# Patrick Giles Gauntlet Dear, Reade Eugene Griffith v Alexander Edward Jackson

Case No: A3/2012/2118

Court of Appeal (Civil Division)

22 February 2013

**[2013] EWCA Civ 89**

**2013 WL 617163**

Before: Lord Justice Laws Lord Justice Lewison and Lord Justice McCombe

Date: 22/02/2013

On Appeal from the High Court Chancery Division

The Hon. Mr Justice Briggs

HC11CO4474

Hearing date: 6th February 2013

## Representation

Robert Miles QC and Camilla Bingham (instructed by Simmons & Simmons LLP ) for the Appellants.
David Chivers QC and Philip Gillyon (instructed by Fladgate LLP ) for the Respondent.

## Judgment

Lord Justice McCombe:

## (A) Introduction

1 This is an appeal, brought with permission granted by Briggs J, from his Order of 25 July 2012, made upon the trial of preliminary issues. At the trial of those issues the Judge declared there to be certain implied terms of an Agreement ("the Agreement") dated 29 September 2008 and made between (amongst others) the appellants ("Messrs Dear and Griffith") and the respondent ("Mr Jackson"). By the Order the Judge also required the parties to the Agreement not to invoke certain provisions of the Articles of Association of a company incorporated in Guernsey and called Tetragon Financial Group Limited ("TFG") to remove Mr Jackson from office as a director of TFG and not to invoke any other power to remove Mr Jackson as such director (with a specified exception), provided that an event specified in clause 5(b) of the Agreement ("a Termination Event") has not occurred.

2 The Order further stated that provided a Termination Event had not occurred and insofar as necessary, Messrs Dear and Griffith were required to take certain further steps, as controlling shareholders of Polygon Credit Holdings II Limited ("PCH II") (the sole voting shareholder of TFG), to absolve themselves from, or to disapply what otherwise might have been a fiduciary duty to concur in Mr Jackson's removal as a director of TFG.

## (B) Background Facts

3 For the purposes of the preliminary issues the Judge had before him an agreed statement of facts. I take the facts from that document and the learned Judge's judgment.

4 The dispute concerns a group of companies called the Polygon Group, established in 2002 by the parties to these proceedings. For present purposes, the relevant holding company within the group is PCH II, which is incorporated in the Cayman Islands. It holds all the voting shares in TFG. The issued shares in PCH II are owned as to 40% by Mr Jackson, 40% by Mr Griffith and 20% by Mr Dear. The issued non-voting shares in TFG are owned by members of the public following a public offering in 2007. Those shares are traded on the Euronext Amsterdam Exchange. TFG, together with an associated company as investment manager, runs a "closed-ended" investment fund regulated under the laws of Guernsey.

5 The Articles of TFG, adopted on 26 April 2007, provide that (in effect, subject to casual vacancy) the majority of its directors should be "Independent Directors", defined as being persons who are determined by the directors to satisfy in all material respects the standards for an "independent" director set out in the UK Financial Reporting Council's Combined Code of Corporate Governance , as from time to time in effect.

6 In early May 2008 the Appellants began to voice concerns about the allegedly poor performance of the Respondent in managing certain investments. Mr Jackson acknowledges that concerns were raised but denies that they had foundation. Discussions ensued between Mr Jackson, Mr Griffith and Mr Dear which failed to bear fruit and on 19 May 2008, Mr Jackson received from lawyers (no doubt at the behest of Mr Griffith and Mr Dear) documentation designed to suspend Mr Jackson's executive responsibility and management role in the fund. On 23 May 2008, Fladgate (Mr Jackson's present solicitors) sought undertakings that no steps would be taken to suspend Mr Jackson from his functions. Later that day an application was made to Henderson J, sitting in the High Court, for an interim injunction. However, on the proffering of undertakings in the terms sought by Fladgate, including an undertaking not to remove Mr Jackson as a director from "certain entities" (as the agreed statement puts it), the application for an injunction was not pursued.

7 Further negotiations ensued and on 3 June 2008 a "letter agreement" was concluded between these parties and others in which all committed themselves, in part in legally binding form and in part in terms not intended to be legally binding, to use best endeavours to procure a re-organisation of the interests underlying their enterprise. The result was the making of the Agreement, in issue in these proceedings, on 29 September 2008.

8 As the Judge put it, in barest outline, the Agreement provided that the voting shares of TFG would be used at the next AGM to procure the nomination and election of Mr Jackson, Mr Griffith and Mr Dear as directors of TFG and would be used at each subsequent AGM to procure the re-appointment of Mr Jackson as director, unless and until there occurred one of five specified events, called in the proceedings "Termination Events". One such event is stated as being the breach of fiduciary duties on the part of Mr Jackson. Mr Griffith and Mr Dear contend that by the beginning of 2011 events had occurred giving rise to the right of PCH II under the Agreement to remove Mr Jackson as a director of TFG, without obligation to re-appoint him.

9 Under Article 88(e) of the Articles of TFG, power is conferred on all the directors of TFG, acting together, to give notice to a Director to vacate office, whereupon that director's office is vacated. The power was not affected by any of the express terms of the Agreement and remained in force. It was invoked by the directors of TFG (including Mr Griffith and Mr Dear), other than Mr Jackson. In January 2011, notice was served upon Mr Jackson to vacate office. At the AGM of TFG, held in December 2011, Mr Griffith and Mr Dear caused PCH II to decline to re-appoint Mr Jackson as a director. On 19 December 2011 Mr Jackson began these proceedings claiming specific performance of the Agreement and an order that Mr Griffith and Mr Dear procure his re-appointment to TFG's Board.

10 As already stated, Mr Griffith and Mr Dear contend that a "Termination Event" has occurred and that accordingly Mr Jackson's right under the Agreement to continued

appointment and re-appointment as a director has come to an end. In the alternative, however, they contend that the Agreement contains nothing to negate the power of the TFG directors under Article 88(e) to remove Mr Jackson. They argue, therefore, that Mr Jackson's claim should be dismissed at the outset, without the need to determine the very contentious issues upon which the alleged occurrence of a Termination Event depends. For this reason, the trial of preliminary issues was directed by order of the Deputy Master of 30 April 2012.

## (C) **The Preliminary Issues**

11 The two issues to be tried were these: first, whether it was an implied term of the Agreement that:

> "(i) Mr Jackson would not be removed as a director of TFG; and
>
> (ii) The parties to the agreement in cl. 5(b) of the Agreement, namely Messrs Dear and Griffith and PCH II would procure that Mr Jackson would not be removed as a director of TFG";

and secondly, whether

> "By reason of clause 7, the parties to the Agreement are required: (i) To give effect to clause 5 of the Agreement; (ii) Not to invoke article 88(e) of the articles of TFG in order to remove Mr Jackson from office as a director of TFG; (iii) Not to invoke any other power to remove Mr Jackson from office as a director of TFG and (iv) To take steps formally to disapply, delete or amend article 88(e) of the articles of association of TFG so as to remove the power of removal therein set out insofar as it might otherwise be invoked against Mr Jackson. Provided in the case of (ii) to (iv) inclusive above that a clause 5(b) Termination Event has not occurred".

12 As apparent from the above, the learned Judge answered each of these questions in the positive sense, "Yes". Mr Griffith and Mr Dear appeal against that decision.

## (D) **The Articles of TFG and the Agreement**

13 As the Judge said in paragraph 19 of his judgment the material provisions of the articles of TFG must be taken to have been in the knowledge of the parties to the Agreement, since they were in place at the time that the Agreement was made. The Judge summarised, and in part quoted in full, the relevant provisions in paragraphs 22 to 27 of the judgment as follows:

> "22. By article 80:

"Unless otherwise determined by Resolution of the Voting Shares, the number of Directors shall be seven. At no time shall a majority of Directors be residents of the Untied Kingdom."

> 23. By article 81, subject to provisions dealing with their death, resignation or removal, and the filling of vacancies, not less than a majority of directors were to be Independent Directors (as defined by reference to the standards set forth in the UK's Financial Reporting Council's Combined Code of Corporate Governance ).
>
> 24. Under the heading Powers of Directors, article 83 provided as follows:
>
> "(a) Subject to the provisions of the Law, the Memorandum and these Articles and to any directions given by Resolution of the holders to Voting Shares, the business of the Company shall be managed by the Directors, who may exercise

all the powers of the Company in any part of the world. No alteration of the Memorandum or these Articles and no such direction shall invalidate any prior act of the Directors which would have been valid if that alteration had not been made or that direction had not been given. The powers given by this Article shall not be limited by any special power given to the Directors by these Articles, and a meeting of Directors at which a quorum is present may exercise all powers exercisable by the Directors.

(b) Subject to the Law, every discretion vested in the Directors shall be absolute and uncontrolled, and every power vested in them shall be exercisable at their absolute and uncontrolled discretion, and the Directors shall have the same discretion in deciding whether or not to exercise any such power."

25. Under the heading Appointment and Retirement of Directors, article 86 provided as follows:

"The holders of Voting Shares by Resolution shall have power at any time, and from time to time, to

(i) appoint any person to be a Director, either to fill a vacancy or as an additional Director (subject to the eligibility requirements hereof and any requirements of the Law), and

(ii) remove any person from office as Director for any reason."

Article 87 provided for a director to retire from office by giving notice.

26. Under the heading Disqualification and Removal of Directors, article 88 (which contains the provisions principally in issue in these proceedings), provided as follows:

"Without prejudice to the provisions regarding retirement contained in the Articles, the office of a Director shall be vacated if:

(a) he ceases to be a Director by virtue of any provision of the Law or becomes prohibited by law from, or is disqualified from, being a Director; or

(b) he becomes bankrupt or makes any arrangement or composition with his creditors generally; or

(c) he resigns his office by notice to the Company; or

(d) he becomes of unsound mind; or

(e) he is given notice by all other Directors (not being less than two in number) to vacate office;

(f) he is absent from meetings of the Directors for four successive meetings without leave expressed by a resolution of the Directors and the Directors resolve that his office should be vacated; or

(g) the Company so resolves by Resolution of the Voting Shares; or

(h) he becomes a resident of the United Kingdom and, as a result thereof, a majority of the Directors are residents of the United Kingdom."

It will be noted that provisions in article 88 repeat, dovetail or otherwise overlap with provisions in articles 80, 86 and 87 to which I have already referred.

27. Under the heading Proceedings of Directors, article 93 provided that a resolution of the Directors required the affirmative vote of five Directors, provided that a quorum was present. Finally, under the heading Amendments, article 142 provided that subject to the requirements of the Law (defined as Guernsey company law) and article 12, the articles could only be amended by

Resolution of the Voting Shares."

14 The material provisions of the Agreement are to be found in clauses 5 and 7. They are as follows:

> "(a) This section 5 shall become operative upon receipt by Dear and Griffith of a written notice from Jackson prior to October 30, 2008 notifying them that Jackson wishes to be a director of Tetragon.
>
> (b) Subject to Section 5(a) above, Jackson, Griffith, Dear and PCH II agree that (i) at the next annual shareholders meeting for Tetragon Financial Group Limited, a Guernsey company ("Tetragon"), which shareholders meeting is expected to be held prior to December 31, 2008, PCH II shall, subject to applicable laws, (including applicable stock exchange and regulatory requirements), (A) nominate each of Jackson, Griffith and Dear as the sole non-independent directors of Tetragon (each a "TFG Non-Independent Director") and (B) vote all shares of Tetragon held by PCH II at such shareholders meeting in favour of the appointment of each TFG Non-Independent Director as a non-independent director of Tetragon and (ii) subject to applicable laws (including applicable stock exchange and regulatory requirements), to continue to nominate, and to vote all shares of Tetragon held by PCH II in favour of the appointment of Jackson as a TFG Non-Independent Director at each subsequent annual shareholders meeting for Tetragon; provided , however, that such right of Jackson to be nominated and reappointed shall terminate and the shares of Tetragon held by PCH II may be voted to remove Jackson as a director of Tetragon if Jackson (i) breaches his fiduciary duties or other obligations as a director of Tetragon under applicable laws (including applicable stock exchange and regulatory requirements), (ii) is found pursuant to a judgment by a court of competent jurisdiction, to have engaged in or to be responsible for fraud or wilful misconduct, (iii) is found by a competent authority not to be a fit and proper person to be involved in a regulated business or is otherwise disqualified from being involved in any part of the business of Tetragon or any of its subsidiaries or affiliates, (iv) transfers his interests in PCH and PCH II such that he holds, directly or indirectly through controlled affiliates, less than 15% of the aggregate voting and economic interests of either PCH or PCH II and their respective subsidiaries or (v) resigns as a director of Tetragon and notifies Griffith, Dear and PCH II that he does not wish to be reappointed as a Tetragon director; provided , further, however, that in the event Griffith or Dear transfer their shares in PCH II to a controlled affiliate (including, but not limited to, in the case of Griffith to REG Holdco), such transfer shall not be effective unless and until such transferee agrees to be bound by this Section 5…
>
> **Further Assurances.**
>
> 7. The parties agree to take such other actions as may be reasonably required to authorise, approve and otherwise give effect to this Agreement. The parties also agree that each of Griffith, REG Holdco II, Jackson, AEJ Holdco and Dear have the right to request that the interests that each currently holds in PCH or any subsidiary of PCH (each a "member of the PCH group" ) be restructured to the extent necessary such that the income and profits of such member of the PCH Group is received by such person in a tax efficient manner, provided, however, that any such restructuring does not adversely affect any other party's interest in any member of the PCH Group. The parties acknowledge that this may require a party to be granted a direct interest in a member of the PCH Group not currently held directly."

## (E) **The Law on Construction and Implication of Terms**

15 In paragraph 39 of his judgment the Judge said that he had been "treated" by counsel to detailed citation of the "ever increasing binding (and Privy Council) authorities on this subject", including *Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896* , *Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101* , *Rainy Sky S.A. v Kookmin Bank [2011] 1 WLR 2900* , *Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988* (PC), *Mediterranean Salvage & towage v Seamar Trading and commerce Inc [2009] 1 C.L.C. 909* , and *Groveholt Ltd v Hughes [2010] EWCA Civ 538* . Suffice it to say, we were not so "treated" at the hearing of the appeal. In opening, Mr Miles QC for Messrs Dear and Griffith said that he was not going to go through the authorities again. The appeal was argued accordingly against the background of the Judge's summary of the effect of the cases as set out in paragraph 40 of his judgment as follows:

> **"Objective Process**
>
> (i) Construction (or as I would prefer to call it interpretation) is, in relation to any point at issue, the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (ii) For that purpose, even though the point in issue may be a narrow one, the interpretation of the relevant provision depends upon an understanding of its context within the agreement as a whole.
>
> (iii) The court's function is to ascertain the meaning of the agreement rather than to seek to improve upon it, or put right any inadequacies of meaning. Nonetheless the court recognises that draftsmen may make mistakes, may use occasionally inappropriate language and may fail expressly to address eventualities which may later occur.
>
> **Implied terms**
>
> (iv) the implication of terms is no less a part of the process of ascertaining the meaning of an agreement than interpretation of express terms. Implication addresses events for which the express language of the agreement makes no provision.
>
> (v) In such a case the usual starting point is that the absence of an express term means that nothing has been agreed to happen in relation to that event. But implied terms may be necessary to spell out what the agreement means, where the only meaning consistent with the other provisions of the document, read against the relevant background, is that something is to happen.
>
> (vi) Although necessity continues (save perhaps in relation to terms implied by law) to be a condition for the implication of terms, necessity to give business efficacy is not the only relevant type of necessity. The express terms of an agreement may work perfectly well in the sense that both parties can perform their express obligations, but the consequences would contradict what a reasonable person would understand the contract to mean. In such a case an implied term is necessary to spell out what the contact actually means.
>
> **Commercial common sense**
>
> (vii) The dictates of common sense may enable the court to choose between

> the alternative interpretations (with or without implied terms), not merely where one would "flout" it, but where one makes more common sense than the other. But this does not elevate commercial common sense into an overriding criterion, still less does it subject the parties to the individual judge's own notions of what might have been the most sensible solution to the parties' conundrum."

16 Save in one respect, the parties did not dispute those propositions. The exception was the Judge's proposition in sub-paragraph 40(vi). Mr Miles submitted that this sub-paragraph smacked of a potential re-writing of contracts to achieve what the court perceived to be a "sensible" or reasonable commercial result. He submitted that such a tendency would run counter to the approach of the *House of Lords in Liverpool City Council v Irwin [1977] AC 239* in which any idea of a mere perception of "reasonableness", as a touchstone of the implication of contractual terms, was rejected.

17 Mr Chivers QC for Mr Jackson drew our attention to a short passage from the judgment of the Privy Council, delivered by Lord Hoffmann, in the Belize case as indicating from where the Judge's proposition (vi) was derived. The passage is in paragraph 22 to 23 of that judgment and reads as follows:

> "…..There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?
>
> 22. There are dangers in treating these alternative formulations of the question as if they had a life of their own. Take, for example, the question of whether the implied term is "necessary to give business efficacy" to the contract. That formulation serves to underline two important points. The first, conveyed by the use of the word "business", is that in considering what the instrument would have meant to a reasonable person who had knowledge of the relevant background, one assumes the notional reader will take into account the practical consequences of deciding that it means one thing or the other. In the case of an instrument such as a commercial contract, he will consider whether a different construction would frustrate the apparent business purpose of the parties. That was the basis upon which *Equitable Life Assurance Society v Hyman [2002] 1 AC 408* was decided. The second, conveyed by the use of the word "necessary", is that it is not enough for a court to consider that the implied term expresses what it would have been reasonable for the parties to agree to. It must be satisfied that it is what the contact actually means.
>
> 23. The danger lies, however, in detaching the phrase "necessary to give business efficacy" from the basic process of construction of the instrument. It is frequently the case that a contract may work perfectly well in the sense that both parties can perform their express obligations, but the consequences would contradict what a reasonable person would understand the contract to mean."

18 In my judgment, it is not necessary for the purposes of this appeal to resolve this brief conundrum. The judge's seven propositions are a sufficient and helpful summary of the necessary approach to these problems for present purposes.

## (F) **The Rival Arguments in Outline**

19 The crux of Mr Miles' submissions can be found in paragraphs 6 to 8 and 10 of the appellants' skeleton argument as follows:

> "6. The preliminary issues of construction concerned the extent of protection from removal conferred by the Shareholders Agreement on the Respondent,

> and in particular whether it protected him from removal from office otherwise than by PCH II. By its express terms, the Shareholders Agreement only addresses appointment and removal at shareholder level by PCH II: it is silent as to the Respondent's vulnerability to disqualification to hold office, or removal, as a director under TFG's Articles.
>
> 7. Briggs J found the issue "finely balanced" (J § 522), but he decided that on its true interpretation the Shareholders Agreement protected the Respondent from removal not only by PCH II, but also by the six other directors of TFG (the four independent directors and the two Appellants) exercising a fiduciary power of removal conferred by TFG's Articles.
>
> 8. In so doing, the judge re-wrote the parties' bargain to reflect what he thought would have been a reasonable agreement…..
>
> 10. The judge ought to have held that the Shareholders Agreement only legislated for the appointment and non-removal of the Respondent by PCH II, and did not impact on the exercise by the directors of TFG, its subsidiary, of distinct powers conferred on TFG by its Articles. In short, the express (and only) agreements of the parties were that they would ensure that PCH II <u>did</u> use its voting power to appoint, and <u>did not</u> use its voting power to remove, the Respondent as a director of TFG; otherwise he was like any other director to TFG, to hold office on the terms of the constitution of TFG, including the constitutional restraints on qualification."

20 The core of Mr Chivers' submissions appears in paragraph 3 of the respondent's skeleton argument thus:

> "3. **Mr Jackson's case is simple.**
>
> 3.1 The Appellants have agreed to the re-appointment of Mr Jackson until the happening of a Termination Event.
>
> 3.2 As matters stand, any re-appointment of Mr Jackson would serve no useful purpose because the Appellants will, immediately upon his appointment, join in removing him as a director.
>
> 3.3 The parties did not intend that the obligation to re-appoint would either cease, or serve no useful purpose absent a Termination Event.
>
> 3.4 Accordingly, to give effect to the intentions of the parties, it is necessary that either:
>
> (i) The Appellants must not vote to remove Mr Jackson as a director; or
>
> (ii) If (as the Appellants allege) they are obliged to vote to remove Mr Jackson as a director, then they must remove that obligation – it being within their power to do so.
>
> 3.5 This necessity can be expressed either as an implied term of the Agreement or as part of the general obligation of a party not to render performance of an agreement futile. It can also be expressed as the performance of a separate obligation (under clause 7) to give effect to the Agreement."

## (G) **Discussion**

21 The "starting point", as the Judge stated is that "the absence of an express term means than nothing has been agreed to happen in relation to that event" (Proposition (iv)). While recognising (without trying to resolve) the dispute about Proposition (vi),

therefore, I ask, do the consequences of the express obligations "contradict what a reasonable person would understand the contract to mean"? Put another way, do the dictates of common sense "enable the court to choose between alternative interpretations (with or without implied terms) where one alternative makes more common sense than the other" (Proposition (vii))? In posing these questions the court must not "subject the parties to the individual judge's own notions of what might have been the most sensible solution to the parties' conundrum".

22 Given the starting point, namely the silence of the contract itself, one has to ask whether the consequences would contradict what a reasonable person would understand the contract to mean. As to this, the opinions of reasonable people may well differ in any given set of circumstances. I consider that, even adopting for full value the judge's Proposition (vi), I would take the proper touchstone of that proposition to be the consequences would contradict what *"any"* (rather than "a") reasonable person would understand the contract to mean. As for commercial common sense enabling a choice between alternative interpretations, opinions as to commercial common sense in any given situation may also differ between reasonable people. In such circumstances, there is no room for implication.

23 I have substantial doubts whether, in this case, all reasonable people would agree that the continued availability of the power in Article 88(e) of TFG's Articles would contradict what the Agreement meant. I doubt equally whether all would agree that "commercial common sense" must dictate a choice of Mr Jackson's proposed implied terms over the express words of the Agreement. I can well see that a sensible bargain can be made in either form.

24 Given the nature of TFG, and the important provision of the independent directors, no doubt as a re-assurance to investors, the meaning of the contract contended for by Mr Griffith and Mr Dear does not necessarily contradict what all reasonable people would consider the contract to mean. Nor does a universal "commercial common sense" dictate a solution as contended for by Mr Jackson. It might well be that one commercial sense would be that the shareholders in PCH II might agree to limit that company's power to remove a TFG director, while wishing to conserve the power of removal on the part of TFG's directors as a whole, if they all considered that the interests of TFG so dictated.

25 In the present case, putting oneself in the position of the parties making this contract, they may well have been as "ships passing in the night". We are not permitted to inquire into the subjective intentions of the parties. However, while on the one hand, Mr Jackson may have contemplated that he was achieving the bargain for which he now contends, on the other hand, Messrs. Dear and Griffith may have been intending to agree how PCH II's shares were to be voted, as the terms of clause 5 provide, in respect of directors' appointments at AGMs, being either conscious or unconscious as to the residual provision of Article 88(e) .

26 Each party might have had his own views, if asked, of the commercial common sense of the situation. Absent any claim to rectification, on the basis that Mr Griffith and/or Mr Dear knew that Mr Jackson was labouring under a false apprehension as to what the Agreement was to achieve (see *Riverplate Properties Ltd. v Paul [1975] Ch 133)* , the Agreement could reasonably and commercially stand as written, with Article 88(e) unaffected. It does not seem to me that the only meaning consistent with the other provisions of the Agreement, against the relevant background, is that terms have to be implied.

27 Equally, if one applies an "officious bystander" approach to the implication of terms and asks what the parties' answer would have been to a suggestion, at the time of the Agreement that the implied terms sought by Mr Jackson should be included as express terms, would each have said, "Of course"? I am not confident that they would. It may be that such a point would have brought the negotiations to a swift halt, but that is not the criterion for the implication of a term.

28 In the end, I find myself in broad agreement with the seven submissions made by

Mr Miles QC at the outset of the hearing before us, as follows:

i) Clause 5 of the Agreement addresses the very subject matter with which the suggested implied term is concerned. Therefore, one must exercise caution in going beyond it.

ii) Clause 5 is silent about whether or not it disentitles Mr Griffith and Mr Dear from joining in a directors' notice under Article 88(e) ; thus, the starting point is that nothing is to happen in that respect;

iii) It is not necessary for the commercial *workability* of the Agreement (and in particular clause 5) to imply a term requiring any party not to join in a notice proposed to be given under Article 88(e) (even, I interpolate, if the commercial *objective* of one party was to achieve a different result).

iv) It is not obvious that the parties would have agreed the suggested implied terms. There are tenable reasons for differing views being taken: see above.

v) There is reason to think that the terms proposed would result in the suspension, for an unlimited period, of a potentially useful power available to the directors.

vi) If, on its true meaning, clause 5 does not require the implication of terms, then clause 7 does not take the matter further.

vii) Equally, if such implication is not otherwise required, then the operative circumstances of the contract are defined by the express terms and it cannot be said that the participation by Mr Griffith and Mr Dear in a removal of Mr Jackson would frustrate clause 5, contrary to the principle in *Stirling v Maitland (1864) 5 B & S 840* .

29 Some of these points require a little expansion.

30 I would add to points (i) and (ii) by noting that clause 5, which deals with the very subject matter of the present debate, is silent about it. It was drafted by lawyers and negotiated between legally advised parties. This is not a case where one is dealing with a subject not touched upon at all in a contract drawn up by laymen. It is also a contract drawn up after litigation had been about to commence. In such circumstances one cannot readily assume that the express terms of the contract failed to represent the parties' true bargain. The protection for Mr Jackson, negotiated and drafted into the Agreement on its face, is that the shares in PCH II will be voted to appoint and to continue to appoint Mr Jackson to the board, but "the shares of [TFG] held by PCH II may be voted to remove [Mr] Jackson as a director of [TFG]…" on the occurrence of a Termination Event. It would be a strong thing to import into the Agreement a further protection covering the same ground but going beyond that which is expressed.

31 Two passages from earlier cases cited in the appellant's skeleton argument are material. In *Aspdin v Austin (1844) 5 QB 671* at 684, Lord Denman CJ said,

> "Where parties have entered into written engagements with expressed stipulations, it is manifestly not desirable to extend them by any implications: the presumption is that, having expressed some, they have expressed all the conditions by which they intended to be bound under the instrument."

To the same effect is the following from MacKinnon LJ in Broome & anor. v Parkless Co.-Op. Society etc. [1940] 1 All ER 603 , 612:

> "Where the parties have made an express provision as regards some matter with regard to the contract, it is, and must be, extremely difficult for either of them to say in regard to that subject-matter, as to which there is an express provision, that there is also an implied provision or condition in the contract."

32 I agree with Mr Miles' submission that clause 5 is all about using/not using the shares in PCH II for certain purposes, i.e. under Article 86(ii) and 88(g) . There is no clash between that provision and Article 88(e) .

33 For my part, I do not agree with the notion that in the absence of the implied terms,

clause 5 is rendered "futile". In fact, it achieved the objective of securing Mr Jackson's appointment at the 2008 AGM and he was subsequently re-appointed at two further AGMs. He remained a director until January 2011. The power of serving notice upon him under Article 88(e) , to cause him to vacate office, was not exercisable at the whim of Mr Griffith and Mr Dear; it required the concurrence of all the independent directors also and had to be exercised in good faith in the interests of TFG, in accordance with all the directors' fiduciary duties to TFG. It is not futile, in protecting Mr Jackson's interests, that the support of any one other director for Mr Jackson would prevent the power being exercised against him. I do not think that any obvious sense of the commercial objective of the Agreement requires more.

34 I agree with Mr Miles that there is an element of circularity in the contention for Mr Jackson that clause 5 is futile in the absence of further implications into it. That depends upon what the contractual purpose of clause 5 is, and that is the very matter which, in my judgment, cannot be answered necessarily in the sense advanced on Mr Jackson's behalf.

35 The Judge (at paragraph 64 of the judgment) stated that he found that the principle that a party must do nothing of his own motion to render an agreement inoperative, coupled with the covenant for further assurance in clause 7, "of decisive force", in a case which he had earlier described as "finely balanced" (paragraph 52). With respect to the learned Judge's very careful reasoning, I do not find either the stated principle (which is not in dispute) or clause 7 of any real assistance on the main issue in the case. The principle only applies to prevent one party acting unilaterally to render an agreement "inoperative". That depends on what, the true meaning of the document, the operation of the contract was. That is the matter to be decided. By clause 7 the parties agreed to take such actions as were reasonably required to "…give effect to this Agreement". To give effect to an agreement requires one to know what the parties have agreed that the agreement shall do. A clause such as clause 7 does not assist in that exercise.

36 The case of Brady v Brady [1989] 1 AC 755 , relied upon by Mr Chivers, both in this court and below, does not, I think, take the matter any further. In that case the underlying contractual obligation, to which the covenant for further assurance was prayed in aid, was not in doubt. In this case, the identification of the obligation, the performance of which clause 7 is to assist, is the essence of the dispute; clause 7 cannot help in determining what that obligation is.

37 Mr Chivers' primary submission before us, in supplement to the helpful and succinct summary of Mr Jackson's case in paragraph 3 of the respondent's skeleton argument quoted above, was that the clear purpose of the Agreement was that Mr Jackson should be a director of TFG, pending the occurrence of a Termination Event. Clause 5, Mr Chivers argued, was the *mechanism* for achieving the purpose and did not define the purpose itself. To achieve that purpose there had to be adequate contractual protection.

38 I do not consider that, while the contractual purpose so identified may well have been in Mr Jackson's mind as his commercial purpose and is certainly one possible objective commercial purpose, it is the only possible purpose of the Agreement, in the objective sense required for the construction of contractual meaning and/or identifying the need for implication of terms.

39 In argument for the appellants, it was submitted that the implication of terms advanced by Mr Jackson fettered their ability from the date of the Agreement, in acting in what they might in the future see to be their fiduciary duty to TFG. Equally, the supposed implied term would render nugatory any duty on the part of the independent directors, as they saw it, to exercise the power under Article 88(e) . Mr Miles submitted that that would be an odd contractual objective.

40 Mr Chivers submitted in answer that this did not matter, because it was open to PCH II, as sole voting shareholder in TFG, to negate any breach of fiduciary duty by the simple expedient of passing a resolution to that effect. Indeed, it would be open, said

Mr Chivers for PCH II to direct the commission of a breach of duty by the directors of TFG, if it so wished: see *Re Duomatic Ltd. [1969] 2 Ch 365* . However, I agree with Mr Miles that it seems to be an odd approach to assessing what must be an *a priori* contractual purpose to assume that it was intended that it would require the parties to take steps to absolve themselves from their duties to promote the interests of TFG. I would find it strange to hold that "…the only meaning [of the Agreement] consistent with the other provisions of the document, read against the relevant background…" was that such steps would have to be taken as a matter of obvious contractual obligation.

41 In my judgment, the implication of the terms proposed would involve an impermissible re-writing of the parties' contract or, in other words, would subject them merely to one notion of "what might have been the most sensible solution to the parties' conundrum". That is not a proper basis for implying terms into the Agreement.

## (H) **Conclusion**

42 For these reasons, I would allow the appeal.

Lord Justice Lewison:

43 I agree that the appeal should be allowed for the reasons given by McCombe LJ. In addition to those reasons there are two further points that impressed me. First, the agreement into which terms are said to be implied was an agreement between *shareholders* . But the terms in question affect powers entrusted to Messrs Dear and Griffith as *directors* . A shareholder can vote his shares entirely in his own interest. A director can only exercise his powers in the interests of the company. It seems to me to be more difficult to sustain an argument that terms are to be implied into an agreement made by the contracting parties in one capacity which result in fetters on his powers to act in another capacity. Second, there is the position of the other independent directors to consider. In deciding whether or not to take office as directors they are surely entitled to consider what powers the company's articles of association confer on them. In reading the company's articles a putative director will have no knowledge of collateral matters such as a shareholders' agreement. They are surely entitled to take the articles at face value and to take up office on the footing that if the whole board votes to remove a director, that power will be an effective one.

Lord Justice Laws.

44 I agree with both judgments.