IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA502/2022
[2023] NZCA 540

BETWEEN	AIVITA HEALTHY NEW ZEALAND LIMITED Appellant
AND	UNIPHARM MANUFACTURING CO. LIMITED First Respondent
	ANC NZ LIMITED Second Respondent
	QINGFENG CHEN Third Respondent

Hearing:	17 July 2023
Court:	Gilbert, Lang and Woolford JJ
Counsel:	S O McAnally and A Ho for Appellant G P Blanchard KC, C Jiang and P K J Roycroft for Respondents
Judgment:	1 November 2023 at 2 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The cross-appeal is dismissed.

C The appellant must pay costs to the respondents for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Gilbert J)

[1] This appeal arises out of a dispute between shareholders. There are three issues. The first is whether pre-emptive rights provisions in a draft constitution that was never formally adopted were nevertheless incorporated by reference in the shareholders agreement. If so, the second issue is whether the pre-emptive rights were exercised in time following a change in control of one of the shareholders giving rise to the deemed service of a transfer notice. The High Court answered both of these questions in the affirmative and made an order for specific performance of the pre-emptive rights provisions.[1] If the appeal succeeds on either of these questions, a third issue will be whether the affairs of the company were conducted in an oppressive or unfairly prejudicial manner such that relief should be granted to the respondents under s 174 of the Companies Act 1993 (the Act). The High Court considered that it was unnecessary to determine this issue in light of its order for specific performance.

[2] The appellant, Aivita Healthy New Zealand Ltd (Aivita), and the second and third respondents, ANC NZ Ltd (ANC) and Mr Chen, are shareholders in the first respondent, Unipharm Manufacturing Co. Ltd (Unipharm). They entered into a shareholders agreement which provides that the pre-emptive rights in the constitution of the company shall apply with all necessary modifications in various circumstances, including where there is a change in the control of any shareholder. The constitution is defined in the shareholders agreement as meaning the constitution of Unipharm at that time. However, no constitution was ever formally adopted.

[3] Following a change of control in Aivita to a party associated with a competitor of Unipharm, the respondents commenced proceedings against Aivita seeking specific performance of the pre-emptive rights provisions in the shareholders agreement and, in the alternative, for relief pursuant to s 174 of the Act. Edwards J made an order for specific performance requiring Aivita to offer its shares in Unipharm to the other shareholders at a price to be determined by an arbitrator in accordance with the relevant clauses in the shareholders agreement and the draft constitution. The Judge dismissed the alternative claim under s 174.[2]

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1 *Aivita Health New Zealand Ltd v Unipharm Healthy Manufacturing Co Ltd* [2022] NZHC 2198 [High Court judgment] at [100] and [111(b)].

2 At [111(c)].

[4] Aivita appeals against the order for specific performance, contending:

(a) the draft constitution did not form part of the shareholders agreement and therefore there are no pre-emptive rights; and

(b) even if the pre-emptive rights provisions did apply, the time within which the other shareholders could require Aivita to sell its shares to them expired before any step was taken to exercise those rights.

[5] The respondents resist the appeal. However, in the event the appeal is allowed, they cross-appeal seeking relief under s 174 of the Act.

Background

[6] The following brief summary of the relevant background is uncontentious and is largely drawn from the High Court judgment.

[7] Unipharm was incorporated on 20 September 2016 as a joint venture company to purchase the assets of Evergreen Life (NZ) Ltd (Evergreen) with the intention of manufacturing pharmaceutical and health supplements for the New Zealand and Chinese markets. At the time of its incorporation, Unipharm's shares were held as follows:

(a) 60 per cent by Yibo Weng on trust for Chinan Xie, the sole director and shareholder of ANC;

(b) 20 per cent by Mr Chen; and

(c) 20 per cent by Aivita.

[8] On 21 October 2016, Unipharm's lawyers sent the parties a draft shareholders agreement and a draft constitution. It is plain on the face of the documents that they were intended to work together. The draft constitution provided for typical pre-emptive rights that would normally be expected to apply on any proposed sale or transfer of shares by a shareholder in a closely held joint venture company such as

this. These provisions contain reasonably standard machinery including the giving of a transfer notice, providing a process for determining a fair price in the absence of agreement and setting the time for the other shareholders to exercise their right to purchase at that price. These general provisions in the constitution were to be subject to specific provisions in section 4 of the shareholders agreement which is headed "Disposal of Shares".

[9] Clause 4.1 of the shareholders agreement provides for drag-along rights enabling a shareholder to compel the other shareholders to facilitate the sale to a third party of all the company's shares or the company's business. Where these rights apply, they trump the pre-emptive rights set out in the constitution and the shareholders are deemed to waive all such rights:

> **4. Disposal of Shares**
>
> **4.1 Drag-Along Rights**
>
> The following rights set out in clause 4.1 apply in priority to the pre-emptive rights on transfer set out in the Constitution. The Shareholders agree that, to the extent the rights in clause 4.1 apply, the Shareholders are deemed to waive all pre-emptive rights under the Constitution.
>
> (a) If at any time a Shareholder or Shareholders (in this clause and in clause 4.2 "Disposing Holder") wishes to dispose of all their Shares to an independent third party ("Third Party"), then the Disposing Holder may provide each remaining Shareholder ("Remaining Holders") with a written notice setting out the material terms (including price, the identity of the proposed transferee and the proposed completion date together with full disclosure of any collateral benefits or ancillary arrangements) ("the Drag Notice") of the proposed transaction prior to implementing that transaction.
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> (b) Subject to clause 4.1(d), the Drag Notice issued by the transferor under clause [4.1] will require the Remaining Holders to sell their Shares to the Third Party at the same time and on the same terms (including price per Share) as the Disposing Holder. The Remaining Holders acknowledge that if they default in selling their Shares then the Disposing Holder shall be appointed as attorney for the defaulting party and shall be entitled to do all such things necessary and execute such documents on behalf of the Remaining Holders to facilitate the transfers of their Shares and give effect to this clause.

(c) If a Shareholder wishes to exit the Company (in this clause the "Exiting Holder"), it shall have the right (but not the obligation) to require the Remaining Shareholders to approve by special resolution the sale by the Company of the Business. The Exiting Holder shall provide the Remaining Shareholders with a written notice setting out the material terms (including price, the identity of the proposed transferee and the proposed completion date together with full disclosure of any collateral benefits or ancillary arrangements) ("the Sale Notice") of the proposed transaction. Upon receipt of the Sale Notice, the Remaining Shareholders shall take all steps to approve the sale of the Business and the subsequent liquidation of the Company.

(d) The parties will use their respective best endeavours to effect the procedures set out in subclauses (a), (b) and (c) and procure that any Director appointed by them will use their best endeavours to ensure that the clause is given full effect to.

[10] Clause 4.2 was drafted so as to bring into play the general pre-emptive rights provisions in the constitution where a corporate shareholder is liquidated, dissolved, or removed from the Companies Register, or where there is a change in the control of that shareholder. This was achieved by deeming that a transfer notice has been given immediately prior to the relevant occurrence and applying the pre-emptive rights provisions in the constitution with all necessary modifications:

4.2 Dissolution/change of a Shareholder

A Shareholder ("Transferor") is deemed to have given a notice to the Board offering all of the Shares held by that Shareholder for sale to the other Shareholders ("Transfer Notice") immediately prior to:

(a) the dissolution, liquidation, removal from the Companies Register, winding up (or any similar occurrence) of that Shareholder; and/or

(b) a change in the control of any Shareholder,

and the pre-emptive rights for provisions in the First Schedule of the Constitution shall apply (with all necessary modifications).[3]

[11] Clause 1.1 of the shareholders agreement defines "Constitution" to mean "at any time, the constitution of [Unipharm] at that time".

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[3] The reference to the First Schedule of the Constitution is an obvious drafting error; there is no First Schedule.

[12] The shareholders agreement was signed by the shareholders on 3 June 2017, but no constitution was ever adopted, apparently through oversight.

[13] The purchase of Evergreen settled in January 2017 and Unipharm commenced trading at that time. The company encountered financial difficulties within only a few months. By October 2017, the secured creditor, ASB Bank, was threatening to appoint receivers if its loan facility was not reduced. The relationship between the shareholders deteriorated to the point where Aivita commenced proceedings against the respondents on 17 May 2019. In its third amended statement of claim, it advanced three causes of action, the first in debt, the second seeking an order pursuant to s 91 of the Act rectifying the register to reflect what it contended was the correct shareholding position, and the third for relief under s 174 of the Act.

[14] On 24 June 2019, about a month after Aivita filed its proceeding, Aivita's shareholders transferred their shares to a third party associated with one of Unipharm's competitors. The other shareholders did not become aware of this transfer until later.

[15] Aivita's proceeding was heard together with the separate proceeding filed by the respondents in March 2021 seeking specific performance of their alleged pre-emptive rights following the change of control of Aivita or, alternatively, relief under s 174 of the Act for alleged oppressive and unfairly prejudicial conduct. The Judge dismissed Aivita's claims and there is no appeal from that part of the judgment.

Was the draft constitution incorporated in the shareholders agreement?

High Court judgment

[16] The Judge was satisfied that the parties could enforce the pre-emptive rights in the draft constitution by contract. This was because:[4]

(a) these provisions were specifically incorporated by reference in cl 4.2 of the shareholders agreement;

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4 High Court judgment, above n 1, at [67]–[68].

(b) the Judge found as a fact that each of the shareholders agreed to these provisions;

(c) the fact that the constitution was not formally adopted by a shareholders resolution appeared to be a matter of oversight; and

(d) all parties acted as if they were bound by these terms, including Aivita:

(i) Drafts of the constitution and shareholders agreement were prepared by lawyers and circulated together to all shareholders and directors. All parties received copies of both documents.

(ii) Aivita's sole director agreed in her evidence that the constitution was valid and binding.

(iii) Aivita pleaded in its first and second amended statements of claim that the constitution was agreed by all parties.

(iv) Aivita itself initially pursued a claim alleging a breach of the pre-emptive rights provisions in the constitution as part of its claim under s 174 of the Act.

Submissions

[17] Mr McAnally, for Aivita, submits that whether the relevant provisions in the draft constitution were incorporated in the shareholders agreement is not a question of interpretation but, rather, turns on whether the assent of the parties to the shareholders agreement also included unreserved assent to the additional terms found in the draft constitution. He relies on this Court's decision in *Nalder & Biddle (Nelson) Ltd v C & F Fishing Ltd* for this proposition.[5] He says there must be unequivocal evidence that when entering into the shareholders agreement, Aivita also agreed to be bound by the pre-emptive rights provisions now sought to be enforced. Mr McAnally says there is no direct evidence that it did so. The sole director and shareholder of ANC candidly

[5] *Nalder & Biddle (Nelson) Ltd v C & F Fishing Ltd* [2007] 1 NZLR 721 (CA).

acknowledged that he did not turn his mind to the draft constitution. There was discussion about the terms of the shareholders agreement but no discussion about the constitution. In summary, Mr McAnally says there was no unequivocal evidence of acceptance. Rather, the evidence was consistent with the parties having forgotten about the constitution when they signed the shareholders agreement more than seven months after the documents were sent to them.

[18] Mr McAnally submits that if the parties did not turn their minds to the matter, the pre-emptive rights provisions in the constitution could not have been agreed to other than by implication. It was not contended at trial that those provisions be implied into the shareholders agreement. This means that they can only have been incorporated as express terms of the shareholders agreement. He submits that all that can be said to have been unequivocally agreed is that if Unipharm did adopt a constitution, the parties would be bound by the pre-emptive rights provisions contained in it. That never happened.

[19] As to the evidence relied on by the Judge, Mr McAnally submits that little to no weight can be given to the evidence of Aivita's director at the trial because she was no longer a director of Aivita and its earlier claims seeking to enforce the pre-emptive rights provisions were made some two years after the shareholders agreement was signed. He submits that what occurred at that time, when the parties were in dispute, can shed little light on what they agreed when the shareholders agreement was signed.

[20] Mr Blanchard KC, for the respondents, submits that *Nalder & Biddle* is not on point. The Court in that case was considering an oral agreement and the question was whether what was offered and accepted included terms referred to in earlier written documents. Mr Blanchard contends that the issue here is simply whether the relevant terms of the draft constitution were incorporated by express reference into the shareholders agreement. If so, the parties are bound, having affixed their signature to the shareholders agreement irrespective of whether they read it. Clause 4.2 of the shareholders agreement refers to the pre-emptive provisions in the "Constitution". The only document fitting this description was the draft constitution sent to the parties with the shareholders agreement.

[21] While there are obvious errors in the drafting of cl 4.2 of the shareholders agreement, Mr Blanchard submits that it is objectively clear that it is meant to refer to the pre-emptive rights provisions in clauses 5.1 to 5.6 of the constitution. These provisions are also referred to in clauses 4.1 and 4.3 of the shareholders agreement. Background recital C of the agreement also contemplates that the parties will be bound by the terms of the constitution because it provides that the provisions in the shareholders agreement will prevail over those in the constitution in the event of any conflict between these provisions.

[22] In any case, even if the test is whether the parties unequivocally manifested an intention that these provisions form part of the shareholders agreement, Mr Blanchard submits there is clear evidence of this. Aivita's sole director at the time accepted in cross-examination that she believed that the constitution was binding. Aivita pleaded in its first amended statement of claim that the parties agreed to the constitution:

> 11. The Shareholders Agreement refers to a Constitution for Unipharm. At the time the Initial Shareholders entered into the Shareholders Agreement, the shareholders had drafted a Constitution for Unipharm. The draft was agreed to by all shareholders but was never formally adopted by the company.

To similar effect, Aivita pleaded in its second amended statement of claim dated 23 July 2021:

> 16. When the Initial Shareholders entered into the Shareholders Agreement, the Initial Shareholders had the draft Constitution for Unipharm prepared by [its solicitors]. The draft was orally agreed to by the Initial Shareholders after 21 October 2016 [when it was sent to the Initial Shareholders] and before 31 January 2017 [when Unipharm settled the purchase of Evergreen's business] but was never formally adopted by Unipharm. …

[23] Prior to June 2022, Aivita relied on the constitution to pursue its own claim for breach of these same pre-emptive rights provisions and filed supporting affidavit evidence that these provisions were binding and had been breached. Even in its original statement of claim dated 17 May 2019, Aivita pleaded a "breach of the Company Constitution". It was not until Aivita filed its third amended statement of claim dated 10 June 2022, one month before the trial, that reliance on the constitution was dropped.

[24] Mr Blanchard also drew our attention to evidence given in the proceedings on behalf of ANC confirming that the rights of pre-emption in the constitution were regarded as binding. As to the suggestion made on behalf of Aivita that the parties may well have forgotten about the constitution when they signed the shareholders agreement, Mr Blanchard responds that this is entirely speculative and is inconsistent with the documentary and oral evidence referred to. The change in Aivita's position only came about following the transfer of control to a third party which had not been involved when the shareholders agreement was signed in June 2019.

Assessment

[25] We agree with Mr Blanchard that this Court's decision in *Nalder & Biddle* does not assist. That case was concerned with whether terms set out in earlier written documents formed part of an oral agreement. The Court readily accepted that an oral contract may refer to and incorporate written documents, but the critical issue in that case was to ascertain whether these formed part of what was offered and accepted.[6] The Court observed that the inquiry as to what were in fact the agreed terms was separate to the inquiry as to the objective construction of the meaning of those terms.[7] In the present case, the question of what was offered and accepted can be determined by looking at the shareholders agreement itself. The reference in cl 4.2 of the shareholders agreement to the pre-emptive rights provisions in the constitution is sufficient to incorporate those provisions into the shareholders agreement.[8] It does not matter whether any shareholder read it or turned their mind to it before signing the agreement.[9] The issue for the Court is to determine objectively what the parties must be taken to have intended that clause to mean. This must be determined by applying the familiar approach to contractual interpretation confirmed by the Supreme Court in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*:[10]

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6 At [30].

7 At [45].

8 *BBX Financial Solutions Pty Ltd v Wallace* [2011] NZCA 667 at [46] citing *Smith v South Wales Switchgear Co Ltd* [1978] 1 WLR 165 (HL) at 171 per Lord Fraser and 177 per Lord Keith.

9 *BBX Financial Solutions Pty Ltd v Wallace*, above n 8, at [47] quoting *L'Estrange v Graucob* [1934] 2 KB 394 (CA) at 403. See also *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52, (2004) 219 CLR 165 at [54]–[59] cited with approval in *BBX Financial Solutions Pty Ltd v Wallace*, above n 8, at [48].

10 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60] per McGrath, Glazebrook and Arnold JJ quoting *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912 per Lord Hoffmann.

> [T]he proper approach is an objective one, the aim being to ascertain "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".

[26] A party's subjective understanding of the meaning of an agreement is not admissible if it was not communicated to the other party prior to the agreement being entered into.[11] Evidence of subsequent conduct, potentially including non-mutual conduct, can be relevant to the objective determination of the proper interpretation of the agreement.[12] But self-serving statements made after a dispute has arisen are very unlikely to assist.[13]

[27] We do not consider the extrinsic evidence provides material assistance other than the evidence that the shareholders agreement and the constitution were drafted at the same time by the solicitors who were instructed to prepare these documents and they were sent together to the shareholders for signing. The shareholders agreement contains numerous cross-references to the constitution and these documents were plainly intended to work together. The other extrinsic evidence relied on, including that given by the former sole director of Aivita, is inadmissible to the extent it does no more than confirm their subjective understanding of the agreement after it was entered into. To the extent there is evidence of mutual post-contract conduct, including that both parties sought to rely on the pre-emptive rights provisions in the constitution at various times, the probative value of this evidence to the interpretation exercise is limited because this conduct was self-serving and occurred after the parties had fallen into dispute.

[28] Importantly, cl 4.2 of the shareholders agreement provides rights beyond those set out in the constitution and must be given effect. The operative part of the clause automatically triggers the deemed service on Unipharm's board of a transfer notice by a shareholder upon the happening of any of the specified events, including the liquidation or a change in control of that shareholder. It can be seen that these specified

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11 *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696 at [68] per Winkelmann CJ and Ellen France J and [232] per Glazebrook, O'Regan and Williams JJ.

12 At [89] per Winkelmann CJ and Ellen France J and [232] per Glazebrook, O'Regan and Williams JJ.

13 At [90] per Winkelmann CJ and Ellen France J and [232] per Glazebrook, O'Regan and Williams JJ.

events trigger the operation of the clause, and this is not expressly dependent on there being a formally adopted constitution. The concluding words of the clause (where reference is made to the constitution) merely provide the machinery for a response to such a deemed service of a transfer notice by engaging the pre-emptive rights provisions contained in the constitution.

[29] Aivita submits that the parties must be taken to have intended that cl 4.2 would operate only in circumstances where Unipharm had formally adopted a constitution. Aivita's interpretation would not only knock out the machinery, but it would also deprive cl 4.2 of having any effect unless a constitution was formally adopted. It seems most unlikely that the parties, as shareholders in a closely held joint venture company such as this, would have intended to provide pre-emptive rights for the transfer of shares by one of the other shareholders following its liquidation or removal from the Companies Register for example, but only if a constitution was formally adopted. We are unable to discern any commercial or other reason why this might have been intended. Further, if that were the intention, one would expect this would have been made clear by stating that the clause applies only in that circumstance. The clause has not been drafted in that way and contains no such restriction.

[30] We agree with the Judge that on the plain meaning of the clause, a shareholder was deemed to have given notice to the board offering its shares to the other shareholders immediately prior to the happening of any of the specified events, including a change in the control of that shareholder. It is also clear that the parties must be taken to have intended that the machinery provisions in the constitution would apply enabling a response to such a deemed service of a transfer notice. At the time the shareholders agreement was entered into, the only "Constitution" was the constitution drafted contemporaneously with the shareholders agreement. By signing the shareholders agreement, the parties must be taken to have intended the reference in cl 4.2 to be to the pre-emptive rights provisions in section 5 of this constitution (discussed below) or the equivalent provisions in any subsequent constitution.

[31] In summary, we agree with the Judge's conclusion on this issue. This ground of appeal fails.

Had the time for exercise of the pre-emptive rights expired?

Pre-emptive rights provisions

[32] The pre-emptive rights provisions are contained in section 5 of the constitution. Clause 5.1 provides that every change in the ownership of shares in the capital of the company shall be subject to the limitations and restrictions set out. Clause 5.2 provides that no share in the capital of the company shall be sold or transferred by any shareholder unless and until the rights of pre-emption have been exhausted. Transfer notices and the ascertainment of fair price are dealt with in cl 5.3. A shareholder wanting to sell or transfer shares is required to give notice in writing to the directors of their desire to sell or transfer. Any such notice is irrevocable and shall be deemed to appoint the directors as agent to sell the shares to any shareholder or shareholders of the company at a price to be agreed between the party giving the notice and the directors or, failing agreement within 28 days of the directors receiving the notice, at a fair price to be determined by an independent expert nominated by the chairperson of the Auckland District Law Society. Because of its central importance to this ground of appeal, we set out cl 5.3 in full:

> **5.3 Transfer notice and fair price**
>
> Every shareholder including the personal representative of a deceased shareholder or the assignee of the property of a bankrupt shareholder wanting to sell or transfer any share or shares shall give notice in writing to the directors of the desire to sell or transfer such share or shares. If such notice includes several shares it shall not operate as if it were a separate notice in respect of each such share, and the proposing transferor shall be under no obligation to sell or transfer some only of the shares specified in such notice. Such notice shall be irrevocable and shall be deemed to appoint the directors the proposing transferor's agent to sell such shares in one or more lots to any shareholder or shareholders of the Company (including the directors or any of them) at a price to be agreed upon between the party giving such notice and the directors or, failing agreement between them within 28 days of the directors receiving such notice, at a fair price to be determined on the application of either party by a person to be nominated by the chairperson for the time being of the Auckland District Law Society. Such person, when nominated, and in certifying the sum which in that person's opinion is the fair price for the share, shall be considered to be acting as an expert and not as an arbitrator and accordingly the Arbitration Act 1908 and any subsequent modifications or re-enactment thereof shall not apply.

[33] Once the price has been agreed or determined, cl 5.4 provides for the shares to be offered to the other shareholders and sets out the time for acceptance:

5.4 Offer to shareholders and consequent sale

> Upon the price for such shares being agreed on or determined as aforesaid (as the case may be), the directors shall forthwith give notice to each of the shareholders (other than the person wanting to sell or transfer such shares) stating the number and price of such shares and inviting each of the shareholders to whom the notice is given to state in writing within 21 days from the date of the notice whether such shareholder is willing to purchase any and, if so, what maximum number of such shares. At the expiration of 21 days from the date of the notice the directors shall apportion such shares amongst the shareholders (if more than one) who have expressed a desire to purchase the same and as far as may be pro rata according to the number of shares already held by them respectively, or if there be only one such shareholder, the whole of such shares shall be sold to that shareholder, provided however, that no shareholder shall be obliged to take more than the maximum number of shares stated in that shareholder's response to such notice. Upon such apportionment being made or such one shareholder notifying such shareholder's willingness to purchase, as the case may be, the party wanting to sell or transfer such share or shares shall be bound, upon payment of the said price, to transfer such share or shares to the respective shareholders or shareholder who have or has agreed to purchase the same and, in default thereof, the directors may receive and give a good discharge for the purchase money on behalf of the party wanting to sell and enter the name of the purchasers or purchaser in the share register as holder of such share or shares so sold.

[34] Where the shares offered are not taken up by the other shareholders, the party wanting to sell may sell the shares to a third party for the same (or higher) price:

5.5 Sale of shares not taken by shareholders

> In the event of all of such shares not being sold under the preceding sub-clause within 60 days of the directors receiving notice under clause 18 hereof, the party wanting to sell or transfer shall be at liberty within a further period of 30 days to sell the shares not so sold, but not a portion only, to persons who are not shareholders, provided however, that such party shall not sell them for a price less than the price at which the same have been offered for sale to the shareholders as aforesaid, but every such sale shall nevertheless be subject to the provisions of clause 16 hereof.

[35] The reference to "clause 18" is an obvious drafting error because there is no clause 18 in the constitution. It is common ground that this was intended to be a reference to cl 5.3 which is the eighteenth clause in the constitution. Similarly, the reference to "clause 16" is also a drafting error because that provision relates to the removal of Unipharm from the Companies Register where it has ceased to carry on business and has discharged all its liabilities. This is an intended reference to cl 5.1:

> **5. TRANSFER OF SHARES**
>
> **5.1 Freedom to transfer is qualified**
>
> Every change in the ownership of shares in the capital of the Company shall be subject to the limitations and restrictions hereinafter provided.

High Court judgment

[36] The Judge was concerned that a deemed transfer notice meant there was no obligation on a shareholder to give actual notice of a change in control. She considered this would create difficulty because the other shareholders would be unlikely to become aware of this change in control unless they received actual notice of that change.[14] It could be difficult to establish the date they received actual notice and this could lead to parallel processes with different timeframes for the sale of shares to different shareholders depending on when they became aware of the change of control. The parties cannot have intended this.[15] Under cl 5.3, time starts running when an actual notice is given. The Judge considered there was no good reason why an actual notice would be given in relation to a transfer or sale of shares but a deemed notice to be given in relation to a change in control of a shareholder. The need for certainty applied in both situations.[16]

[37] Given this difficulty, the Judge considered the parties did not intend cl 4.2 of the shareholders agreement to relieve a shareholder from the obligation to give actual notice under cl 5.3 of the constitution.[17] The requirement to give an actual notice "ensures certainty and clarity in the timeframes that apply and when rights of offer and acceptance must be exercised".[18] The Judge concluded that Aivita was required to serve an actual notice under cl 5.3 of the constitution and time did not begin running until such notice was given.[19] No actual notice having been served, time had not started to run.[20] It followed that the pre-emptive rights had not been lost.[21]

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14 High Court judgment, above n 1, at [76].
15 At [77].
16 At [78].
17 At [79].
18 At [82].
19 At [83].
20 At [83].
21 At [84].

Submissions

[38] Mr McAnally submits that the Judge erred in concluding that an actual transfer notice needed to be served by the relevant shareholder in the event of a change of control or other triggering event under cl 4.2 of the shareholders agreement. He argues the words of cl 4.2 are clear and unambiguous and deems the change of control in Aivita to be a "Transfer Notice". He submits that there are good reasons why the parties would have agreed to deem a transfer notice to have been given immediately prior to the specified events, including liquidation or removal of a shareholding company from the Companies Register.

[39] Mr McAnally says that a transfer notice was deemed to have been given on 24 June 2019. The other directors knew of the change of control on 1 August 2019. They were then able to invoke the process under cl 5.3 of the constitution. He contends they had 60 days from that date to take action, but they failed to do so. He submits the respondents should not be permitted to do so now.

[40] Mr Blanchard supports the Judge's analysis and conclusion. However, if this is not accepted, he argues in the alternative that the deemed notice applies only to cl 5.3, not cl 5.5 of the constitution. On this basis, the deemed notice would trigger the 28-day period for the parties to reach agreement on the price or have it determined. However, in order to trigger the 60-day period under cl 5.5, actual written notice is required. The necessary modification is limited to replacing the words "notice under clause [5.3] hereof" in cl 5.5 with "notice of a change of control". The commencement words in cl 5.5 would therefore be modified as shown in italics as follows:

> In the event of all such shares not being sold under the preceding sub-clause within 60 days of the directors receiving *notice of a change of control* …

Assessment

[41] The starting point is that cl 4.2 expressly requires application of the pre-emptive rights provisions in the constitution *with all necessary modifications*. The question is what modifications are necessary to make these provisions work in circumstances where a transfer notice is deemed to have been given. We consider

there is a more direct route than the one favoured by the Judge, but we arrive at the same result.

[42] We agree with Mr McAnally that a transfer notice having been deemed to have been served, there is no obligation on that party to serve an actual transfer notice as would normally be required under cl 5.3 of the constitution if that party was wanting to sell some or all of its shares. Not only is it unnecessary to require a shareholder to serve an actual notice when notice is already deemed to have been given, it could also be impractical to do so. For example, where a shareholder is a company and is removed from the Companies Register, it no longer exists and cannot do anything. Clause 4.2 of the shareholders agreement safeguards the other shareholders in this circumstance by providing that the relevant shareholder is deemed to have given a notice to the directors immediately prior to being removed from the Register and ceasing to exist.

[43] It is doubtful whether any material modification is necessary to make this provision work in the context of a deemed service of a transfer notice. The 28-day period allowed for the relevant shareholder and the directors to attempt to reach agreement on the price in terms of cl 5.3 only commences when all directors become aware of the triggering circumstance and have therefore received notice of it. This date will be provable as a matter of fact. The directors cannot be expected to agree a price for shares deemed to have been offered for sale until they have received notice of this.

[44] Assuming Mr McAnally is correct that the directors became aware of the change of control on 1 August 2019, the 28-day period in cl 5.3 commenced to run on that date. This period was allowed for the relevant shareholder and the directors to endeavour to reach agreement on the price. If agreement was not reached, the next step was for either party to seek the nomination of an independent expert to determine the price. Neither party has taken that step but there is no stipulated time for doing so. For ease of reference, we set out the relevant part of cl 5.3:

> … at a price to be agreed upon between the party giving such notice and the directors or, failing agreement between them within 28 days of the directors receiving such notice, at a fair price to be determined on the application of either party by a person to be nominated …

[45] It is only after the price has been agreed or determined that notice is to be given to the other shareholders offering the shares for sale under cl 5.4. Because the price has not been agreed or determined, this step has not yet been taken and the 21-day period for the other shareholders to exercise their right to purchase at that price has not commenced to run. Again, for ease of reference, we set out the relevant part of this clause:

> Upon the price for such shares being agreed on or determined as aforesaid (as the case may be), the directors shall forthwith give notice to each of the shareholders (other than the person wanting to sell or transfer such shares) stating the number and price of such shares and inviting each of the shareholders to whom the notice is given to state in writing within 21 days from the date of the notice whether such shareholder is willing to purchase any and, if so, what maximum number of such shares.

[46] For these reasons, we conclude that the respondents have not lost their pre-emptive rights. The price has not yet been determined. Either party can apply for a determination. Once the price has been determined, the respondents must be given 21 days' notice under cl 5.4 to exercise their right to purchase the shares. The pre-emptive right of purchase will not be lost until that period has expired. We therefore conclude that the Judge was correct to make an order for specific performance. The next step is for the price to be determined by an independent expert in accordance with cl 5.3 of the constitution.

[47] On our interpretation, cl 5.5 does not apply in the present circumstances. This is not a case of a shareholder wishing to sell its shares to a third party having freed itself from the pre-emptive rights provisions such that those rights "have been exhausted" in terms of cl 5.2. Instead, in terms of cl 4.2 of the shareholders agreement, there remains an irrevocable offer by Aivita to sell its shares to the other shareholders. The price of the shares has not been fixed and, as discussed above, the procedure mandated by cl 5.4 of the constitution has not yet been implemented. In particular, no offer has been made to the shareholders to purchase the shares at a specified price. We do not consider that cl 5.5 operates to extinguish an offer which has not yet been made or terminate the rights of the other shareholders to buy the shares. According to its own terms, cl 5.5 is not triggered unless and until the shares are not sold under cl 5.4. The 60-day period in cl 5.5 cannot have been intended to defeat the operation of cl 5.4 by extinguishing the pre-emptive rights prior to any offer being made to the

other shareholders or prior to the 21-day period allowed for acceptance of such an offer. This is reinforced by the restriction in cl 5.5 that the shareholder may only sell shares "*not so sold*" for a price "[*not*] *less than the price at which the same have been offered for sale to the shareholders as aforesaid*". This restriction underscores that cl 5.5 was not intended to take effect until the price has been determined, the shares have been offered for sale to the shareholders at that price, and the shareholders have not taken up their right to purchase at that price.

[48] We agree with the Judge's conclusion on this issue, albeit for slightly different reasons. This ground of appeal also fails

Cross-appeal

[49] The cross-appeal was pursued only in the event the appeal succeeded and the order requiring Aivita to offer its shares for sale to the other shareholders is set aside. The appeal having failed, we do not need to consider the cross-appeal. It can also be dismissed.

Result

[50] The appeal is dismissed.

[51] The cross-appeal is dismissed.

[52] The appellant must pay costs to the respondents for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

Solicitors:
Crimson Legal, Auckland for Appellant
Tompkins Wake, Auckland for Respondents