Board of Directors resolved not to object to those transfers; and we consider that this entitled the transferees to registration subject only to presentation of stock transfer forms.

120. We would be disposed to think that it would nevertheless have been open to the Board of Directors acting in accordance with their fiduciary duties at the November Meeting to change their minds, given that by then no actual registration and thus no passing of legal title had been effected. But it is unnecessary for us to reach a concluded view on the point, and since the matter was not fully argued we prefer not to do so.

121. We also think it unnecessary to determine whether it was open to the Judge on the pleadings, and whether the evidence was sufficient, to conclude that the decision made at the November Board Meeting was vitiated by improper or collateral purpose.

122. We have been able to discern no merit or substance in the suggestion that the transfers were invalid on the ground of the mis-description of the transferee.

123. We dismiss the appeal. BHIL is entitled to be registered as a member of the Company in right of the Sale Shares.

124. In those circumstances, BHIL's cross-appeal against the dismissal of its claims against the first to seventh Defendants for misrepresentation and breaches under the SPA is redundant.

Cross Appeal and Appeal on Costs

125. That leaves only BHIL's "self-standing" cross appeal on costs. Apart from one aspect to which we make reference below, the other costs appeal falls away since we have dismissed the main appeal. On 24 October 2014 Briggs LJ refused permission on paper on the ground that there was "no real prospect of a successful appeal against the Judge's careful and fully reasoned exercise of discretion in relation to costs, unless the

main appeal or the cross appeal in relation to paras 6 to 8 of the Order succeeds." However, as Briggs LJ subsequently directed (on 21 November 2014) BHIL renewed its application for permission to pursue that part of its cross appeal in this Court. Mr Hollington also sought permission to rely on a second witness statement made by an associate in his instructing solicitors' firm dated 7 November 2014 correcting certain factual suppositions and conclusions in the Judge's Supplemental Judgment which are said to be wrong. It is to these matters that we now turn.

Costs orders sought to be appealed

126. The orders which BHIL seeks permission to appeal are as follows:

(1) Although BHIL does not dispute that it was bound to pay the costs of the first to seventh Defendants, having failed to obtain relief against them (such relief being otiose in light of its success in obtaining rectification of the register), it contends that it should not have been ordered to pay those costs on an indemnity basis.

(2) Further, and more importantly, the eighth to tenth Defendants (Mr Dixon, Mr Clarke and Mr Wells) should have been ordered (in terms of a "Bullock Order") to indemnify BHIL in respect of the costs of the first to seventh Defendants or to pay a substantial part of such costs.

(3) The eighth to tenth Defendants should have been ordered to pay all of BHIL's own costs and not just 60%.

(4) The eighth to tenth Defendants should also have been held liable for the Company's costs and in addition ordered to repay monies it was only belatedly revealed that they had received in respect of their own costs from the Company.

(5) The eighth Defendant should have been required to pay the Claimant's costs in connection with amendments to the eighth Defendant's and the Company's defence and in connection with certain late disclosure on an indemnity basis, rather than merely a standard basis.

(6) The Judge's order that there be no order in respect of costs in connection with certain expert evidence on the law of the BVI was wrong: she should have allowed BHIL to have all or a majority of its costs in connection with such issues.

General approach

127. Appeals in relation to costs are discouraged. An appeal court will be particularly loath to interfere with a decision on costs. As Wilson J (as he then was) said (sitting in the Court of Appeal) in *SCT Finance v Bolton* [2002] EWCA Civ 56:

> "This is an appeal…in relation to costs. As such, it is overcast from start to finish by the heavy burden faced by any appellant in establishing that the judge's decision falls outside the discretion in relation to costs…For reasons of general policy, namely that it is undesirable for further costs to be incurred in

> arguing about costs, this court discourages such appeals by interpreting such discretion widely."

128. In other words, the generous ambit within which a reasonable disagreement is possible is at its most generous in such a context.

129. Nevertheless, Court must be astute to correct plain injustice; and the essence of BHIL's application is that this is indeed what has been occasioned to it by the Judge's orders.

BHIL's "Best Points"

130. At our request, after it became clear that there was insufficient time to deal with the matter within the two days allotted for the appeal, Mr Hollington provided the Court with an adumbration in writing of BHIL's "Best Points" on its costs appeal in the event that the substantive appeal should be dismissed, as it has been.

131. The first point he advanced was that it was "manifestly unjust" that the Judge did not order Mr Dixon to pay the whole or at least a substantial part of the costs that BHIL was ordered to pay the first to seventh Defendants, the effect of which was to exonerate Mr Dixon from any liability for such costs.

132. Mr Hollington particularly emphasised in this regard:

(1) the fact that BHIL purchased the Sale Shares on an express warranty to the (broad) effect that there were no applicable pre-emption provisions;

(2) it was Mr Dixon who, in circumstances of some uncertainty, "re-discovered" the November Letters and the pre-emption provisions they appeared to confer, and it was he (and the Company) who held out against the combined position of the first to seventh Defendants that the pre-emption agreements, if ever agreed, had been waived or abandoned and that Mr Dixon was estopped from relying on them, and in any event that the transfers had been approved at the October Board Meeting;

(3) BHIL itself, as a complete outsider, had no means of knowing which side's version of events was correct, but a strong and understandable commercial interest in perfecting its title: it sued the first to seventh Defendants first because Mr Dixon was a solicitor and therefore apparently a reliable source as to the true position, but was constrained to join him when a successful application for third party disclosure against him undermined his case (and that of his supporters on the Board (Messrs Wells and Clarke);

(4) BHIL's dilemma as to who to believe, and therefore whom to sue, was exacerbated by what Mr Hollington described as "the disgraceful approach to disclosure and underhand and bullying behaviour of Dixon", upon which the Judge made trenchant comments in her main judgment [but] failed to take into account adequately or at all on the issues of costs;

(5) In the event, BHIL's success against Mr Dixon resulted in its loss against the first to seventh Defendants: and this was a classic case for the making of a *Bullock* order;

(6) The Judge did not make such an order because by the time of the judgment on costs she had convinced herself that "the claim against [the first to seventh Defendants] was practically unsustainable" and the "claim for rescission was always bound to fail": but this was wrong, and entirely inconsistent with (a) the fact that the first to seventh Defendants had (as she had herself recorded in paragraph 141 of her main Judgment) conceded that the claim against them succeeded (subject to establishing loss) if Mr Dixon won and (b) BHIL carefully submitted in closing that it would await judgment before electing as to its relief in that event (damages or rescission);

(7) The Judge, in supposing that no loss could be established because none flowed from non-registration, overlooked the fact that the court could have granted damages in lieu of rescission, and also that if BHIL had failed against Mr Dixon and therefore succeeded against the first to seventh Defendants, its claim could have included the costs that it was ordered to pay Mr Dixon.

133. We propose to say very little beyond this: we think there is enough in these points to suggest the possibility that the effective exoneration of Mr Dixon at the expense of BHIL was a serious injustice, and that we should, unusually, give permission to appeal on the point.

134. The second of Mr Hollington's choice of "best points" was that it was also "manifestly unjust" that Mr Dixon was only ordered to pay 60% of BHIL's costs", despite BHIL's success against him.

135. As to this second point, Mr Hollington again relied on

(1) the same error in the Judge's Supplemental Judgment as to the purported unsustainability of the claim against the first to seventh Defendants as infected her approach in relation to the first point;

(2) the Judge's failure to take into account adequately or at all her own trenchant findings against Mr Dixon of underhand and bullying conduct and late disclosure; and in addition Mr Hollington relied on

(3) the manifest unjustness inherent in the Judge's decision (in effect) to penalise BHIL as against Mr Dixon for the failure of the first to seventh Defendants' case that there had never been any agreement as to pre-emption provisions whilst at the same time denying BHIL a *Bullock* order against Mr Dixon: for the effect was to leave "BHIL paying for not only its own but also D1-7's costs (and then on an indemnity basis as well!) for running that defence, for which D1-7 were entirely responsible and whose merits only they could assess."

136. Again we shall be brief; we think that there is enough in these points to suggest the arguable prospect of establishing that the reduction of Mr Dixon's liability at the expense of BHIL was an injustice, and that we should, unusually, give permission to appeal on the point.

137. The third and last of Mr Hollington's "best points" was that the Judge's decision to order indemnity costs as between the first to seventh Defendants and BHIL was also plainly wrong and manifestly unjust.

138. Mr Hollington relied on the following errors:

(1) it was wrong for the Judge to suppose that BHIL had blocked any prospect of mediation because the fact that it had ATE insurance (the terms of which, being privileged until assessment, she could not know) and the prospect of a *Bullock* order (which she in the event refused) insulated it from substantial risk and thus attenuated or removed any incentive to BHIL to settle;

(2) it was wrong for the Judge to consider that mediation in this multi-party case would have been likely to result in settlement, and that BHIL's approach in not facilitating this took the case out of the norm: the parties were far apart, and the Judge's approach once again failed to take into account her own findings as to Mr Dixon's own conduct.

139. We are presently minded to permit the introduction of the evidence which Mr Hollington relies on to correct parts of the Judge's Supplemental Judgment in this regard. Further, we think that this part of the cross appeal is also arguable with a realistic prospect of success. We give permission accordingly.

140. Having (somewhat reluctantly) gone this far, we think we should also give permission to appeal the orders referred to at paragraph 126(4) and (5) above. There is, however, no prospect of this court reversing the order in paragraph 126(6) which was well within the Judge's discretion. We refuse permission to appeal that order.

141. Lastly, we must determine whether in these circumstances to grant Mr Dixon permission to appeal any aspects of the Judge's cost order notwithstanding dismissal of the main appeal. In written submissions following the circulation of this Judgment in draft, Counsel for Mr Dixon has accepted (correctly, in our view) that the only aspect of Mr Dixon's application for permission to appeal against paragraphs 10, 11(i) and 13 of the Judge's Order dated 18 June 2014 which he could pursue in light of this Judgment relates to paragraph 10 of that Order, the effect of which was to make Mr Dixon liable for 60% of BHIL's costs of and incidental to its claims against Mr Dixon, Mr Clarke, Mr Wells and the Company on the standard basis, and to make Mr Wells jointly and severally liable with Mr Dixon for 20% of such costs. Briggs LJ declined to grant Mr Dixon such permission but permitted an oral renewal to be made at the hearing of the appeal. In light of our decision to grant BHIL permission to appeal against the Judge's order limiting Mr Dixon's liability for its costs to 60% (see paragraph 136 above), we consider that we should give Mr Dixon permission to appeal against that part (paragraph 10) of the Judge's Order so as to enable him to argue that (a) the 60% proportion he was required to pay was too high and in any event that (b) Mr Wells' joint and several liability should not be limited to 20%.

142. We direct that the Claimant prepare draft bills of costs showing the financial consequences of the Judge's order and the orders for which the Claimant contends.