**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TĀMAKI MAKAURAU ROHE**

**CIV-2019-404-000933**
**[2022] NZHC 2198**

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| BETWEEN | AIVITA HEALTHY NEW ZEALAND LIMITED<br>Plaintiff |
| AND | UNIPHARM HEALTHY MANUFACTURING CO LIMITED<br>First Defendant |
| | ANC NZ LIMITED<br>Second Defendant |
| | QING FENG CHEN<br>Third Defendant |

see over for further proceeding

Hearing: 18–22 July 2022

Appearances: S O McAnally and A Ho for Plaintiff/Defendant
G Blanchard QC and C Jiang for Defendants/Plaintiffs

Judgment: 31 August 2022

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**JUDGMENT OF EDWARDS J**

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*This judgment was delivered by me on 31 August 2022 at 11.30 am pursuant to r 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

*Counsel/Solicitors:*
S O McAnally, Auckland
Crimson Legal, Auckland
G P Blanchard QC, Auckland
Tompkins Wake, Auckland

**CIV-2021-404-000477**

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|---|---|
| BETWEEN | UNIPHARM HEALTHY MANUFACTURING CO LIMITED<br>First Plaintiff |
| AND | ANC NZ LIMITED<br>Second Plaintiff |
| | QING FENG CHEN<br>Third Plaintiff |
| | AIVITA HEALTH NEW ZEALAND LIMITED<br>Defendant |

[1] Unipharm Healthy Manufacturing Co Ltd (Unipharm) manufactures pharmaceutical and health supplements for the New Zealand and Chinese markets. These two proceedings involve disputes between the shareholders of Unipharm.

[2] ANC NZ Ltd (ANC) and Qing Feng Chen (Kevin)[1] hold approximately 90 per cent of the shares in Unipharm. They, together with Unipharm, are referred to as the Unipharm parties in this judgment. Aivita Healthy New Zealand Ltd (Aivita) holds the remaining 10 per cent shares in Unipharm.

[3] In the first proceeding (Aivita proceeding), Aivita sues the Unipharm parties claiming that 80,000 of its shares have been wrongly recorded as belonging to ANC. It seeks rectification of the Companies Office Register to reflect the true position. Aivita also seeks relief under s 174 of the Companies Act 1993 (Act) for conduct in relation to the issue of new shares and the removal of a director.[2]

[4] In the second proceeding (Unipharm proceeding), the Unipharm parties seek relief for a change in control of Aivita which they say was in breach of pre-emptive rights contained in the shareholders' agreement and Constitution of Unipharm.[3] They seek a buy-out order in relation to Aivita's shares which they say are now owned by a competitor of Unipharm. The application for relief is made by way of specific performance of the pre-emptive provisions, or s 174 of the Act in the alternative.[4]

[5] The Unipharm parties also claim that Aivita has breached confidentiality duties by disclosing Unipharm's financial information to its competitor.

**Factual background**

[6] Chinan Xie (Charlie) is the sole director and shareholder of ANC, and a director of Unipharm. In 2016 he was the New Zealand general manager and director

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1 The individuals involved in this claim referred to themselves by their anglicised first names. I do likewise out of deference to their preferred form of address.

2 The first cause of action was discontinued following agreement reached between the parties at trial.

3 The Constitution was not formally adopted by shareholders' resolution but I shall nevertheless refer to it as the Constitution for ease of reference.

4 Aivita consents to part of the relief sought in the first cause of action in the Unipharm proceedings. A declaration in agreed terms is set out at the end of this judgment.

of a different Chinese pharmaceutical company. Charlie identified an opportunity to purchase the assets of Evergreen Life (NZ) Ltd (Evergreen), a health supplements manufacturer.

[7] Charlie discussed this opportunity with Haibing Du (Wilson) and Kevin. Both Wilson and Kevin worked for another health supplements manufacturer at that time, GMP Pharmaceuticals (GMP).

[8] The Unipharm parties say that Charlie, Wilson and Kevin agreed to incorporate Unipharm as a joint venture company to purchase the assets of Evergreen and manufacture health supplements for the New Zealand and Chinese markets. Wilson denies there was any discussion about a joint venture.

[9] On 9 August 2016, Kevin entered into an agreement to purchase the Evergreen business on behalf of the three men as Unipharm had not yet been incorporated. The purchase price was $2.2 million.[5] The purchase of the Evergreen assets was funded by way of advances from the shareholders totalling $1,600,000. Charlie (through his stepson, Yibo Weng) advanced 70 per cent of these funds, and Kevin and Aivita advanced 15 per cent each. The balance of the purchase price was funded through a loan facility from ASB.

[10] Aivita was incorporated on 18 August 2016. Wilson's wife, Yinghua Xu (Wendy) was the sole director. Wendy and her friend Chengqun Song, who lives in China, were the only shareholders. The Unipharm parties say that Aivita was effectively a front for Wilson who was subject to a restraint of trade at the time. Wilson and Wendy deny this.

[11] Unipharm was incorporated on 20 September 2016. On incorporation the directors of Unipharm were Wendy, Yibo Weng and Kevin. The initial shareholders were Yibo Weng (60 per cent shareholding), Aivita (20 per cent) and Kevin (20 per cent). Yibo Weng held his shares on trust for Charlie.

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5 This is at odds with the figure nominated in the sale and purchase agreement included in the common bundle of documents. Nevertheless, all parties gave evidence that this was the purchase price and so I proceed on that basis.

[12] Kevin and Aivita each owned 20 per cent of the shares, despite each having only advanced 15 per cent of the purchase price funds. The additional five per cent was held on trust for Yibo Weng, subject to whether Unipharm met certain performance targets.

[13] Those performance targets were set out in a shareholders' agreement executed by the parties on 3 June 2017 (Shareholders' Agreement). The relevant clauses are set out at [31] of this judgment. For present purposes it is enough to say that the performance targets were benchmarked by turnover and net profit figures for the first three years of operation. Whether the net profit targets were met (which depends in turn on the meaning of "net profit" as used in these clauses) is at the heart of Aivita's claim for rectification of the share register.

[14] The Shareholders' Agreement is also relied on by the Unipharm parties to establish their claim that the pre-emptive rights provisions contained in that Agreement and the Constitution have been breached. The shareholders did not pass a resolution formally adopting the Constitution. Nevertheless, the Unipharm parties say the pre-emptive rights provisions in this Constitution were incorporated into the Shareholders' Agreement and are therefore enforceable as a matter of contract.

[15] The purchase of Evergreen was settled in January 2017 and Unipharm began trading straightaway. Wilson signed an employment agreement with Unipharm in April 2017 to become its Chief Executive Officer. Charlie says he was unaware of this appointment.

[16] Unipharm's financial performance began to unravel in the first five months of trading. In July 2017, the shareholders signed a shareholder loan plan by which they agreed to advance funds to Unipharm. Yibo Weng advanced $350,000, Kevin advanced $75,000 and Aivita advanced $65,000. Aivita's advance was less than the $75,000 loan it had promised to provide.

[17] These advances were not enough to stop Unipharm's financial decline, and by October 2017 ASB was requiring Unipharm to reduce its loan facility, failing which receivers would be appointed.

[18] Around this time, Charlie resigned from his job to focus on Unipharm. Later on, Charlie's partner, Pengli Teng (Pengli), also became involved with the financial management and accounting of Unipharm. Pengli is an accountant, and assisted Unipharm without remuneration from October 2017 to May 2019.

[19] On 20 November 2017, there were shareholders' and directors' meetings regarding the transfer of Yibo Weng's shares to ANC, with Yibo Weng then being replaced by Charlie as director. Charlie says that Wilson attended this meeting but refused to sign the documents authorising the transfer of shares.

[20] By this time, Wilson was advocating sale of Unipharm to a third party as a way to solve the company's financial problems. Initially, Kevin and Pengli agreed with Wilson but later changed their minds. Kevin and Pengli say they changed their minds when they discovered that the new purchaser Wilson had found was in fact Wilson's new business partner.

[21] Around this time, Charlie, Kevin and Pengli became aware that Unipharm's confidential information had been leaked. They suspected Wilson was the source of that leak. Wilson, and other Unipharm staff, were asked to sign a confidentiality agreement, which they did.

[22] The relationship between Wilson on the one hand, and Charlie, Kevin and Pengli on the other, deteriorated even further. On 14 December 2017, the directors passed a resolution relieving Wilson of his Chief Executive role. The board resolution is signed by Wilson who attended the board meeting. There is a dispute about whether Wilson was effectively fired, or whether he left voluntarily.

[23] The following day, the five per cent shareholding that both Kevin and Aivita each held on trust was transferred to ANC. Charlie says this transfer was made because Wilson was no longer involved in the operation and management of Unipharm and Unipharm did not meet its performance targets. This transfer is the subject of Aivita's second cause of action.

[24] Unipharm's financial difficulties continued, and in February 2018 Unipharm borrowed $400,000 from Charlie on condition that if Unipharm could not repay the loan, then he was entitled to have the loan repaid by the issue of new shares in Unipharm. A further $300,000 was borrowed from Full Joy Foods Pty Ltd (Full Joy) on the same terms.

[25] Wilson incorporated Universal Pharmaceuticals Ltd (Universal Pharmaceuticals) in April 2018. He is a director and ultimate shareholder of this company. There are parallel proceedings whereby the Unipharm parties are suing Universal Pharmaceuticals and Wilson for breach of confidentiality provisions. Those are for trial next year.

[26] On 3 March 2019, a shareholders' meeting was called at which the removal of Wendy as a director was discussed. Charlie says Wendy was asked to resign because Wilson was no longer working at Unipharm and had set up a competing business. Wilson was invited to the meeting but did not attend. Unipharm was in default on its loans to Charlie, Full Joy and Kevin. The parties discussed converting those loans into shares at this meeting. Wendy left the meeting. It is common ground that she did not agree to her removal as a director, nor the conversion of loans into shares.

[27] Subsequently, Wendy was removed as director. New shares were issued to Full Joy and to ANC in repayment of their loans. New shares were also issued to Kevin in repayment of his loan to Unipharm. This had the effect of diluting Aivita's shareholding in Unipharm. Wendy's removal as director, and the issue of new shares, is the subject of Aivita's third cause of action.

[28] Aivita commenced its proceeding on 17 May 2019. Two months later, 100 per cent of the shares in Aivita were sold to Kun Xiu (Sabrina) for approximately $330,000. The Unipharm parties say Sabrina is associated with Yi Wu (Easter) who is the sole director and shareholder of Megadairy Ltd (Megadairy) and Supermega Market Ltd (Supermega). Megadairy and Supermega are competitors of Unipharm.

[29] The Unipharm parties say that the change of control in Aivita breached their pre-emptive rights in the Shareholders' Agreement and Constitution, and otherwise constituted oppressive and unfairly prejudicial conduct within the meaning of s 174 of the Act. Unipharm commenced its proceeding on 5 March 2021.

**Aivita's claim for rectification of the Register**

[30] The share register for Unipharm records Aivita as holding 240,000 shares in Unipharm. Aivita says this is an error and it should record a shareholding of 320,000 shares. It seeks rectification of the share register under s 91 of the Act.

[31] The dispute concerns the five per cent shareholding that Aivita originally held on trust subject to achieving performance targets as set out in the Shareholders' Agreement. The relevant clauses of the Shareholders' Agreement provide:

> 2.9.1 It is acknowledged that Mr Weng [Yibo Weng] will not be involved in the Company's daily operation except for unanimous approval required pursuant to clause 2.5. Further, Mr Chen [Kevin] and Aivita acknowledged that they have each introduced capital equivalent to 240,000 shares (15%) only. Mr Chen [Kevin] and Aivita are each holding 80,000 shares (5%) on behalf of Mr Weng [Yibo Weng] on trust.
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> 2.9.2 The parties agree that Mr Chen [Kevin] and Aivita are fully entitled to the additional 80,000 (5%) shares under their respective names if the following performance targets are met for the next three years ("the performance targets");
>
> (a) A net profit of $100,000 at the year ended 31 March 2018 with a turnover of $3,500,000.00 or more; and
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> (b) A net profit of $200,000 at the year ended 31 March 2019 with a turnover of $5,000,000.00 or more; and
>
> (c) A net profit of $300,000 at the year ended 31 March 2020 with a turnover of $6,000,000.00 or more.
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> 2.9.3 If Mr Chen [Kevin] and Aivita are unable to meet the performance targets, they agree to unconditionally transfer the 80,000 shares that each of them is holding on Mr Weng's [Yibo Weng's] behalf to Mr Weng [Yibo Weng]. If the parties agree to alter the performance targets or agree to any lower or higher performance target taking other the business' circumstances [sic] into consideration, they shall put the new performance targets in writing and sign that document recording the new performance targets for that particular year or years.

> 2.9.4 The parties agree that the above performance targets may be a total target for the three years. In other words, the performance targets shall be considered achieved if the total combined net profit of the three years comes to $600,000.00 or any other later agreed net profit amount(s); and similarly if the combined turnover is $14,500,000.00 for the three years or any other later agreed turnover amount(s).
>
> 2.9.5 If either Mr Chen [Kevin] or Aivita or both decide to sell his/its/their shares before 31 March 2020, the 5% shareholding that him/it/they hold on behalf of Mr Weng [Yibo Weng] shall be unconditionally transferred back to Mr Weng [Yibo Weng] without any payment and clause 2.9.3 shall apply.

[32] The clause operates to specify yearly targets for both net profit and turnover for the years ended 31 March 2018, 31 March 2019 and 31 March 2020. The effect of cl 2.9.4 is that the targets may be measured on a total combined basis – $600,000 net profit and $14.5 million turnover.

[33] There is no issue as to the turnover figure. Over the relevant three years, the total income identified in the financial statements is approximately $26 million – clearly in excess of the $14.5 million target. Nor is there any issue raised about the timing of the transfer, that is, it took place prior to the expiry of the three-year period. The sole focus of the dispute is the net profit targets and the meaning of "net profit" in cl 2.9.2.

*What is the plain meaning of "net profit" in cl 2.9 of the Shareholders' Agreement?*

[34] Aivita says that "net profit" means profit calculated without deduction for depreciation. If depreciation is excluded, then the net profit for the three years totalled $622,492 which is in excess of the target of $600,000.

[35] Unipharm says that "net profit" bears its ordinary accounting meaning which means that depreciation is included in the calculation as an expense. Measured on this basis, the net profit for the three years showed a deficit of $113,076 which falls well short of the net profit target.

[36] The meaning of "net profit" is to be determined in accordance with the relevant principles of contractual interpretation. Those principles were most recently set out

by the Supreme Court in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*.[6] In brief, the approach is to ascertain the meaning which would be conveyed to a reasonable person having all the background knowledge reasonably available to the parties in the situation they were in at the time of the contract.[7] Context is a necessary element of the interpretive process, but text remains centrally important.[8] Regard should be had to commercial purpose and to the structure of the parties' bargain to the extent they can be readily identified.[9] As to specialised meaning, the Supreme Court said:[10]

> Parties to contracts will sometimes use words that have specialised meanings within a particular profession, industry, trade or locality, or words that have a particular meaning simply to them (the private dictionary principle). It is well established that a court is entitled to receive evidence which demonstrates that the parties have adopted such a specialised meaning.
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> (footnote omitted)

[37] Applying those principles to this case, the starting point is the language used in cl 2.9 construed in the context of the Shareholders' Agreement as a whole.

[38] The first point to note is that the Shareholders' Agreement does not specify how "net profit" is to be calculated and it provides no other direction as to whether depreciation is to be excluded or included in the calculation.

[39] As Mr McAnally responsibly acknowledges, the fact that financial years are referenced in cl 2.9.2(a)–(c) gives rise to an inference that the parties intended Unipharm's financial statements to be used in assessing whether the performance targets had been met. There is no dispute that Unipharm's financial statements include depreciation as an expense in calculating net profit.

[40] Mr Apps was called by the Unipharm parties to give expert evidence on the meaning of "net profit" as it is used in accounting practice. He said that "net profit" generally describes the difference between revenue generated and expenses incurred

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6 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60]–[63], [77]–[79], [84] and [88]–[98] per McGrath, Glazebrook and Arnold JJ (Elias CJ and William Young J reserving their positions).

7 At [60].

8 At [63].

9 At [79].

10 At [84].

in undertaking a business and that depreciation is a normal business expense. In its most simple terms, Mr Apps described depreciation as the process by which the value of an asset at its acquired cost is expensed over the life of that asset as it is used to generate income. He said he was not aware of any commonly accepted definition of "net profit" that excluded deduction for depreciation.

[41] Aivita did not call expert evidence to rebut Mr Apps' evidence. Nevertheless, Mr McAnally submits that a reasonable person having all the background knowledge reasonably available to the parties at the time would not have intended "net profit" to be used in its strict accounting sense, at least insofar as depreciation is concerned. That is because the net profit figure in cl 2.9.2 was only relevant as a reflection of the performance of Kevin and Aivita. Mr McAnally said depreciation does not measure performance by individuals.

[42] There is no dispute that the performance targets in cl 2.9.2(a)–(c) acted as incentives for Kevin and Aivita. As recorded in cl 2.9.1, Yibo Weng was not to be involved in the Unipharm's daily operations and it is common ground that Charlie was not going to be involved on a day-to-day basis either.

[43] However, the fact that the clause was to operate as a performance incentive does not lead to an inevitable conclusion that "net profit" must exclude depreciation or bear a meaning different to that used in the financial statements. Indeed, Mr Apps also took issue with the exclusion of depreciation as an expense on the basis that it was not a performance measure. Mr Apps considered that ignoring depreciation by excluding it from operational performance would ignore the cost attributed to capital intensive plant.

[44] If Aivita's interpretation was to be adopted, "net profit" would be calculated differently depending on the purpose for which it was to be used. There is nothing in the clause or the Shareholders' Agreement to suggest that this is what the parties intended. Rather, the ordinary and natural meaning of the clause, construed in its contractual context, is that "net profit" refers to the net profit figure in the financial statements and so includes a deduction for depreciation.

*Was there a meeting where it was agreed that "net profit" would not include depreciation?*

[45] Aivita relies on Wilson's evidence of a meeting in late 2016 where he said that he, Charlie, and Kevin, orally agreed that "net profit" would not include depreciation for the purposes of cl 2.9. Wilson said he raised this as an issue because when he inspected Evergreen's factory equipment, he noted that it was aged and that if "net profit" was to include depreciation, it would be a difficult target to reach.

[46] Charlie and Kevin denied that such a meeting took place or that there was any discussion regarding depreciation or the calculation of net profit for the purposes of meeting the performance targets.

[47] The admissibility of Wilson's evidence regarding this meeting was not challenged at trial. I assume, without deciding, that the evidence was admissible in accordance with the principles set out by the Supreme Court in *Bathurst Resources Ltd v L & M Coal Holdings Ltd.*[11] Even if admissible, I reject Wilson's evidence on this point (and others) as lacking in credibility for the reasons which now follow.[12]

[48] First, Wilson's evidence that there was a meeting regarding depreciation was only adduced in supplementary questions during his evidence-in-chief at trial. The transfer of Aivita's performance shares was a key issue in Aivita's proceeding from the start. Given the significance of such a meeting to the specialised meaning Aivita seeks to attribute to "net profit", it is reasonable to expect this evidence would be referred to in Wilson's brief of evidence filed in support of Aivita's claim.

[49] That late evidence must also be seen in the context of the late amendment to Aivita's statement of claim raising the depreciation issue for the first time. The contention that the net profit performance targets were met on the basis that "net profit" was to be calculated excluding depreciation was only raised for the first time in Aivita's third amended statement of claim dated 10 June 2022. The late change of

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11 *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85; [2021] NZLR 696.

12 I have approached these credibility findings in accordance with the Supreme Court's observations in *Deng v Zheng* [2022] NZSC 76 at [78].

tack adds weight to the strong inference that Wilson's evidence regarding a meeting was invented to bolster Aivita's claim on their second cause of action.

[50] Second, Wilson's evidence of a meeting is not corroborated by the documentary record. That record shows that cl 2.9 of the Shareholders' Agreement was amended several times and the performance targets were discussed between Charlie, Kevin and Wilson in a WeChat message group set up for the purpose of communicating about purchasing the Evergreen assets.

[51] None of the discussions in the WeChat messages or the drafts of the Shareholders' Agreement corroborate Wilson's evidence that the parties had agreed that "net profit" was to be calculated as excluding depreciation. If a discussion had taken place as Wilson suggests, then it would be reasonable to expect some reference to it in the WeChat messages.

[52] There was also ample opportunity to ensure that the drafting of cl 2.9 reflected the agreement which Wilson said was reached. The fact that it did not suggests that there was no discussion or agreement as to excluding depreciation at all.

[53] Wilson sought to explain this discrepancy by contending that he did not receive or review a copy of the Shareholders' Agreement before it was finalised. I reject that evidence. A draft of the Shareholders' Agreement was circulated to shareholders in October 2016 and January 2017. It was addressed to Wilson at his wife's email address and Wendy confirmed that Wilson used her email address. Furthermore, in one of the WeChat messages contained in evidence, Wilson mentions cl 2.9 of the Shareholders' Agreement which is clear evidence he had received and reviewed it. Accordingly, I find that Wilson did receive and read the draft Shareholders' Agreement, including cl 2.9.

[54] Third, I found Wilson's evidence given at trial to be generally unsatisfactory. It was often at odds with his own affidavit evidence given earlier in the proceeding. For example:

(a) In his affidavit, Wilson admitted that Unipharm was a joint venture between Charlie, Kevin and himself, and Aivita was a vehicle for that investment. At trial, Wilson denied this was the case and insisted that he was an employee of Unipharm.

(b) In his affidavit, Wilson gave evidence that Wendy was a director of Unipharm because he was subject to a restraint of trade with his former employer. At trial, Wilson denied that he was subject to a restraint of trade at all.

(c) In his affidavit, Wilson said he knew that Yibo Weng held the shares on trust for Charlie, and he was aware that Yibo Weng was Pengli's son. At trial, Wilson said that he did not understand that Yibo Weng's shares were held on trust and did not know that Yibo Weng was Pengli's son until proceedings were issued.

[55] Wilson tried to explain these inconsistencies as being due to difficulties with the translation of his affidavit evidence into English. I do not accept that explanation. It was apparent during cross-examination that Wilson was able to read and understand the English language used in his affidavits quite well.

[56] The evidence given in the earlier affidavits was plausible and consistent with the documentary record. Wilson's departure from this evidence at trial was transparently self-serving and lacked credibility.

[57] Wilson also refused to accept propositions or documentary evidence which were clearly contrary to his evidence. For example, Wilson denied knowing "Douglas Xu" despite signing directors' resolutions which contained that name and including that name in brackets next to Wilson's name. The clear inference was that Wilson was using the name "Douglas Xu" to disguise his involvement with Unipharm given his restraint of trade. His denial that this was the case lacked plausibility. Further, when confronted with evidence in the WeChat messages which contradicted his sworn testimony, Wilson simply denied that he had posted the message in issue.

This is despite it being clear from the icon used to post the message, and the content of the message, that it was him.

[58] Accordingly, I reject Wilson's evidence there was an agreement that "net profit" would exclude depreciation for the purposes of considering whether the performance targets in cl 2.9 were met.

*Conclusions on the meaning of "net profit" in cl 2.9 of the Shareholders' Agreement*

[59] To sum up, I find that "net profit" as used in cl 2.9 is to be calculated by taking into account depreciation. That means the net profit performance targets specified in cl 2.9.2, calculated in accordance with cl 2.9.4, were not met.

[60] The consequence of the performance targets not being met is that cl 2.9.3 was engaged and Aivita had no right to retain the 80,000 shares held on trust for Yibo Weng. Aivita has accepted that the transfer of these shares to ANC was valid and have consented to a declaration being made in those terms. That declaration, together with the other declaration sought in relation to Unipharm's first cause of action, is set out at the end of this judgment. Aivita's second cause of action is dismissed.

**The Unipharm parties' claim of breach of pre-emptive rights**

[61] The Unipharm parties claim that Aivita's change in ownership was in breach of the pre-emptive rights provisions conferred in the Shareholders' Agreement and Constitution.

[62] There is no dispute that the shareholder parties are bound by the Shareholders' Agreement. However, Aivita defends the claim on the basis that the Constitution was not adopted by Unipharm and so it is not bound by the clauses conferring pre-emptive rights. Alternatively, if the Constitution is binding, Aivita says that there has been non-compliance with the timeframes set out in the Constitution for the exercise of the pre-emptive rights.

*Shareholders' Agreement and Constitution clauses*

[63] Clause 4.2 of the Shareholders' Agreement provides as follows:

> **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 the Shareholder,
>
> and the pre-emptive rights for provisions [sic] in the First Schedule of the Constitution shall apply (with necessary modifications).

[64] It is common ground that cl 4.2(b) applies in this case. Although the clause refers to the pre-emptive rights provisions in the First Schedule of the Constitution, there is in fact no "First Schedule" annexed to the Constitution. However, cls 5.1 to 5.6 of the Constitution set out pre-emptive right provisions. Those clauses are set out in full in the appendix to this judgment. For present purposes, the effect of these clauses may be summarised as follows:

(a) *Clause 5.1:* Every change in the ownership of shares in the capital is subject to the limitations and restrictions provided.

(b) *Clause 5.2:* No shares in the company shall be sold or transferred by any shareholder unless and until the rights of pre-emption have been exhausted.

(c) *Clause 5.3:* A shareholder wanting to sell or transfer shares shall give notice in writing to the directors of that desire.

The notice is irrevocable. The directors are deemed to be agents to the proposing transferor to sell the shares to any shareholder or director of the company at a price to be agreed between them.

If the parties fail to reach agreement on price within 28 days of the directors receiving such notice, then the price is to be determined, on the application of either party, by a person to be nominated by the chairperson of the Auckland District Law Society. That person is to certify a fair price for the shares and is acting as an expert.

(d) *Clause 5.4:* Once the price is either agreed or determined, the directors must give notice to each of the shareholders stating the number and price of such shares and inviting each shareholder to state in writing within 21 days from the date of notice whether such shareholder is willing to purchase any, and if so, how many, shares.

At the expiration of 21 days from the date of notice of offer, the directors shall apportion the shares amongst the shareholders (if more than one) who have expressed a desire to purchase the shares.

Once the willingness of a shareholder to purchase has been ascertained and shares apportioned (if necessary), the party wanting to sell or transfer the shares is bound to transfer those shares once the payment price is received.

In default, 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 purchaser or purchasers in the share register as holder of those shares.

(e) *Clause 5.5:* In the event that not all of the shares are sold within 60 days of the directors receiving notice of intention to sell, then the party wanting to sell or transfer shall be at liberty within a period of a further 30 days to sell the unsold shares to non-shareholders but they may not do so for a price that is less than the price at which the shares have been offered for sale to the shareholders previously.

(f) *Clause 5.6:* Allows for share transfers between family members.

*Are the terms of the Constitution binding on the parties?*

[65] It is common ground that the Constitution was not adopted by shareholder resolution and was not registered with the Companies Office. Nevertheless, the Unipharm parties submit that the pre-emptive rights provisions of the Constitution are incorporated into the Shareholders' Agreement (subject to "necessary modifications") and are enforceable by way of contract.

[66] In *Taylor v Seahorse World Aquarium*, McKenzie J accepted the proposition that a constitution that had not been formally adopted by the parties could nevertheless be enforced by way of contract.[13] The Judge concluded that statements made in *Shalfoon v Cheddar Valley Cooperative Dairy Co Ltd* to the effect that an obligation contained in Articles of Association under the Companies Act 1908 could be enforced by way of contract remained valid under the 1993 Act.[14]

[67] The case for contractual force is much stronger in this case because the pre-emptive provisions of the Constitution are specifically incorporated into the Shareholders' Agreement by reference in cl 4.2 of the Shareholders' Agreement.

[68] Furthermore, and contrary to Aivita's submissions, I find that each of the Unipharm shareholders agreed to the provisions of the Constitution, including the rights of pre-emption. The fact that it was not formally adopted by shareholder resolution appears to have been a matter of oversight and all parties acted as if they were bound by its terms. In reaching that conclusion, I rely on the following:

(a) Drafts of the Constitution and Shareholders' Agreement were prepared by lawyers and circulated to all shareholders and directors in October 2016. All parties received a copy of these two documents.

(b) Wendy, on behalf of Aivita, agreed in her evidence that the Constitution was valid and binding. She affirmed her earlier affidavits to this effect.

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13 *Taylor v Seahorse World Aquarium* [2008] NZCCLR 21.

14 *Taylor v Seahorse World Aquarium* [2008] NZCCLR 21 at [37]–[38] citing *Shalfoon v Cheddar Valley Co-operative Dairy Co Ltd* [1924] NZLR 561.

(c) In the first and second amended statements of claim, Aivita pleaded that the Constitution was agreed between all parties. Indeed, initially Aivita pleaded breach of the pre-emptive rights in the Constitution in its claim under s 174 of the Act.

[69] I consider the fact that the Constitution does not contain a First Schedule does not impact on its enforceability by way of contract. As explained further below, there are several areas where the drafting of both the Shareholders' Agreement and Constitution is very poor. The reference in cl 4.2 of the Shareholders' Agreement to a First Schedule to the Constitution falls into that category.

[70] That drafting error cannot be relied on to show that the final terms of the Constitution had not been agreed. There was only one copy of the Constitution admitted in evidence and no suggestion that there were other drafts. Aivita initially relied on the same pre-emptive rights provisions in the same version of the Constitution which Unipharm now seeks to rely on as being incorporated into the Shareholders' Agreement.

[71] Finally, the definition of "Constitution" provided in the Shareholders' Agreement is "the constitution of the Company at that time". I take this to mean that the parties anticipated that the Constitution would be formally adopted and registered by the parties. However, I do not consider this acts as a barrier to enforcement of the pre-emptive rights clauses in the Constitution by way of contract. What is important is that the terms of the Constitution were agreed to, even if not formally adopted by shareholder resolution. Clause 4.2 of the Shareholders' Agreement makes it clear that the pre-emptive rights provisions contained in the Constitution were incorporated into the Shareholders' Agreement. That is sufficient, in my view, to make them enforceable by way of contract.

[72] I find that cls 5.1 to 5.6 of the Constitution were agreed to by the parties and are incorporated by reference into the Shareholders' Agreement. They are accordingly enforceable by way of contract.

*Has Unipharm lost its right to enforce the pre-emptive rights provisions?*

[73] Aivita submits that Unipharm has lost its right to enforce the pre-emptive rights provisions because those rights have expired through the effluxion of time. Specifically, Aivita says the 60-day period contained in cl 5.5 has expired and the pre-emptive rights have now lapsed.

[74] Whether that is so depends on the proper construction of cl 4.2 of the Shareholders' Agreement and cls 5.1 to 5.6 of the Constitution, and how those provisions operate together.

[75] As previously mentioned, the drafting of the relevant clauses in the Shareholders' Agreement and the Constitution leave much to be desired. The various clauses do not speak to each other directly and the relationship between them is, at times, disjointed. Nevertheless, I consider the intention of the parties may be ascertained from the plain meaning of the relevant clauses construed in the context of the Shareholders' Agreement and Constitution as a whole.

[76] The starting point is cl 4.2 of the Shareholders' Agreement. Both parties interpreted cl 4.2 of the Shareholders' Agreement as deeming a "Transfer Notice" (within the meaning of cl 5.3 of the Constitution) to have been given when a change in the control of a shareholder had occurred. However, that construction of cl 4.2 is not without difficulty. A "deemed" Transfer Notice means there is no positive obligation on a shareholder to give actual notice of a change in control. That is problematic because the other shareholders are unlikely to become aware of a change of control in a shareholder unless they receive actual notice of that change.

[77] That difficulty is demonstrated by the facts of this case. Charlie and Kevin were unaware Sabrina had purchased all the shares in Aivita until almost two months after the transfer took place. Although Aivita's construction of cl 4.2 means that a Transfer Notice was deemed to have been given immediately prior to the transfer on 24 June 2019, Aivita accepts that time should not start running from that date, but rather the date that Charlie and Kevin became aware of the change of control. However, that could also be difficult to establish in a particular case and 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. I do not consider the parties to have intended such a result.

[78] Deeming a notice to have been given is also at odds with cl 5.3 of the Constitution which requires an *actual* notice to be given, in writing, to the directors in the event of a transfer or sale of shares. The date that the actual notice is given sets the clock running for the timeframes set out in cls 5.3, 5.4, and 5.5. There is no good reason for an actual notice to be given in relation to a transfer or sale of shares in Unipharm, but a deemed notice to be given in relation to a change of control in a shareholder. The need to ensure certainty as to when the relevant time periods start running applies equally in both situations.

[79] Given this difficulty, I do not consider the parties intended cl 4.2 to relieve a shareholder from giving actual notice under cl 5.3. Rather, I consider the effect of cl 4.2 is two-fold. First, cl 4.2 makes clear that any change in control of a shareholder is subject to the pre-emptive rights contained in the Constitution. This is achieved by deeming a Transfer Notice to have been given immediately prior to the change in control and making the pre-emptive rights provisions in the Constitution applicable. Rather than effectively creating a Transfer Notice by deeming it into effect, the clause deems the change of control as being subject to the pre-emptive rights provisions – as if a Transfer Notice had been given prior to it occurring.

[80] Second, cl 4.2 confirms that a change in control of a shareholder will mean that the pre-emptive rights will apply to *all* of the shares held by that shareholder. This is in contrast to cl 5.3 which allows a shareholder to give notice relating to part of, or all of, its shareholding.

[81] This interpretation is consistent with cls 5.1 and 5.2 of the Constitution. Clause 5.1 provides that every change of ownership in the shares of the capital of the Company (which must be read to include any change of control in a shareholder) is subject to the limitations and restrictions set out in cls 5.2 to 5.6. Clause 5.2 of the Constitution prohibits the sale or transfer of any shares (which must be read to include the change of control of a shareholder) unless and until the rights of pre-emption have been exhausted, including that those shares must be offered to the other existing

shareholders. As already noted, the effect of cl 4.2 is to deem any change in control as being subject to the pre-emptive rights provisions contained in the Constitution.

[82] The effect of construing cl 4.2 in this way is to ensure a single process shall apply whenever there is a desire to transfer shares in Unipharm (as per cl 5.3), or where there is a change of control in a shareholder triggering the pre-emptive rights in the Constitution. The requirement that an actual notice be served ensures certainty and clarity in the timeframes that apply and when rights of offer and acceptance must be exercised. It also requires the minimal level of modification (as mandated in cl 4.2) to be made to the pre-emptive rights provisions by essentially reading all references to the sale or transfer of shares as including a change of control in the shareholder.

[83] It follows from this construction of the Shareholders' Agreement that Aivita was required to serve an *actual* notice under cl 5.3 of the Constitution. The timeframes in cls 5.3, 5.4, and 5.5 do not begin running until such notice has been given.[15] As an actual notice was not served, the timeframes by which a price for the shares is set (cl 5.3) and the acceptance of any offer by the other shareholders made (cl 5.4) have not yet started running.

[84] Accordingly, the Unipharm parties have not lost their pre-emptive rights under the Constitution.

*Should the Court make an order for specific performance?*

[85] The Unipharm parties seek an order for specific performance which would compel Aivita to offer its shares in Unipharm to the other shareholders. The parties have agreed that in the event I make such an order the price at which the shares should be offered for sale will be set by an arbitrator.[16]

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[15] Clause 5.5 of the Constitution refers to a notice under cl 18. This is clearly an error and another example of infelicitous drafting. The context of the clause makes it clear that cl 18 is in fact a reference to the notice under cl 5.3 and the parties intended that to be the case. Similarly, the reference to cl 16 at the end of that clause must be understood as referring to cl 5.1 of the Constitution.

[16] This agreement modifies cl 5.3 which provides that a person appointed to determine the fair price of the shares shall be acting as an expert and not as an arbitrator.

[86] The grant of specific performance is an equitable remedy and equitable considerations are accordingly relevant to the exercise of the Court's discretion.

[87] There has been delay in the Unipharm parties enforcing their rights. However, I am satisfied that this can be explained by the delay in finding out that Aivita's shares had been transferred to Sabrina, and subsequently her connection with Unipharm's competitors.

[88] I have carefully considered whether the circumstances in which new shares were issued on 3 March 2019, and Wendy was removed as director (which forms the basis of Aivita's third cause of action), mean that the Unipharm parties do not come to the Court with clean hands. The issue of new shares was in breach of the Shareholders' Agreement as all directors had to agree. And, while the removal of Wendy as director was authorised under the Shareholders' Agreement, the use of those powers to circumvent the unanimity provisions of the Shareholders' Agreement appears contrary to the good faith obligations on each shareholder.

[89] Nevertheless, I am not persuaded that this conduct disentitles the Unipharm parties to seek an order of specific performance. The conduct complained of needs to be seen in context. By 3 March 2019, Wilson had set up his own company and was no longer involved with Unipharm. The remaining shareholders suspected he was responsible for leaking confidential information. Unipharm remained in a precarious financial state and was unable to repay its loans. Issuing shares discharged those responsibilities.

[90] It is also relevant that Aivita does not seek any recompense for this conduct in its third cause of action. The only relief sought is an order that the Unipharm parties be restrained from issuing new shares pending the adoption and registration of a new Constitution.

[91] More importantly, events have subsequently overtaken this 2019 conduct, the most significant of which is Aivita's change of control. Not only has there been a change of control, but I consider Aivita to be, at least indirectly, associated with a competitor as a result. Under cl 5.1 of the Shareholders' Agreement, each shareholder

undertakes not to be involved, "directly or indirectly, in any capacity, with any business, the principal business of which is similar to or competitive with [Unipharm]…".

[92] Aivita's new shareholder, Sabrina, admitted she was a friend of Easter and that he had told her about the opportunity to purchase Aivita's shares. She also admitted that she had provided accounting services to his companies, Megadairy and Supermega. However, she denied there was a close connection with Unipharm's competitor or that she held Aivita's shares on Easter's behalf.

[93] I did not find Sabrina to be a credible witness. Although the evidence did not go so far as to show that Sabrina held Aivita's shares on behalf of Easter, there was clearly a very close connection.

[94] That close connection was evidenced in documentary records and the testimony of Peter Luo (a former employee of Megadairy). Mr Luo was an independent witness without any apparent interest in the litigation. From his evidence, it is clear that Sabrina was performing services for Megadairy and Supermega which would normally be performed by an employee. She had an internal Supermega email address, was responsible for paying Megadairy's staff, obtaining sales information, sending legal documents, and compiling human resources material for Megadairy. She was also frequently at the Megadairy site. These services appear to have been provided by Sabrina for some years prior to her employment with her current employer (an accounting firm which provides external accounting services to Megadairy and Supermega).

[95] Sabrina's evidence was that she purchased Aivita's shares as a future investment. However, that evidence did not stack up when compared to the financial information available for Unipharm at the time, and the purchase price paid for the shares. Sabrina said she only had the 2018 financial accounts for Unipharm at the time she agreed to purchase Aivita's shares. Those accounts showed that Unipharm had suffered losses of approximately $1.3 million in that financial year, and only had net equity of $200,000. Sabrina's agreement to pay $330,000 for a 10.1 per cent shareholding in Unipharm lacks commercial sense. Her insistence that she considered

Unipharm's business would grow in the future lacked substantive foundation and was unpersuasive. The lack of commerciality in the purchase price paid supports an inference that the purchase of Aivita's shares was for an ulterior purpose.

[96] There is no real doubt that Megadairy and Supermega are Unipharm's competitors. All three companies conduct business related to the supply of health supplements and pharmaceuticals to the Chinese and New Zealand markets. More than that, however, is the fact that Easter is actively hostile towards Charlie and Unipharm. That is evident from WeChat posts produced in evidence targeted at both Unipharm's business operations and Charlie personally.

[97] An association between a shareholder and a hostile competitor poses real risks to Unipharm's business. A shareholder has a right to request copies of all financial information and other information relating to Unipharm's business under cl 2.8(d) of the Shareholders' Agreement. More significantly, the Shareholders' Agreement contains "drag-along rights" provisions which allow a shareholder who wishes to sell their shares to a third party to compel the other shareholders to sell. This clause may be exercised by *any* shareholder, regardless of the number of shares held in Unipharm. On the face of this clause, there is nothing to prevent Aivita exercising these rights and compelling a sale of Unipharm to Megadairy, Supermega, or another third party and effectively bringing the business to an end.

[98] As matters currently stand, the parties cannot continue in business together, and they must be allowed to go their own ways. This consideration outweighs any "clean hands" considerations arising from the removal of Wendy as a director and the issue of new shares. Aivita will receive value for its shares according to the process set out in the Constitution (as modified by the parties by agreement).

[99] To recap, I do not consider there to be any reason why specific performance of the pre-emptive rights provisions (as amended by agreement) should not be granted in this case. Indeed, the risks inherent in having a hostile competitor shareholder in the midst of Unipharm lends significant weight to such an order being appropriate in this case.

[100] Accordingly, I enter judgment in favour of Unipharm on its second cause of action. An order of specific performance is made at the end of this judgment.

**Unipharm's claim that Aivita disclosed confidential information**

[101] The Unipharm parties claim that Aivita disclosed Unipharm's confidential information, specifically 2017 and 2018 financial statements, to Megadairy, Supermega and Easter in breach of the Shareholders' Agreement and a duty of confidence.

[102] There is no dispute that Unipharm's financial statements fall within the definition of "Confidential Information" provided in the Shareholders' Agreement. There is also no dispute that Sabrina obtained the financial statements for the year ending 31 March 2018 and considered those statements when looking to purchase Aivita's shares.

[103] However, to establish its claim, Unipharm must show that this confidential information was disclosed to Megadairy, Supermega and Easter. I do not consider there to be sufficient evidence from which to draw that inference. Despite the strong connection between Sabrina, Easter, Megadairy and Supermega, I do not consider that this connection alone is sufficient to infer that Sabrina disclosed the financial statements to Easter. Something more is required. In the absence of such evidence, the Unipharm parties' claims in these causes of action must fail.

**Aivita's and Unipharm's claims under s 174 of the Act**

[104] The orders for specific performance made in Unipharm's second cause of action make it unnecessary to address each party's claim for relief under s 174 of the Act. Nevertheless, in the event I am found to be wrong in my determination of that cause, I set out my views on the parties' respective claims, albeit briefly.

[105] Section 174(1) of the Act relevantly provides that relief is available to a shareholder or former shareholder of a company who considers the affairs of the company have been, or will be, conducted in a manner that was oppressive, unfairly discriminatory or unfairly prejudicial to that shareholder.

[106] Unipharm's claim for relief under s 174 is unusual in that it involves allegations that a minority shareholder, with only 10 per cent of the shares in Unipharm, acted in an oppressive and unfairly prejudicial way. That is despite the majority shareholder having the right to appoint and remove directors and control the affairs of the company through the ability to pass resolutions by majority vote.

[107] Nevertheless, I would have entered judgment for the Unipharm parties on this alternative cause of action. I would have found Aivita's change of control resulted in a hostile competitor to Unipharm becoming a 10 per cent shareholder in the company for the reasons already given (at [91] to [97]) of this judgment. The presence of a hostile shareholder, even a minority one, was contrary to the expectations of the parties in forming Unipharm and could give rise to Unipharm's affairs being conducted in an oppressive and unfairly prejudicial manner in the future for the reasons set out in [97]. While the question of relief would have given me pause given Charlie's willingness to sell his shares, ultimately, I would have found it just and equitable to make the buy-out order so that Aivita could be removed as a shareholder sooner rather than later.

[108] Aivita's claim for relief under s 174 of the Act was on the basis that the Unipharm parties acted oppressively and unfairly when it issued new shares after the meeting on 3 March 2019 and removed Wendy as director. Viewed in isolation, I would have found that this conduct was oppressive and unfairly prejudicial. That was not really contested by the Unipharm parties. However, Mr Blanchard QC submitted that a buy-out order was the appropriate form of relief for this cause of action.

[109] If this cause of action was considered in isolation from the rest, I would have declined to make a buy-out order as sought by Unipharm as it would not respond to the oppressive and unfairly prejudicial conduct alleged. Instead, if the parties were to remain together as shareholders in Unipharm, I would have granted the relief sought by Aivita. Essentially, that relief provided for the shareholders to adopt and register a new Constitution and restrained the Unipharm parties from issuing new shares in the meantime. Unipharm did not oppose that relief sought.

**Result**

[110] I dismiss Aivita's claims in the Aivita proceeding.

[111] In the Unipharm proceeding, I order as follows:

(a) I enter judgment for Unipharm on the first cause of action. By consent, I make a declaration that the transfer of 960,000 shares in Unipharm from Yibo Weng to ANC on 20 November 2017 was valid.

(b) I enter judgment for Unipharm on the second cause of action and order Aivita to offer for sale its shares in Unipharm to the other shareholders at a price to be determined by an arbitrator (as agreed by the parties) in accordance with cl 4.2 of the Shareholders' Agreement and cls 5.1 to 5.6 of the Constitution.

(c) The other causes of action in the Unipharm proceeding are dismissed.

[112] Unipharm is the successful party in the proceeding and is entitled to an award of costs. The parties are encouraged to confer and reach agreement on the quantum of costs. If costs cannot be agreed, then a memorandum of counsel in support of a costs award shall be filed 30 working days from delivery of this judgment. A memorandum of counsel in opposition shall be filed 14 working days from receipt of the first memorandum. Memoranda shall be no more than eight pages in length. Costs shall be determined on the papers unless ordered otherwise.

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Edwards J

## APPENDIX

## 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.

### 5.2 Pre-emptive provisions

No share in the capital of the Company shall be sold or transferred by any shareholder unless and until the rights of pre-emption hereinafter conferred have been exhausted, and any shares issued or proposed to be issued that rank as to voting or distribution rights ahead of or equally with shares already issued must be offered to the holders of the shares already issued as provided in section 45 of the Act.

### 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 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.

### 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 shareholders 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 purchase in the share register as holder of such share or shares so sold.

**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.

**5.6 Family transaction**

Any share may be transferred by a shareholder to, or to trustees for, any husband or wife or child or grandchild or son-in-law or daughter-in-law of that shareholder, and any share of a deceased shareholder may be transferred by his or her executors or administrators to any husband or wife or child or grandchild or son-in-law or daughter-in-law of the deceased shareholder, and any share held by trustees under any such trust as aforesaid may be transferred to any beneficiary (being a husband or wife or child or grandchild or son-in-law or daughter-in-law of such shareholder) of such trust, and shares standing in the name of the trustee of the will of any deceased shareholder or trustees under any such trust as aforesaid may be transferred upon any change of trustees for the time being of such will or trust, and the restrictions contained in the preceding clauses 17 to 20 hereof inclusive shall not apply to any transfer authorised by this sub-clause but every such transfer shall nevertheless be subject to the provisions of clause 22 hereof.