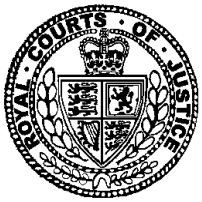

Neutral Citation Number: [2023] EWHC 8 (Ch)

Case No: CH-2022-000083

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 11/01/2023

Before:

MR JUSTICE ZACAROLI

- -

Between:

SALLY ELIZABETH JOHNSON	**Appellant/ Claimant**
- and –	
(1) HOWARD DUNCAN SPOONER **(2) QUAY STREET LTD**	**Respondents/ Defendants**

- -
- -

Mr Jeffrey Chapman KC (instructed by **Keystone Law**) for the **Appellant**
Ms Tina Kyriakides (instructed by **Greenwoods Legal LLP**) for the **Respondent**

Hearing date: 9 December 2022

- -

Approved Judgment

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

.....

Mr Justice Zacaroli :

1. This is an appeal, brought with the permission of Meade J, against an order of Insolvency and Companies Court Judge Prentis dated 31 March 2022 (the "Order").

2. The following is a brief summary of the facts, a longer description of which is set out in the Judge's written judgment of the same date.

3. In early 2019 the claimant ("Mrs Johnson"), her husband ("Mr Johnson") and the first defendant, Mr Howard Spooner ("Mr Spooner") were in negotiations for the Johnsons to acquire an interest in a business operating the "George Hotel". The second defendant ("QSL") had earlier been incorporated by Mr Spooner for the purpose of acquiring a lease on the hotel.

4. The negotiations resulted in an agreement whereby Mrs Johnson acquired one share in QSL, in return for an investment of £150,000. She and Mr Spooner then each held one share. A written shareholders agreement was entered into on 2 April 2019. The terms included that, for so long as they each held shares in the Company: (1) Mr Spooner was entitled to be a director; (2) Mrs Johnson was entitled to appoint a director; and (3) each of them was obliged to make available to the Company certain items of furniture, paintings, and other decorative items, free of charge.

5. The relationship between the parties was not an easy one, and had broken down by the summer of 2020. Negotiations ensued for a settlement of disputes between them.

6. On 29 June 2020 Mr and Mrs Johnson sent an email to Mr Spooner, headed "Without Prejudice and Subject to Contract", setting out heads of terms for a proposed settlement. These included that payments totalling £132,001 would be made to the Johnsons, as follows: (1) £31,000, being half of the costs of two statutory demands that had been served, but later withdrawn, by Mr Spooner; (2) £18,000, representing the Directors Loan made by Mr Johnson to QSL; (3) £85,001, in respect of an amount claimed to be in excess of £155,000 invested by the Johnsons in QSL. The email stated "All payments to be personally guaranteed by Howard Spooner", and the payment was described as "Total buyout of our position: 132,001 subject to contract and personally guaranteed."

7. Mr Spooner and Mrs Johnson met on 2 July 2020. Mr Spooner contends, and the judge concluded, that they reached, at this meeting, a binding oral agreement on terms including that Mrs Johnson would transfer her share in QSL to Mr Spooner, and £133,084 would be paid to Mrs Johnson, personally guaranteed by Mr Spooner. In his Defence and Counterclaim, Mr Spooner pleaded that this sum was made up of: (1) £42,000, to be paid by Mr Spooner by 7 August 2020, in respect of legal costs of the statutory demand proceedings; (2) £18,000, to be paid by QSL by 30 September, in respect of Mr Johnson's director's loan account; (3) £73,084, to be paid by the Company by instalments on dates up to and including 30 September 2021.

8. Mr Spooner also pleaded that it was a term of the alleged agreement that Mrs Johnson would cease to have any interest in, or involvement in QSL from that point onwards, that she would be entitled immediately to remove her personal items from the hotel, and that she would transfer her share in QSL to Mr Spooner.

9. As to the transfer of the share, his contention was that, either as a matter of construction of the agreement or by way of implied term, Mrs Johnson was required to transfer her share to him as soon as possible after 2 July 2020.

10. In her defence to counterclaim, Mrs Johnson denied that any negotiations took place, or that any agreement was reached on 2 July 2020.

11. The following day, Mrs Johnson removed a large amount of her personal items from the hotel. Further email communications between the parties followed. On 5 July 2020 Mr Spooner sent an email to Mrs Johnson, headed "Heads of agreement for settlement without prejudice and subject to contract", saying: Dear Sally, I am pleased that we managed to shake hands and move on." The terms set out in the email differed in some respects, however, from those which had been agreed at the meeting.

12. Mrs Johnson replied by email dated 7 July 2020, proposing two alternative ways to achieve a buyout: first, that she would accept £145,000 with £18,000 on signing, £42,000 in accordance with the court order, then the remainder by 16 monthly instalments; second, that she would accept a payment of £100,000 by 6 August, with the £42,000 following as ordered by the court (in fact, the next day).

13. Mr Spooner responded (at 14:58 on 7 July), having noted that "my offer, which you agreed to, was extremely fair", by offering the following "to get this done":

> "You will transfer the shares on signing so I can borrow more money. I cannot get my hands in [sic] any more up front money, so the payment schedule remains. I will increase your price to £135,000 which is higher than we agreed, subject to getting the vat invoices for everything and copy invoices for labour and receipts for ferries."

14. Further email exchanges occurred on 8 July 2020, in which Mrs Johnson and Mr Spooner disagreed over whether there was already a binding agreement (Mrs Johnson noting, at 12:06, for example that "for the record, I have NOT agreed to any deal").

15. At 12:45, Mr Spooner emailed Mrs Johnson, saying: "Look at my offer in red please. Your money is secured by the personal guarantee that's why the shares are handed over on signing".

16. At 14:08, Mrs Johnson replied:

> "Howard, I accept your offer of 135,000 subject to contract, and conditional on your personal guarantee. Shares up front on signing. Payment as per the suggested schedule over 16 months. So 42,000 August 7th as per court order, 18,000 30th September 2020, then the rest over the next 16 months on a monthly basis according to your schedule already suggested. All personal item, already listed to be returned first week jan 2021. can you please draft up the contract and send it to me. I've stuck to my side of this, please be honourable and stick to yours. Let's all move on. This has to be the end of the matter."

17. At 18:05, Mr Spooner responded: "Thanks Sally, I will get a draft across to you."

18. No written agreement, as envisaged in the above emails, was in fact executed. Mr Spooner nevertheless contended that a binding agreement had been reached, in reliance on which he filed the necessary forms at Companies House to transfer Mrs Johnson's share to him. His pleaded case is that, as a result of the variation agreed on 8 July 2020, Mrs Johnson was required to transfer the share as soon as possible, alternatively in a reasonable time. In her defence to counterclaim, Mrs Johnson accepted that she agreed to Mr Spooner's revised offer on 8 July 2020, but contends that no binding agreement was reached because her acceptance was subject to contract.

19. These proceedings are, in form, a claim by Mrs Johnson for the rectification of the register to reflect her continuing ownership of one share in QSL. Mrs Johnson was, however, granted such relief by ICCJ Jones on 12 August 2021, but the registration of her as the owner of a share in QSL was marked "disputed" pending resolution of Mr Spooner's counterclaim that she had agreed to transfer her share to him. In substance, therefore, the trial before ICCJ Prentis was of Mr Spooner's counterclaim.

20. The Judge found that the negotiations between the parties reached a conclusive agreement for the sale of Mrs Johnson's share to Mr Spooner on 2 July 2020, varied subsequently by the exchange of emails on 7 and 8 July 2020. Alternatively, if the agreement was not made on 2 July 2020 it was made on 8 July 2020 (see §202 of the judgment).

21. Importantly, he preferred Mr Spooner's evidence given at the trial, over that of Mrs Johnson, as to what was agreed between them on 2 July 2020.

22. He found that, although the email from Mr and Mrs Johnson of 29 June 2020, setting out terms that formed the basis of the discussion on 2 July 2020 was marked "subject to contract", Mrs Johnson and Mr Spooner intended to create a legally binding agreement there and then on 2 July 2020: "[Mr Spooner] and Mrs Johnson treated this as a conclusive agreement, notwithstanding, as she said, that she wished it to be drawn up formally" (see §135).

23. He also found that, notwithstanding the reference to "subject to contract" in Mrs Johnson's email of 8 July 2020, accepting Mr Spooner's "offer of £135,000", that the parties had reached a binding variation agreement in the exchange of emails on 7 and 8 July 2020. He said, at §181:

> "…I read this as an immediate acceptance by Mrs Johnson of the terms sent at 1458 on 7 July. She has had enough. She has already replied once, in detail, to this offer making her own counter-proposals. Those are gone. There has been a change of heart. Agreement is effective immediately, with the terms to be written up, as before, as the record of what has been agreed."

24. There is no appeal against these findings: although permission to appeal was sought on the ground that the variation agreement reached on 8 July 2020 was "subject to contract", that was refused.

25. The only reference in the judgment in response to the timing of the transfer of the share and resignation of Mr Johnson is at §134:

> "As to the transfer of the share and resignation of Mrs Johnson's appointed director, it seems a plain implication that as this agreement was to end her and her husband's involvement with QSL, that should be effected on the making of the first payment."

26. Apart from referring to the terms of the emails on 7 and 8 July 2020 (which refer to the transfer of the share taking place on signing) nowhere in the judgment does the judge expressly deal with the timing of the transfer of Mrs Johnson's share pursuant to the variation agreed on 8 July 2020.

27. In the final paragraphs of the judgment, where his conclusion is set out, the judge merely said that the agreement was for the transfer of Mrs Johnson's share without addressing timing.

28. The parties then drew up the terms of an order, which they presented to the judge for approval at a hearing to determine consequential matters. The Order contained the following declarations:

> "1. on 2 July 2020 a settlement agreement was entered into between the Claimant and the Defendants, which was varied by an agreement made between the parties on 8 July 2020 (together "the Agreement"), pursuant to which the parties agreed to settle all disputes between themselves (themselves including their nominees, Brook Johnson as the Claimant's nominee director, Sarcen Limited and Stony Valley Limited) on the terms set out in Schedule 1 to this Order;
>
> 2. the Claimant should have transferred her one share of £1.00 in the capital of the Second Defendant ("the Share") to the First Defendant on 2 August 2020, when the First Defendant transferred the sum of £42,000, and that since that date she has held the Share on trust for the First Defendant;
>
> 3. the Claimant's nominee director, Brook Johnson, should have ceased to have been a director of the Second Defendant on 2 August 2020."

29. Schedule 1 to the Order is in the following terms:

> "(1) The sum of £135,000 would be paid to the Claimant as to £42,000 by 7 August 2020, £18,000 by 31 August 2020 and then the balance by the instalments and on the dates set out in an email dated 29 June 2020 from the Claimant to the Defendant and Lucy Spooner, save that the final instalment would be on 30 September 2021 for the balance outstanding in the sum of £5,000.

> (2) The Claimant would transfer her one share of £1.00 in the capital of the Second Defendant ("the Share") to the First Defendant, and the Claimant's nominee director, namely, her husband, Brook Johnson, would cease to be a director of the Company, upon the Claimant receiving the first instalment due under the Agreement, namely, the sum of £42,000.
>
> (3) The Second Defendant would be entitled to retain, and would own, the items set out in the 85k List as defined in the judgment and the additional items in Schedule 2 below.
>
> (4) The Claimant would provide VAT receipts for the expenditure set out in the 85k list (save insofar as the expenditure related to labour costs).
>
> (5) Upon the transfer of the Share to the First Defendant, Brook Johnson would automatically be released from his obligations under a Contribution Agreement dated 8 April 2019 made between the First Defendant, Stony Valley Limited and Mr Johnson, relating to the liabilities of the Second Defendant to the freehold owner of The George Hotel, Yarmouth.
>
> (6) The Claimant's personal items remaining at the Hotel after 2 July 2020 would be returned to her by the Defendants by the first week of January 2021 in good order and guaranteed in good condition by the First Defendant."

30. I was taken to the transcript of the hearing held to consider consequential matters. Ms Kyriakides (who appears on this appeal for Mr Spooner) also appeared below, but Mr Chapman KC (who appears on this appeal for Mrs Johnson) did not. So far as the second and third declarations (which set out the timing of the transfer of the share, and Mr Johnson's resignation) are concerned, Ms Kyriakides merely told the judge that these reflected §134 of the judgment.

31. Permission to appeal was originally sought against a number of the Judge's primary findings of fact. Meade J, however, refused permission against the Judge's primary findings of fact including his key finding that the parties were in agreement on the main terms of their negotiation as at 2 July 2022. Limited permission was granted on the following revised grounds only:

(1) The judge was wrong in law to imply into the oral agreement reached on 2 July 2020 terms in relation to the transfer of Mrs Johnson's share in QSL and the resignation of Mr Johnson;

(2) The judge was wrong in law to imply such terms into the oral agreement as varied on 8 July 2020;

(3) In light of the findings that Mr Spooner had agreed to provide a personal guarantee for the payments to be made by QSL, and that such guarantee would have to be "drawn up formally" (because, it is inferred, of the requirements of the Statute of Frauds 1677), the judge should have found applying the objective test in *RTS*

Flexible Systems Ltd v Molkerei Alois Muller GmbH [2010] UKSC 14 ("*Flexible Systems*") that the parties had not reached a "conclusive agreement" either on 2 July 2020, as varied on 8 July 2020, or on 8 July 2020.

32. By a Respondent's Notice, Mr Spooner contends that the decision should be upheld on the following alternative grounds:

(1) If the judge applied the wrong test for the implication of a term into the oral agreement reached on 2 July 2020, the same term should nevertheless be implied according to the correct test;

(2) If the term that the judge implied was wrong, then he ought to have implied a term that Mrs Johnson's share would be transferred (and Mr Johnson would resign) within a reasonable time;

(3) Alternatively, the judge's finding that the share should be transferred, and Mr Johnson should resign, on the date of the first payment was a reasonable finding of what a reasonable time would have been;

(4) If the judge failed to take into account the fact that the parties agreed in the email exchanges of 7 and 8 July 2020 that the transfer of the share should take place "on signing", his decision should nevertheless be affirmed on the ground that the signing of documents was a mere formality, such that a further term should be implied that the parties would sign the documents within a reasonable time, and it follows that the transfer of the share and the resignation should also occur within the same reasonable time;

(5) The judge was correct to hold that the 2 July 2020 oral agreement and the 8 July 2020 variation were binding and conclusive agreements, notwithstanding that a formal guarantee had not been drawn up;

(6) Alternatively, the judge's conclusion that the agreement and variation agreement were binding should be upheld on the grounds that: (i) the guarantee did not need to be formally drawn up because it was only an incidental part of a larger contract; or (ii) the Statute of Frauds 1677 was in any event satisfied by the exchange of emails on 7 and 8 July 2020; or (iii) Mrs Johnson waived the requirement for there to be a formal guarantee by removing her personal goods following the agreement reached on 2 July 2020; or (iv) by failing to respond to the draft documentation provided by Mr Spooner, Mrs Johnson waived the requirement for a formal guarantee before the oral agreement, or variation agreement, became binding;

(7) Alternatively, if the judge was wrong to find that the 2 July 2020 agreement was legally binding, Mrs Johnson is in any event estopped from denying that it was.

The Implied Terms

33. As I have noted, the only reference to implied terms in the judge's judgment is at §134: it was a "plain" implication that the transfer of the share and the resignation of Mr Johnson were to occur on the date of the first payment to be made by Mr Spooner (7th August 2020).

34. Although the implied term covers two matters – the date of transfer of Mrs Johnson's share and the date of Mr Johnson's termination – it was common ground before me that the latter follows inevitably from the former. Since Mrs Johnson is entitled to appoint a director only for so long as she holds her share, Mr Chapman accepted that Mr Johnson would be required to cease being a director upon the transfer of her share. I will focus, therefore, on the implied term as to the transfer of the share.

35. The first revised ground of appeal advances this point in relation to the 2 July agreement. The second revised ground of appeal advances it in relation to the 8 July variation agreement. Given the judge's conclusion that the agreement reached on 2 July was varied by the 8 July variation agreement, it is the terms of that variation agreement that matter. The 2 July agreement is, however, important background to the subsequent variation. I will therefore first address, as the parties have done, the first ground of appeal.

Ground 1

36. The test for implication of terms was authoritatively stated by the Supreme Court in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) ltd* [2016] AC 742, per Lord Neuberger of Abbotsbury (with whom Lords Sumption and Hodge agreed), at §15-31. It was recently reiterated by Lord Hughes in *Ali v Petroleum Co of Trinidad and Tobago* [2017] UKPC 2, at §7. Having warned that the process of implying a term into a contract must not become the rewriting of the contract in a way which the court believes to be reasonable, he said:

> "A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, "Oh, of course") and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient precondition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement."

37. Mr Chapman contends that the judge was wrong to imply a term that the share would be transferred on the date of the first payment by Mr Spooner. He submitted that whether the test is expressed as obviousness or necessity, it is clearly not satisfied in this case. That is because there are at least three potential dates for the transfer of the share and resignation of Mr Johnson, so it cannot be obvious or necessary that any one of them is to be implied. Those dates are: (1) as soon as possible after 2 July 2020; (2) on the date of the first payment; or (3) on 30 September 2021, the date of the last payment. It could be neither of the first two, Mr Chapman submitted: neither is fair or reasonable because they would leave Mrs Johnson without any security for the

subsequent payments due from the Company. The third option was never contended for by Mr Spooner.

38. At the heart of his submission is the contention that any date for the transfer of the share which was before the date for payment of all or substantially all of the consideration cannot be fair or reasonable because it would leave Mrs Johnson without any security for subsequent payments due to be made by QSL, in circumstances where QSL's financial viability was in doubt.

39. I do not accept this. The risk that QSL would be unable to pay was specifically catered for in the agreement, as found by the judge, that Mr Spooner was personally liable for the payments due from QSL. There is no evidence that provision of security (aside from by reason of Mr Spooner being personally liable for the payments due from QSL) was ever considered or discussed between the parties. There is nothing inherently unfair or unreasonable in Mrs Johnson's share being transferred before QSL had satisfied in full its payment obligations, particularly where that was catered for by Mr Spooner undertaking personal responsibility for the payments.

40. That does not meet, however, the further objection that it is neither necessary nor obvious that, even if an *early* transfer of the share was intended, it should be on the date that Mr Spooner made his first payment, as opposed to any other early date. In this respect, I do think that the judge fell into error, compounded by the failure to give reasons in the judgment for the conclusion at §134 that the term he identified was a "plain implication". This is no doubt in part because, as pointed out by Ms Kyriakides, who appeared for Mr Spooner, no submissions were made, or authorities cited to the judge, on the legal test for implication of terms. The lack of reasoning, however, means it is impossible to know on what basis the judge concluded the term he identified in the declaration should be implied into the agreement.

41. Nevertheless, in agreement with the arguments presented in support of the Respondent's Notice, I consider that on the basis of the judge's findings of primary fact (against which there is no appeal) there is a plain and obvious term to be implied into the 2 July agreement, which justifies the judge's declaration that Mrs Johnson holds her share on trust for Mr Spooner. That term is that the share was to be transferred within a reasonable time of the agreement being reached on 2 July 2020.

42. As Mr Chapman submitted, the starting point when implying terms is to identify what was expressly agreed insofar as it might have a bearing on timing, because until one has worked out what the parties have expressly agreed, it is difficult to see how one can decide whether a term should be implied into the contract: *Duval v 11-13 Randolph Crescent Ltd* [2020] QC 845, per Lord Kitchin at §51.

43. The judge's key primary finding, on which the conclusion as to the implied term is based, is that the purpose of the agreement was to bring to an end to the Johnsons' involvement with QSL. This is the only reason given in §134 of the judgment, for the implication of the term as to timing of the share transfer.

44. It is clear from numerous other references in the judgment that the judge meant, by his conclusion that the purpose of the agreement was to bring an end to the relationship, that the purpose was to bring an end to the relationship there and then. First, an issue of considerable importance to Mrs Johnson was the return of her personal items, which

she was obliged to leave on loan at the hotel while she remained a shareholder. The fact that the agreement enabled her to remove those items immediately is consistent with her status as shareholder coming to an end from that point onwards: see, for example, the judgment at §106, §107 and §135. Second, there are numerous references in the judgment to the agreement being intended to, and having the effect of, achieving "closure" and being to "allow the parties to move on" in light of the imminent reopening of the hotel: see, for example, §85, §87, §106 and §123. Third, the judge found that the manner of Mrs Johnson's interaction when she came to remove her personal items, was of someone leaving permanently, then and there: see §137 to §139. This conclusion is reinforced by the fact the closure, or moving on, as between the parties involved Mr Johnson ceasing to be a director (and ceasing to be under any obligation to invest in QSL), which happened automatically on the transfer of Mrs Johnson's share.

45. Mr Chapman submitted that this cannot have been the intention, because the agreement envisaged at least some form of relationship continuing for another 14 months, because Mr Spooner was to make instalment payments over that period. The continuing relationship was, however, merely of debtor and creditor. It is clear that what the judge was referring to was the parties' intention to end, there and then, the joint involvement in the running of the business.

46. Since the actual transfer of the share required formal steps to be undertaken, it could not literally be achieved then and there. In the absence of a precise date being agreed upon, this is nevertheless a clear case for implying a term that the share would be transferred within a reasonable time. As Ms Kyriakides submitted, there are numerous examples of cases where the courts have implied a term, where a contract requires a party to do an act but is silent as to timing, that the act be done within a reasonable time: see Chitty on Contracts, 34th edition, at §24-013. If the notional officious bystander had been asked in this case, I have no doubt that the response would have been that "of course", the parties' intention of putting an end to their business relationship would be achieved in practice by Mrs Johnson transferring her share to Mr Spooner within a reasonable time of agreement being reached on 2 July 2020.

47. It may be that the judge had this in mind, and settled on the date of Mr Spooner's first payment as a proxy for the reasonable time within which Mrs Johnson's share would be transferred. If so, however, it would still not justify the implication of a *term* that the share should be transferred on the date of the first payment by Mr Spooner: that would be to confuse the actual term to be implied and the question whether transfer on a particular date would satisfy the obligation created by that term.

48. For these reasons, while I consider the judge erred in identifying the implied term as one which required the share to be transferred on the date of Mr Spooner's first payment, I consider that there was an implied term that the transfer would take place within a reasonable time. While there is room for debate as to what a reasonable time would have been, on the basis of the judge's primary findings of fact I have no doubt that it required Mrs Johnson to transfer her share by the time of the first payment from Mr Spooner, which was over a month later. On any view, that reasonable time had passed long before the proceedings had commenced, so that Mrs Johnson was undoubtedly by then under an obligation to transfer her share to Mr Spooner, such that she held her share on trust for him.

Ground 2

49. As I have already noted, the judge's finding (at §181 of the judgment) that a binding variation agreement was reached on 8 July 2020 upon Mrs Johnson accepting the terms of Mr Spooner's email timed at 14:58 on 7 July renders moot the question as to what term as to timing is to be implied into the 2 July agreement. That is because Mr Spooner's email of 7 July included the express term: "you will transfer the shares on signing…". To put the matter beyond doubt, Mrs Johnson's email in response reiterated: "Share up front on signing."

50. Mr Chapman submitted that the 8 July variation agreement only varied the 2 July agreement in respect of the amount to be paid by Mr Spooner. That, however, cannot be right. The judge's conclusion at §181 is clear: he found an agreement reached *in the terms set out in the exchange of emails*. There is nothing to contradict that finding in the remainder of the judgment.

51. It is true that in Ms Kyriakides' skeleton for the substantive appeal it was acknowledged in a footnote that "all that the 8 July Variation did was to vary the total sum payable by the Company under the agreement". At the hearing, however, she maintained the position that it followed from the judge's finding at §181 that the 8 July variation agreement was on the terms of the emails exchanged between the parties including, therefore, that the share would be transferred "on signing". Mr Chapman did not suggest that Mr Spooner was precluded from advancing that point by reason of an acknowledgment made in a footnote in Ms Kyriakides' skeleton served relatively shortly before the hearing of the appeal.

52. Mr Chapman advanced similar arguments against the implication of a term as in relation to the 2 July agreement. Insofar as he contended that there could be no implication of a term that the share would be transferred either on the date of the first payment by Mr Spooner, or within a reasonable time of the agreement being reached, because it would be unfair to require Mrs Johnson to transfer her share while a substantial part of the consideration payable by QSL remained outstanding, in addition to the points made above at §39, I note that Mr Spooner followed up his email of 7 July 2020 containing the revised offer, with a further explanation of timing in a subsequent email, as follows: "Your money is secured by the personal guarantee that's why the shares are handed over on signing…"

53. As with the implication of a term into the 2 July agreement, however, there is an important step missing between the finding in §181 of the judgment, and the declarations appearing in the Order. An express term that the share would be transferred "on signing", in circumstances where no written agreement was ever signed, does not in itself lead to the conclusion that Mrs Johnson was liable to transfer her share at the date of the first payment by Mr Spooner. There would at least have to be a further process of reasoning to justify the declarations in the Order. Insofar as the transcript of the hearing to consider consequential matters reveals any process of reasoning undertaken by the judge, then it is clearly insufficient, being based solely on the judge's finding at §134 as to the term to be implied into the 2 July agreement.

54. In my judgment, this reveals a similar error as in relation to the 2 July agreement, again compounded by the lack of reasoning to bridge the gap between the express term "on signing" and the conclusion set out in the declarations. I nevertheless consider (again, in agreement with the Respondent's Notice) that a similar term as to timing of transfer of the share is to be implied into the 8 July variation agreement as into the 2 July

agreement. Like the earlier implied term, transfer of the share on the date of the first payment would satisfy an obligation to transfer within a reasonable time, but that is not the same thing as the implied term itself being that the share would be transferred on that date.

55. The key finding of the judge is that, although Mrs Johnson stated in her email of 8 July 2020 that her agreement was "subject to contract", a binding agreement was reached on her accepting Mr Spooner's terms, in the same way that the 2 July agreement had been immediately binding. While the terms were to be written up afterwards, that did not detract from the conclusion that the parties had reached a final agreement on 8 July 2020.

56. In light of that finding, and the circumstances which I have summarised above surrounding the 2 July agreement, being that the purpose of the agreement was to enable the Johnsons and Mr Spooner to end their business relationship from that point onwards, I consider this is a clear case where there is to be implied a term that the parties would prepare and sign the written terms of their agreement as soon as reasonably possible. It necessarily follows, since the express term was that the share would be transferred on signing, that Mrs Johnson was obliged to transfer the share as soon as reasonably possible.

57. Mr Chapman submitted that, if the argument in the Respondent's Notice was to be pursued, based on the premise that the judge had found that the 8 July variation agreement contained an express term that the share would be transferred on signing, then since this was a new argument, Mrs Johnson was free to contend that the 8 July variation agreement was truly subject to contract, and that no binding agreement was reached. If she was free to make this contention, then the matter would have to be remitted to the judge for a re-trial because it is not open to the appeal court to determine that new question of fact.

58. I do not accept this submission. While it is true – as Mr Chapman submitted – that an appellant appeals an order, not a judgment, nevertheless an appeal proceeds on the basis of those findings of fact made by the judge against which no appeal lies. Mrs Johnson is unable to dispute on appeal the finding of fact that the 8 July variation agreement was immediately binding notwithstanding that Mrs Johnson said that she accepted Mr Spooner's offer 'subject to contract', because permission to appeal was sought on that issue, but refused.

59. The argument contained in the Respondent's Notice is based, therefore, on a primary finding of fact which Mrs Johnson is unable to dispute.

The Guarantee

60. Mr Chapman's submission on revised ground 3 relies on the fact that the agreement (whether that made on 2 July 2020 or as varied on 8 July 2020) provided for the provision of a guarantee by Mr Spooner, but the judge acknowledged (at §135) that such a guarantee would have to be drawn up formally.

61. As the argument was advanced in Mr Chapman's skeleton argument, at §57, it was based on the contention that the judge had found that the parties had entered into a binding agreement "save only that the personal guarantee would need to be put into

writing". Why, he asked rhetorically, would parties want only that part of their agreement to be in writing? That was not, however, how Mr Chapman advanced the case at the hearing of the appeal. Such a contention would clearly have been wrong. The judge had not found that the parties intended the personal guarantee element of their agreement to be binding only on it being committed to writing. The words in parentheses in §135 are clearly an aside by the judge, and do not constitute such a finding.

62. Mr Chapman's submission was instead that, while accepting the judge's finding that Mrs Johnson and Mr Spooner intended their agreement (and the variation to it) to be immediately binding, nevertheless as a matter of law (that is, on the basis of the test laid down in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14 ("*RTS Flexible Systems"*)), so far as the guarantee was concerned they had not reached an enforceable agreement.

63. The test as to whether a binding agreement has been reached between the parties was set out in the judgment of Lord Clarke of Stone-cum-Ebony JSC in *RTS Flexible Systems*, at §45:

> "The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."

64. I did not understand Mr Chapman's contention to be that the parties had not reached a conclusive agreement because the guarantee was not – as a matter of law – enforceable until it was reduced to writing. If it was, then I would reject the contention. As Ms Kyriakides submitted, the argument fails to distinguish between an intention to be bound by a contract (including a contract of guarantee) and the formalities required for enforceability of that contract: *Golden Ocean Group Ltd v Salgaocar Mining Industries Ltd* [2012] EWCA Civ 265, per Tomlinson LJ at §30.

65. Instead, I understood his argument to be that even though (according to the judge's finding which is not the subject of the appeal) the parties themselves thought they had reached a conclusive agreement, on the *RTS Flexible Solutions* test, which is an objective one, no conclusive agreement had in fact been reached because reasonable parties would not have considered there to be an immediately binding agreement where one element, the guarantee, could not be enforced without it being reduced to writing.

66. This, however, is to misunderstand the objective nature of the test. The test is objective in the sense that the intention of the parties is to be gleaned from a consideration of what passes between, whether by words of conduct (as opposed to being based on their

subjective intentions). That is the exercise the judge carried out, and against which no appeal lies. Mr Chapman's argument involves imputing to the parties the knowledge which others might have had as the requirement that an enforceable guarantee must either be in writing, or reflected in a subsequent memorandum. That, in my judgment, is not what the *RTS Flexible Test* requires.

67. In my judgment, therefore, the appeal on Ground 3 fails.

Conclusion

68. For the above reasons, although in part because the declarations made by the judge are to be upheld on the basis of a different implied term to that which he found to be implied, and despite the careful and impressive arguments of Mr Chapman on behalf of Mrs Johnson, I dismiss this appeal.