Neutral Citation Number: [2019] EWHC 2322 (Ch)

Case No: BL-2018-000281; CR-2018-003995

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES (ChD)
BUSINESS LIST AND INSOLVENCY AND COMPANIES LIST

Royal Courts of Justice
Strand, London
WC2A 2LL
Date: 16 September 2019

Before :

MR JUSTICE FANCOURT

- -

Between :

UTB LLC	Claimant
- and -	
SHEFFIELD UNITED LIMITED	Defendant
And	
HRH PRINCE ABDULLAH BIN MOSAAD BIN ABDULAZIZ AL SAUD	
And	
YUSUF GIANSIRACUSA	

AND IN THE MATTER OF BLADES LEISURE LIMITED
AND IN THE MATTER OF S.994 OF THE COMPANIES ACT 2006

SHEFFFIELD UNITED LIMITED	Petitioner
And	
(1) UTB LLC	
(2) UTB 2018 LLC	
(3) HRH PRINCE ABDULLAH BIN MOSAAD BIN ABDULLAH BIN ABDULAZIZ AL SAUD	
(4) YUSUF GIANSIRACUSA	
(5) HRH PRINCE MUSA'AD BIN KHALID M BIN ABDULRAHMAN AL SAUD	
(6) BLADES LEISURE LIMITED	Respondents

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Mr Andreas Gledhill QC and Mr Tom Mountford (instructed by **Jones Day**) for the **Claimant, Third Party, Fourth Party and the First to Fourth Respondents**
Mr Paul Downes QC and Miss Emily Saunderson and Mr Luka Krsljanin (instructed by **Shepherd and Wedderburn LLP**) for the **Defendant/Petitioner**

Hearing dates: 13-17 May, 20-24 May, 4, 5, 7, 10-13, 18, 19 June 2019

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Approved Judgment

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

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THE HONOURABLE MR JUSTICE FANCOURT

Mr Justice Fancourt:

This judgment comprises the following parts:

A. Introduction

1. The origin of this dispute is an investment and shareholders' agreement made on 30 August 2013 ("the ISA"). The ISA was made between Blades Leisure Ltd ("Blades"), Blades' wholly-owned subsidiary, The Sheffield United Football Club Ltd ("SUFC"), which operates the football club of that name, and the two shareholders of Blades and their guarantors. The shareholders are UTB LLC ("UTB"), a company incorporated in Nevis, and a company known at the time as Sheffield United plc and now known as Sheffield United Ltd ("SUL"). The principal individual behind SUL is Kevin McCabe, a Yorkshire businessman, and the beneficial owner of UTB is HRH Prince Abdullah bin Mosaad bin Abdulaziz al Saud ("Prince Abdullah"), a grandson of the late King Abdulaziz of Saudi Arabia.

2. Under the terms of the ISA, UTB agreed to inject £10 million of capital over a period of about two years in return for a 50% shareholding in Blades. SUL was issued with the other 50% of the shares. Blades was expected to be a loss-making company for several years, until promotion to the Premier League of English football was secured. Despite the detailed and precise terms of the new articles of association and the ISA,

the shareholders had different understandings about who would fund Blades after the initial two-year period of UTB's funding. SUL believed that UTB would continue to fund any deficit in future years. UTB believed that, until it achieved super-majority control of Blades, UTB and SUL would fund Blades equally.

3. Disagreement between UTB and SUL about the funding of Blades arose in 2014, 2015, 2016, 2017 and 2018. Disagreement about funding spawned disagreement about several other matters, all of which came to a head in November 2017. At that time, Prince Abdullah believed that he was being deceived and manipulated by Kevin McCabe, who (he thought) was seeking to control SUFC at the expense of proper corporate governance. Kevin McCabe believed that those acting on behalf of Prince Abdullah were unfairly seeking to marginalise SUL's involvement in Blades and SUFC and force SUL's exit. The disagreement became very personal and acrimonious between Kevin McCabe and Prince Abdullah's attorney, Yusuf Giansiracusa, in November and December 2017.

4. At that stage, both SUL and UTB were considering how they might be able to exercise contractual rights under the ISA to bring the joint ownership of Blades to an end. SUL acted first. In December 2017, without prior warning, it served a call option notice on UTB, offering to buy UTB's shareholding for £5 million. That offer entitled UTB instead to elect to buy SUL's shareholding at the same price. It did so on 26 January 2018, by serving a counternotice on SUL.

5. In these proceedings, UTB seeks to enforce the contract of sale and purchase of SUL's shares at the price of £5 million that arose from service of the counternotice. SUL seeks to have that contract declared void or set aside and seeks an order that UTB sell its shares to SUL at the current value of UTB's non-majority shareholding. SUL also seeks damages for breach of contract and for a conspiracy by UTB, Prince Abdullah and Mr Giansiracusa to harm SUL by unlawful means.

6. Following service of the counternotice, completion of the contract of sale and purchase of SUL's shares (if valid) was due at 2pm on 6 February 2018. Completion did not take place. By letter of the same day, SUL purported to terminate the ISA and the contract of sale and purchase on account of alleged repudiatory breaches of contract by UTB. UTB issued a claim form on 9 February 2018 seeking specific performance of the contract of sale and purchase and declaratory relief in relation to the status of contingent obligations of SUFC under the ISA to buy property assets used by or in association with the football club ("the Club"). By counterclaim dated 27 March 2018, SUL sought different declaratory relief in relation to those contingent obligations and served an additional claim for damages for breach of contract and unlawful conspiracy.

7. On 15 May 2018, SUL issued and served a petition under section 994 of the Companies Act 2006 ("the Petition"), claiming relief against UTB, Prince Abdullah, Mr Giansiracusa and others in respect of conduct unfairly prejudicing the interests of SUL as a shareholder of Blades.

8. After a substantial number of interim applications, all these claims were heard together at a trial in May and June 2019. Although the evidence and arguments at trial covered a very wide range of facts and issues, it is unnecessary to decide all the facts and issues in order to resolve the claims that have been brought. There is nevertheless

a substantial number of issues of fact and law that need to be determined. The principal issues that will determine the outcome of the litigation are the following:

i) Is the contract of sale and purchase of SUL's shares for £5 million valid and enforceable?

ii) Did UTB act in breach of contract? The main breaches of contract alleged are breach of an implied term of good faith in the ISA and preventing SUFC from exercising the property call options in the ISA.

iii) Was any breach of contract repudiatory, and if so were the ISA or the contract of sale and purchase, or both, terminated by SUL on 6 February 2018?

iv) Did UTB, Prince Abdullah and Mr Giansiracusa conduct the affairs of Blades between August and December 2017 in a manner unfairly prejudicial to SUL, such that relief should be granted to SUL, either by setting aside the contract of sale and purchase or by ordering the buy-out of UTB's shares at market value, or both?

9. For the convenience of those who need only to know the outcome of the trial, reference can be made to Part M of this judgment (paras 529-538 below), where I set out a summary of my conclusions. Parts C to L below explain my conclusions and reasons on the many issues and sub-issues that the parties have raised.

10. Before addressing all such issues individually, it is convenient to set out in Part B the main aspects of the factual history, in so far as it is now uncontentious. In doing so, I will indicate where the factual disputes arise that are relevant to the issues in dispute and will return to those disputed matters later in the judgment.

B. Undisputed Factual Narrative

11. Kevin McCabe was born in Sheffield and has been a Sheffield United fan all his life. After school, he qualified as a quantity surveyor and was later appointed an associate member of the Royal Institution of Chartered Surveyors. He began working in the construction industry and, by his own skill and hard work during his lifetime, established a very substantial group of companies, operating worldwide and principally in relation to real estate and property development and management. The main holding company is Scarborough Group International Limited and I will refer to the group of companies as the "Scarborough Group". SUL is a company in the Scarborough Group.

12. By the 1990s, Kevin McCabe was an influential local businessman and became an owner and director of the Club. By about 2003, he had become the majority shareholder of SUL, which was then the holding company of SUFC. By 2013, he owned all but about 12% of the shares in SUL. These 12% are held by about 9,000 individual supporters of the Club. Effectively, therefore, Kevin McCabe owned and controlled the Club through his or his companies' shareholding in SUL. Over many years, he has injected tens of millions of pounds into the club out of love and loyalty, not for financial return.

13. Before the early part of 2013, SUL (and certain other Scarborough Group companies) owned five properties associated with the football club: the stadium at Bramall Lane ("the Stadium"), the Sheffield United hotel at Bramall Lane, land at Shirecliffe Road, Sheffield where the Club's youth academy is established ("the Academy"), a junior development centre at Crookes Road, Sheffield and a serviced offices centre at Bramall Lane.

14. In 2012, when Kevin McCabe was approaching 65 years of age, he began to look for someone to whom he could, as he put it, "hand on the baton". The Club, which had been in the Premiership in 2006-7, was languishing in the English League Division One (despite its name, the third tier in English professional league football, below what are now called the Premier League and the Championship). The Club was in need of a benefactor, Kevin McCabe thought, who would invest very substantial sums to make the Club competitive at higher levels.

15. He decided to make the Club more attractive (i.e. cheaper) to would-be investors by splitting ownership of the property assets from the Club itself. Kevin McCabe's ambition was for the property assets then to be re-sold to the Club, when it was back in the Premier League and after he had handed over the baton. The mechanism was for Blades, as a new subsidiary of SUL, to purchase the shares in SUFC from SUL and for SUL (and other Scarborough Group companies) to retain the property assets. The investor would then take shares in Blades. The separation of the property assets was not in fact effected until 2013, when Prince Abdullah was negotiating to acquire an interest in the Club.

16. At the end of 2012, Kevin McCabe and Prince Abdullah were introduced by an intermediary, Mr Puian Mollaian. Mr Mollaian led Kevin McCabe to believe that Prince Abdullah was extremely wealthy. He misrepresented the Prince's income as being £20 million to £25 million annually by way of dividends from Saudi Paper Manufacturing Company ("Saudi Paper"), a tissue paper production company in Saudi Arabia founded and part-owned by the Prince. Prince Abdullah said that the most that he received in annual dividends from Saudi Paper was about US$8 million when Saudi Paper was at its peak prior to 2013. Kevin McCabe and Prince Abdullah first met on 16 January 2013 at the Corinthia Hotel in London. Kevin McCabe was accompanied on that occasion by his son, Simon McCabe. A further meeting took place in Riyadh on 13 March 2013 at Prince Abdullah's home. At the time, Prince Abdullah was looking at more than one English football club as a possible investment.

17. In fact, as was established in cross-examination and had become apparent in 2015, Prince Abdullah, though rich by any standards, was not as wealthy in income terms as Mr Mollaian had led Kevin McCabe to believe, nor as rich as Kevin McCabe assumed that a Saudi prince must be. Most of his assets were illiquid. Prince Abdullah's own wealth was self-made. His principal asset in 2013 was his shareholding in Saudi Paper. Prince Abdullah had himself founded and developed that business. It was worth at that time about US$160 million but declined alarmingly in value in the following years. Prince Abdullah in 2013 had other Saudi and American shares and private equity investments worth about US$30 million net, and owned houses in London and Los Angeles worth in the region of US$40-60 million. In 2013, Saudi Paper declared dividends equivalent to US$5 million, but its business declined in the following years and by 2015 it was not paying dividends at all. This deprived Prince Abdullah of his principal source of income.

18. In March 2013, Kevin McCabe prepared a memorandum stating that he intended to sell:

> "a controlling stake (50.1%) in SUFC [in return for] the new partner investor committing to provide appropriate sums to efficiently run the business with an emphasis on permitting a higher than budgeted player wage bill in order to aid promotion(s) back to the Premier League within a 3-5 year term".

The memorandum referred to a sum of £300 million that could expect to be earned during two seasons in the Premier League, at the new levels of payment for broadcasting rights that were about to come into force.

19. On 12 April 2013, leases of the property assets were granted to SUFC. The leases provided for different rents to be payable depending on the division in which the Club was playing. Schedule 2 to the lease of the Stadium specified annual rents of £150,000 in League Two, £250,000 in League One, £500,000 in the Championship and £3 million in the Premier League. From April 2013, Prince Abdullah began to undertake due diligence into SUFC, using accountants from Deloitte, lawyers from Onside Law, sports advisers and property advisers.

20. The Club ended the season in fifth place in League One but did not secure promotion. On 13 May 2013, Kevin McCabe's other son, Scott, was appointed a director of Blades and SUFC.

21. Following a meeting at the Scarborough Group's London offices between Kevin McCabe and Prince Abdullah's legal adviser, Jim Phipps, on 18 June 2013 Kevin McCabe emailed Mr Phipps draft heads of terms. On the same day, Mr Phipps confirmed that Prince Abdullah had decided to abandon the other football club acquisition opportunity "in preference to pursuing becoming part of the Blades family".

22. The heads of terms were subsequently negotiated and signed off by the Scarborough Group and Amas Holdings Limited ("Amas") at the start of July 2013. They provided for a formal agreement to be made subsequently for the acquisition by Prince Abdullah of a 50% interest in Blades for an investment into Blades of £10 million and included the following terms:

    i) the intention of the parties to work together over a three to five-year term to achieve (a) promotion of the football club back to the Premier League and (b) re-uniting all parts of the football club by buying back the property assets;

    ii) option agreements to be put in place between SUFC and SUL and the Scarborough Group to buy back the property assets;

    iii) Amas was to provide the £10 million cash investment principally to fund first-team football in order to improve the Club's chances of achieving promotions back to the Premier League. The investment would be made in four tranches between July 2013 and January 2015;

iv) representatives of the Scarborough Group and Amas would have an equal number of directors on the boards of Blades and SUFC and, with the approval of Amas, Kevin McCabe would initially be the chairman of both;

v) loans made to SUFC would be reorganised so that SUFC could stand alone, to Amas's satisfaction, but on the understanding that all the property assets will be reunited with the club once Premier League football was achieved;

vi) "once SUFC have utilised the £10 million of funds from Amas, then thereafter each party will equally provide any agreed further monies as required for the efficient running of the club".

23. On 2 August 2013, SUL and Prince Abdullah agreed a non-binding "deal sheet", which developed the agreed heads of terms. The common intention to seek to achieve promotion to the Premier League and reuniting the property assets within a 3 to 5-year term was restated. There was provision for new leases and options to be entered into. Materially, the new lease of the Stadium was to be at an annual rent of £250,000 while the club was in League One, but on promotion to the Championship or the Premier League the parties were to agree a suitable and appropriate revised annual rent. Similar provisions were to be contained in the new lease of the Academy.

24. The deal sheet stipulated that, prior to completion, the parties were to agree a business plan and operating budget for 2013/2014 which "must demonstrate how the club will be operating on a breakeven or profitable basis during Season 2013/2014 and thereafter". It also provided that either party could inject further cash for equity, with the other party having a right to match it, until one party held 75% of the fully diluted share capital of Blades or until promotion to the Premier League.

25. The deal sheet also provided for Prince Abdullah to have call options on the shares of SUL between years 3 to 7, if promotion to the Premier League was not achieved within three years, or at any time if the Club was relegated. In the event that Prince Abdullah acquired 75% or more of the share capital of Blades, he was to acquire the freehold and leasehold property assets at a price and on terms to be agreed.

26. Subsequently, Prince Abdullah's solicitors, Onside Law, negotiated with Kevin McCabe's solicitors, Shepherd & Wedderburn, the terms of the leases and property options. On 12 August 2013, Onside Law wrote to Shepherd & Wedderburn: "we need a formula to ascertain how the rent will be reviewed upon promotion to Championship and Premiership (and relegation)". Shepherd & Wedderburn replied that they had "stripped back the rent review provisions… to provide for the rent to be the higher of £250k/£60k [i.e. for the Stadium/Academy] and such other figure as the parties agreed. This is in line with… our instructions". This proposal was accepted by Onside Law on behalf of Prince Abdullah and was reflected in the final versions of the new leases.

27. On 16 August 2013, Onside Law wrote to Shepherd & Wedderburn to tell them that Prince Abdullah would be acquiring his shareholding in Blades through a newly incorporated company, UTB.

28. On 30 August 2013, the parties executed the ISA, newly-drafted articles of Association for Blades, new leases of the property assets and a call option agreement

for each of those assets. The ISA is extremely detailed. Reference to its specific terms will be made later in this judgment when I address the particular issues of interpretation of the ISA that arise for determination. At this stage, it is material to note, in the light of the heads of terms and the deal sheet just referred to, how the finally agreed terms reflected or differed from what had previously been agreed on a non-binding basis.

29. At the start of the ISA the following section, headed "Background" states:

> "(A) The Investor wishes to subscribe for 50% of the fully diluted share capital of the Company [Blades] in return for the payment of £10 million… to the Company in a number of tranches on the terms of this Agreement.
>
> (B) The intention of the Company, SUFC, [SUL] and [UTB] is to work together to seek to achieve the following within the period covering Seasons 2015/2016 to 2017/2018:
>
> (i) promotion of Sheffield United football club to the English Premier league; and
>
> (ii) the re-unification of the freehold and leasehold interests in the property leased to SUFC.
>
> (C) This Agreement sets out the terms and conditions upon which the investment shall be made by [UTB] and regulates the basis on which the Company and SUFC shall be operated."

30. The annual business plan was not required to be prepared on a break even or profit-making basis. That provision in the term sheet was omitted from the ISA. Clause 6.1 of the ISA contained an acknowledgement that Blades might require further finance to fund its and SUFC's projected cash requirements under the business plan. There is no requirement for each of the shareholders to fund on an equal basis, but each was given the right to subscribe for further shares in Blades for cash at any time, subject to pre-emption rights (effectively giving the other shareholder the right to match the subscription), but not after promotion to the Premier League or when either shareholder held 75% or more of the share capital. The subscription price was fixed at the rate of £5 million for new shares that would amount to a 24.9% holding on a fully diluted basis. The issue of further shares to either shareholder on that basis would require the prior written approval of the other shareholder if the subscriber's holding would as a result amount to 75% or more of the share capital. So UTB could not dilute SUL so as to achieve super-majority control without the agreement of SUL.

31. If and when any shareholder acquired 75% or more of the share capital, SUFC was to exercise each of the property call options unless the shareholders agreed otherwise. In the event of deadlock on any important issue, each shareholder should have the right to offer to buy all the shares of the other shareholder. The offeree could either accept that offer or buy out the offeror at the same price per share. Both shareholders (not just UTB) were given the option to acquire the shares of the other shareholder during

the close season of years four to eight, or after the end of year three at any time if the Club had not by then been promoted to the Premier League or if it had been relegated.

32. The new leases of the Stadium and the Academy reserved initial annual rents of £250,000/£60,000 and then subject to revision in accordance with provisions in schedules to the leases. These provided for Review Dates on 1 May 2014 and on each anniversary of that date and for the reviewed rent on each occasion to be the greater of the originally reserved annual rent and "such other sum as the Landlord and Tenant may agree". There was therefore no express obligation to increase the rents on promotion.

33. The property call options each conferred on SUFC the right during a period of 10 years to purchase the freehold or leasehold asset at the market value at the time of exercise or, in the case of the Stadium, the average of (i) the market value at the time of exercise and (ii) a value based on the aggregate of the land value and book value of the property less capital expenditure made during the option period. The contract of sale and purchase arising from exercise of the option was to be completed 12 months after the date of service of the option notice.

34. The completion documents therefore did not provide that the property call options must be exercised if the Club was promoted to the Premier League, nor was UTB required to have more than 75% of the share capital by that time. The ISA did not provide for further injections of capital that might be needed after the first two years to be provided equally by the shareholders; it merely conferred on each a right to subscribe for further shares for cash.

35. As a result of completion of the investment of Prince Abdullah in these terms, it was therefore less clear that UTB would be acquiring SUL's shares by any particular time, and unclear who would be funding the annual losses (if any) incurred after the 2014/15 season had ended. The aspiration was for the Club to reach the Premier League within 3-5 years, but of course that could not be guaranteed (and in the event did not happen). The result was that the shareholders had somehow to fund four further seasons of loss-making business of SUFC before the Club did achieve promotion to the Premier League shortly before the start of the trial.

36. Kevin McCabe believed that a super-rich Prince Abdullah would be exercising his right to subscribe for further shares and would dilute SUL to the point that he obtained super-control of Blades and the property call options would be exercised. SUL would not be troubled to inject further capital and the baton would be passed on. Prince Abdullah believed, consistently with what had been stated in the heads of terms but was not stated in the ISA, that UTB and SUL would be providing the needed capital in equal shares after the 2014/15 season until he was in a position to acquire control.

37. It did not take very long for the disagreement about funding to arise. By the time that further capital was needed in order to pay SUFC's bills, the Club had failed to obtain promotion even to the Championship and Prince Abdullah was facing a significant decline in his income. The Scarborough Group too, as principally a real estate business, was still suffering from the after-effects of the global financial crisis and recession. Neither side was well-placed to inject further cash.

38. But that crisis was still two years away at the time when the transaction was completed in August 2013. In the meantime, Prince Abdullah became the co-chairman of SUFC with Kevin McCabe. Kevin, Scott and Simon McCabe together with Jeremy Tutton, a Scarborough Group employee, certified accountant and the secretary of Blades and SUFC, became the SUL-nominated directors of Blades and Prince Abdullah, Jim Phipps (Prince Abdullah's then legal advisor) and Selahattin Baki were nominated as directors by UTB. Even though there was (at that time) one fewer UTB-appointed director than the full complement of SUL-appointed directors, the votes on the board were nevertheless treated as equal pursuant to clause 5.10 of the ISA. Prince Abdullah and Mr Phipps also became directors of SUFC at that time.

39. Sheffield United had a disastrous start to the new football season, which resulted in the sacking of the manager, David Weir, on 11 October 2013. Nigel Clough became the full-time manager on 23 October 2013. In January 2014, the chief executive officer ("CEO") of SUFC, Julian Winter, was replaced by Malachy Brannigan, who had previously worked with Mr Clough at another club. The two of them had a close bond, and Mr Phipps (who was effectively Prince Abdullah's eyes and ears in Sheffield) became quite close to them too. Kevin McCabe was less than happy with this axis, in particular with the level of spending for which they were primarily responsible. It appears that the board of SUFC was not exercising effective control of management at that time.

40. Nevertheless, after a poor start to the season, the Club finished strongly (though it failed to achieve promotion from League One) and there was harmony between the UTB and SUL-appointed directors and, to the extent that they had contact, between Kevin McCabe and Prince Abdullah. Prince Abdullah only attended very few matches and only went to Sheffield twice during that first season. Kevin McCabe was, as he had always been, a constant presence at the Club on match days and occasionally during the week. Prince Abdullah was happy to defer to Kevin McCabe to some extent, given the latter's presence in Yorkshire (although he lived in Scarborough and the Scarborough Group had offices in Leeds and London, not Sheffield) and his substantial experience of English football and knowledge of the Club and its affairs. Mr Phipps was present to safeguard Prince Abdullah's interests.

41. Prince Abdullah's ability to be involved with the Club to any significant degree was however curtailed in June 2014 by his appointment by the King of Saudi Arabia to be President of the General Presidency of Youth Welfare in the Saudi government. This was a ministerial position with particular responsibility for sport and youth welfare in the Kingdom. Having considered his position and taken soundings from advisors, Prince Abdullah decided that it was better if he resigned as co-chairman and as a director of Blades and SUFC. Although the King had told him that it was accepted that Prince Abdullah should continue his own business interests, other advisors said that it might be better if he was not seen to be connected to the Club.

42. In a letter written to Kevin McCabe dated 29 June 2014, Prince Abdullah referred to "our beloved Sheffield United" and said that he resigned with great sadness and that:

> "It has been the highlight of my career to serve with you, Kevin, in the chairmanship of the Blades. My departure to serve my country is but for a season. When my duty has been fulfilled, it is my intention to return. Meanwhile, it is my desire

> to see the Club achieve the goals you and I have set for it. I know you share this intention. I thank you and your sons, Scott and Simon,… for introducing and welcoming me and my family to the Blades family. In the year we have spent together as partners, I have caught the Sheffield United bug and have become a Blade and, as you well know, once a Blade, always a Blade!"

43. The letter went on to charge Mr Brannigan and Mr Clough with taking the Club up to the Premier League, assured them of his commitment to the cause and reassured them that the next tranche of finance was on its way. Prince Abdullah considered that he might have to place UTB's shares into a trust, "to provide the required separation between myself and the Club to satisfy applicable Saudi law", but in the event that was not done.

44. Mr Phipps took over from Prince Abdullah as co-chairman and some consequential changes were made in the composition of the two boards.

45. By the autumn of 2014, which was the second year of UTB's initial funding, Kevin McCabe had indicated that there was no further funding for SUFC available from the SUL side, though he did suggest that part of the property assets might be sold to Prince Abdullah to raise funds. By January 2015, the question of funding had revived. On 22 January, Kevin McCabe sent an email to Mr Phipps:

> "on so many occasions over the course of the last six months or more, either Scott or myself have made it clear that Scarborough/the Family simply do not have further financial resources available to invest in SUFC. This statement has also been made to Mal to ensure that there is no confusion between the Joint Owners and Management."

46. On 13 April 2015, Kevin McCabe met Prince Abdullah in Riyadh. By that time, Mr Phipps and Kevin McCabe were disagreeing about what Kevin McCabe saw as Mr Phipps siding with Mr Clough and Mr Brannigan in unnecessary or ill-judged expenditure of UTB's £10 million. Once again, the Club failed to gain promotion to the Championship. Mr Phipps wrote to Kevin McCabe a letter headed "The Future of Sheffield United Football Club" asserting that Kevin McCabe was abandoning a commitment to fund the Club 50/50 after the first two years and criticising him for accepting two years' significant funding from Prince Abdullah then walking away from his responsibilities with three years out of the five-year project remaining. Mr Phipps threatened that if SUL did not fund the Club going forwards, UTB would not do so either and the project would come to an end. Mr Phipps proposed that each side should put in £3 million, with UTB leading the way in June/July and SUL to follow by December 2015. He suggested that thereafter the two sides should work together to identify a replacement investor for SUL before the end of the following (2015/16) season.

47. Kevin McCabe wrote a conciliatory reply to Mr Phipps, referring to the annoyance and frustration of missing out on promotion again, but not making any funding proposal. Three days later he wrote to Prince Abdullah complaining about Mr Phipps

but nevertheless making reassuring noises about his commitment to the Club. The principals then met again in Riyadh on 10 June 2015 to discuss the affairs of the Club.

48. By that time Mr Clough had been removed as the manager of the Club. Discussions in Riyadh appeared to cover the sustainability of SUFC going forwards, as Kevin McCabe sent an email two weeks later saying that he was going to spend more time at the Club, seek to make more from the property resources that the Club enjoyed and cut costs, in an effort to move away from the "benefactor model" that had applied over the previous two years. Prince Abdullah replied to the effect that his businesses were in trouble and none were paying dividends, and that he had to "cut into flesh" in order to raise £4 million for Blades. At about the same time Mr Phipps had warned Kevin McCabe that if a funding agreement could not be reached by 15 July 2015 the Prince would cease to fund the Club.

49. These discussions led to a funding agreement ("the July 2015 Funding Agreement") which was signed by Kevin McCabe and Mr Phipps on 2 July 2015, the day after a further meeting between them.

> "We are grateful to have reached a meeting of the minds between [SUL] and [UTB], the 50:50 owners of [Blades]… relative to owner funding of SUFC's 2015 – 2016 campaign for promotion from League One to the Championship… Our joint expectations are to ensure that the executive of SUFC do not expose SUL and UTB to further owner funding over and above the maximum combined amounts now budgeted of £8,000,000. UTB and SUL will henceforth impose sensible controls and disciplines upon the executive along with providing as deemed appropriate experience and guidance to better exploit raising revenues and saving costs for SUFC from both the 'on and off the field' activities.
>
> Additionally SUL and UTB will actively work together to secure new and suitable investors for SUFC in order to aid achievement of our joint aims using if appropriate the benefit of SUL and [Scarborough Group's] real estate investment situated at Bramall Lane, Shirecliffe and Crookes, Sheffield
>
> This letter memorializes the meeting of the minds reached as follows:
>
> 1. Further to the August 2013 [ISA] as it relates to continuing financial support of SUFC by its owners, SUL and UTB have agreed that they will each provide the following financial support to SUFC for use in connection the Campaign [sic] per the following schedule:

Party	Amount	To be paid in full by no later

		than …
UTB	£3,000,000 (Three Million Pounds Sterling)	15 July 2015
SUL	£3,000,000 (Three Million Pounds Sterling)	15 October 2015
SUL	£1,000,000 (One Million Pounds Sterling)	1 February 2016
UTB	£1,000,000 (One Million Pounds Sterling)	1 May 2016
Combined	£8,000,000 (Eight Million Pounds Sterling)	1 May 2016

> 2. The issuers of the parent guaranties given in respect of the obligations of SUL and UTB under the [ISA] ('the Guaranties") have each acknowledged that the funding commitments set forth in the funding schedules above are: (a) binding each of SUL and UTB; and (B) covered by the Guaranties… "

50. Pursuant to the July 2015 Funding Agreement, UTB paid its initial £3,000,000 on 14 and 16 July 2015.

51. On 15 October, SUL did not pay its £3,000,000. Kevin McCabe had formed the view that it was better to drip feed the money into SUFC when it was really needed, rather than pay a large sum in one go. He did not tell Prince Abdullah that this was what he intended to do. Mr Phipps discovered that SUL had not paid in accordance with the July 2015 Funding Agreement and informed Prince Abdullah.

52. Prince Abdullah regarded it as a serious breach of trust. He sent Kevin McCabe an email dated 17 October 2015 headed "Crossroads", stating "This violates both the letter and the spirit of our [July 2015 Funding Agreement] and constitutes not merely a breach of contract, but a breach of fundamental trust between us as partners". The letter also complained that "…it has become clear to me that you want to be free of the control approach set forth in the investment agreement, under which we conceded a great deal of decision making power to management" and called on Kevin McCabe to "correct course and pay in the full 3 million pounds before we meet in early November".

53. Kevin McCabe replied, explaining his reasons for withholding the money, and asserting his faithfulness to the aims of the ISA. He said that at the meeting in November the key topic to discuss would be his inability to work any longer with Mr

Phipps. Prince Abdullah denied that in his response, stating that the key issue was one of trust between them. He stated that SUL had to pay in full. The email also said that Mr Phipps was not going to remain in position after December and Prince Abdullah said that he might need a lawyer to help him to deal with Mr McCabe.

54. In a reply dated 29 October 2015, Kevin McCabe blamed the drafting of the July 2015 Funding Agreement and offered to pay the full £3million to Prince Abdullah personally, though not to Blades, but it was in the event paid neither to Prince Abdullah nor to Blades. A sum of £1.3 million was paid to Blades on 23 November 2015.

55. On 1 December 2015, a further funding agreement was made ("the December 2015 Funding Agreement"), under which 4,000,000 new shares were to be allotted to each of UTB and SUL in order to keep debt off Blades' balance sheet. SUL's outstanding contribution for the year was re-scheduled, to be paid in instalments on 25 January, 15 February and 31 May 2016. UTB was to pay its final instalment in July 2016. The Scarborough Group guaranteed SUL's obligations to pay. Following the December 2015 Funding Agreement both parties paid on time (or early) for the remainder of the 2015-16 season.

56. At a meeting of Prince Abdullah and Kevin McCabe in Riyadh on 2 or 3 December 2015, agreement must have been reached on the removal of Mr Brannigan as CEO. On 3 December 2015, Simon McCabe emailed his friend Stephen Bettis, offering him informally the chance to take a short-term role as CEO and restructure the football club. Mr Bettis started work in mid-January 2016.

57. By March 2016, it is evident that Prince Abdullah – though still preoccupied by ministerial duty – was considering how the running of SUFC might change. The football season was not going as well as would have been hoped. Promotion – even to the Championship – was not imminent. The Prince met Scott McCabe on 12 March 2016 at Westfield in London to discuss how the Club might be run in future. It is accepted by all that, even when relations between the Prince and Kevin McCabe were strained, he and Scott McCabe were close and got on well.

58. But Prince Abdullah had decided to obtain professional assistance. It is evident that for some time he had been concerned by the way in which SUFC was being run and why such substantial losses were being made. He sent two new representatives, Chris Howard, an ex-partner from a top City law firm, and Tareq Hawasli, to Sheffield to make an independent assessment of what they found there. The visit lasted for 3 days and included two meetings with Kevin McCabe. Messrs Howard and Hawasli prepared a detailed report ("the Howard Report"), which – though praising certain good qualities of Kevin McCabe – was damning in other respects: principally that he acted according to his own will and opinions and circumvented good governance. The management of the Club was described as "a fiasco and chaos … where no controls and processes were imposed". The conclusion reached was that Kevin McCabe had unfinished business at the club and was going nowhere:

> "Now that KM has to inject money into the club it is absolutely clear that he will be actively involved at every level of the club and that he will seek to direct the club in every area in order to

> protect his investment and to reduce the amount of cash contribution going forward."

59. The report was not shared with SUL at the time. It must inevitably have coloured Prince Abdullah's attitude to the way in which UTB's interests in Blades should be protected, the appropriate governance structure and the desirability of finding a replacement investor for SUL. The following month, Tareq Hawasli was appointed a director of SUFC.

60. May 2016 brought no promotion and a poor eleventh place in League One. That meant that there would be at least another year of funding a League One club. It would be the fourth season since Prince Abdullah's investment. The 3-5 year plan to regain Premier League status was not going well. The manager was sacked and Chris Wilder was appointed in his place. Mr Phipps resigned and was removed as a director of Blades and SUFC.

61. On 24 May 2016, there was a Blades and SUFC board meeting at the George V hotel, Paris. Mr Bettis's financial presentation indicated a budget for the next year that produced a cash flow shortfall of £8m, subject to possible cost savings. There is no evidence that specific dates for payments of capital contributions were agreed between principals at that time, though Mr Bettis's cash flow probably included them. It was recognised that further external investment was needed. No sooner had Kevin McCabe returned to Manchester airport the following day than he was summoned by Messrs Howard and Hawasli to London to discuss a possible investment from the Qatari Investment Authority. This was named "Project Beta" and included an outline proposal to sell the Scarborough Group property assets (other than Crookes Road) and half the football club for £47.5 million. That would leave the new investor owning most of the property assets and sharing the Club ownership with UTB. The stated aim was for completion on 31 July 2016. Kevin McCabe was enthusiastic about Project Beta.

62. On 20 June 2016, Mr Bettis asked each owner for an injection of £1m to meet SUFC's tax bill. The request had an amended cash flow forecast attached and was said to contain suggested dates for injection of capital by UTB and SUL, but the spreadsheet was not in evidence. SUL paid its £1m on 22 July 2016 but UTB did not pay. Prince Abdullah explained, when chased for his contribution at that time, that he would need a month in which to raise further cash for investment in the Club. But he paid only £200,000 on 23 August 2016, £400,000 on 21 September 2016 and a further £400,000 on 2 November 2016. At this time, Prince Abdullah had no spare cash because Saudi Paper had stopped paying dividends the previous year. SUL was reluctant to pay more money into Blades at a time when Project Beta was progressing. SUFC was in real danger of being unable to pay its employees' wages on a monthly basis. Mr Bettis called for another £1m from each owner in November 2016 but SUL paid only £450,000 on 29 November, £50,000 on 1 December and a further £500,000 on 12 December. When Prince Abdullah was called upon to equalise contributions by paying £1m in January 2017 he did not do so, and SUL had to pay a further £600,000 urgently on 27 January 2017 in order to save SUFC from insolvency.

63. Although Project Beta ultimately came to nothing, to Kevin McCabe's annoyance, by January 2017 a new potential investor had been found by Prince Abdullah in Saudi Arabia. This was presented as being Sela Sport, a Saudi sports media company

owned by Dr Rakan Al Harthy, though in fact the true investor turned out to be a different person. This new investment possibility had openly been discussed between SUL and UTB first in November 2016, though it is evident that Prince Abdullah or those acting for him had been seeking to interest Sela Sport for at least a month before that. This was named "Project Delta". A new and more complicated phase of the story was about to begin.

64. Mr Howard, who was assisting Prince Abdullah with Project Delta, sent Sela Sport and their apparent representative in London, Mr Hossam Alsaady of Nuovo Capital Wealth Management Ltd (described as an affiliate of Sela Sport), a confidentiality agreement, which was signed by Mr Alsaady on behalf of Nuovo on 5 December 2016. Whether Mr Alsaady was at any time acting for Sela Sport is a matter of dispute. The following day, Mr Howard explained to Mr Tutton that exactly the same deal as in Project Beta was to be offered to Sela Sport and that Nuovo were an affiliate and representative of Sela Sport.

65. On 9 January 2017, the three McCabes and Mr Bettis flew to Dubai to meet Prince Abdullah and Dr Rakan. At the meeting with Dr Rakan, it became clear that, although Sela Sport was a possible investor in Blades, there would likely be other investors. The name of Saleh bin Laden was mentioned. At the meeting, an early advance or loan of £3 million was discussed and apparently agreed in principle by Dr Rakan. There is an important dispute about what exactly was said by Dr Rakan and Prince Abdullah at the meeting as regards repayment of the £3 million loan, if that is what it turned out to be, and who the investor(s) might be.

66. As a result of the meetings in Dubai, the McCabes and Mr Bettis returned to England the following day confident that a deal with Sela Sport would be done. This was significant for the McCabes not just because their stake in Blades and SUFC would be acquired, ending their need to fund SUFC's losses, but because they would soon be paid very substantial sums for four of the five property assets. The next day, Mr Tutton emailed a rudimentary draft loan agreement to Dr Rakan.

67. On 28 January 2017, Mr Alsaady informed the parties to the proposed transaction that lawyers were being instructed to prepare a loan agreement between an investment company and Blades. In the event, the investment company turned out to be Charwell Investments Ltd ("Charwell"). The loan agreement dated 9 February 2017 provided for three instalments of £1 million each to be paid on 15 February, 15 March and 14 April 2017, repayable on demand, without interest, on 30 April 2018. It gave the lender but not the borrower the option to capitalise the £3 million as equity in Blades.

68. Blades did no due diligence on Charwell in connection with the money laundering regulations. In fact, the ultimate beneficial owner of Charwell was not Sela Sport but the bin Laden family. What exactly SUL knew and believed at the time and subsequently about the source of the loan is in dispute. The money from Charwell was nevertheless extremely welcome to both SUL and UTB. It saved them from having to make further capital contributions during the 2016/17 season. However, at the date of the Charwell loan agreement, SUL had contributed £1.6 million more than UTB. Although in principle, under the ISA, that entitled SUL to subscribe for more shares and dilute the interest of UTB, it did not seek to do so, no doubt because SUL wanted to sell its stake, not increase it.

69. The next event of significance was that, in March 2017, over a dinner at The Ivy, Mr Bettis told Kevin McCabe that his other business interests required him to move to Los Angeles later that month. Mr Bettis said that he would not leave SUFC "in the lurch", but at that stage no decision was taken about whether Mr Bettis could or would continue as CEO. At about the same time, Mr Giansiracusa, a lawyer and partner in Jones Day practising from Riyadh, first became involved with Blades and SUFC, initially in connection with the heads of terms and due diligence process for Project Delta.

70. On 1 April 2017, Prince Abdullah and Kevin McCabe met in the Peninsula Hotel, Paris, to discuss Project Delta and the future of the Club, against the happy backdrop of virtually guaranteed promotion to the Championship at the end of the season. A restructuring of the board of SUFC was discussed, assuming that Project Delta proceeded. Kevin McCabe told Prince Abdullah that Mr Bettis would resign at the end of that season and that a replacement was being sought. Prince Abdullah wanted to be involved in the process of selecting the replacement. After the meeting, Kevin McCabe contacted Mr Giansiracusa to try to arrange a meeting to discuss changes to the boards and arrangements for a successor to Mr Bettis.

71. During April 2017, things were looking brighter for Blades in certain respects. The immediate funding crisis had passed, though that proved to be only a temporary state of affairs. The Club achieved promotion to the Championship. It was still believed that Project Delta would come to fruition, though possibly not for a full 50% stake in the Club. In Kevin McCabe's mind, payment of the Charwell loan had made Project Delta a virtual certainty. Prince Abdullah's ministerial post came to an end on 23 April 2017, releasing him to devote more time to the affairs of the Club.

72. It was initially assumed by both Kevin McCabe and Prince Abdullah that, at some time in the near future (though no fixed date was ever agreed between them), Mr Bettis would cease to be CEO. Kevin McCabe did not believe that Mr Bettis could do that important job part-time, based in Los Angeles. Both sides concerned themselves with arrangements to recruit a successor. On 22 April 2017, ahead of their first meeting, Mr Giansiracusa emailed Kevin McCabe and suggested that they discuss the future of Mr Bettis and instruct an executive search firm to focus on proposals for three positions: a CEO, a chief financial officer ("CFO") and a player recruitment position. He also sounded warning notes about the importance of instilling good corporate governance.

73. The meeting of the McCabes and Mr Giansiracusa (and Mr Bettis) in Sheffield took place on 29 April 2017. Mr Bettis had produced budgets for the following season, which required substantial input from the Project Delta investor. By that time, Prince Abdullah was considering instructing Deloitte to carry out an analysis of the Club's business and a benchmarking exercise. Nothing was decided about the timing of Mr Bettis's resignation.

74. However, on 12 May 2017, Prince Abdullah had lunch with Mr Bettis in Los Angeles. He found Mr Bettis (whom he had not previously met) to be an impressive man with an independence of mind and sound judgment. He wanted him to remain as CEO. As a consequence, Mr Giansiracusa on Prince Abdullah's behalf prepared a memorandum and draft board resolution, which recorded agreement by the directors that Mr Bettis should remain in post part-time and resolved that the Club should seek

to appoint a full-time Chief Operating Officer ("COO"). There is disagreement between the parties as to whether that resolution, which was eventually signed by all directors, amounted to agreement that Mr Bettis should continue to be employed part-time. On 26 June 2017, Andy Birks, a friend of Simon McCabe, started work as COO of SUFC.

75. By that time, the parties had received some bad news. On 6 June 2017, Mr Alsaady informed Mr Giansiracusa and Mr Hawasli that his principal had decided not to proceed with Project Delta. That was not unexpected: both sides had realised in about mid-May that the deal was not progressing as it should have been. Mr Giansiracusa confirmed the bad news to Kevin McCabe on 11 June and suggested that, when dealing with any future would-be investors (that Prince Abdullah was already seeking), changes needed to be made to the due diligence and legal processes. The collapse of Project Delta meant that annual debt finance was once again an overriding issue for SUL and UTB.

76. Apart from the need for more money going forward, Blades had to deal with the implications of the £3 million Charwell debt. To comply with the Salary Costs Management Protocol of the English Football League, part of the debt had to be taken off Blades' balance sheet by the end of the season. Mr Tutton ingeniously suggested that that problem and the imbalance in the equity contributions of UTB and SUL in 2016/17 could be addressed together, by UTB taking on liability for £2.3 million of the debt and SUL for £0.7 million (i.e. UTB contributing £1.6 million more than SUL). It was later decided that, instead, £1.6 million of the Charwell loan should be novated to UTB, leaving Blades liable to repay £1.4 million. That suggestion was rather indelicately put to Mr Alsaady, on behalf of Charwell, who initially was uncooperative, with the result that no resolution was achieved in time to avoid a temporary embargo on the Club's transfer activity. Had the issue not been resolved (as it later was, on 25 July 2017) it could have had a damaging impact on the Club's ability to position itself for the new season in the Championship.

77. After the end of Project Delta there was a period of some weeks leading up to an important meeting between Prince Abdullah, Mr Giansiracusa and Kevin McCabe at the Grand Resort, Bad Ragaz, Switzerland on 24 July 2017. Detailed communications took place in that period between Mr Giansiracusa and Kevin McCabe in relation to the restructuring of the boards of Blades and SUFC. Kevin McCabe was very keen to see Selahattin Baki and Tareq Hawasli removed as directors. Those communications gave rise to a number of misunderstandings and disagreements, in particular about Prince Abdullah's prerogative to appoint whomever he wished to be a director of Blades or SUFC. In addition, it was clear that Kevin McCabe envisaged Mr Bettis's involvement being phased out quickly, as Mr Birks settled in to the COO role, and that he should be guided by the McCabes or Prince Abdullah (not Mr Bettis) until he was ready to take over as CEO.

78. In an email of 28 June 2017, Mr Giansiracusa criticised the suggestion that matters should carry on in that way and rebuked Kevin McCabe for seeking to interfere in the management of the Club. He stated that it had been understood that Mr Bettis would remain as a part-time CEO for the forthcoming season and that he and Prince Abdullah would be extremely concerned if there was any deviation from that understanding. The seeds of the November 2017 breakdown in relations had now been sown. They were then watered by constant conflict between Mr Giansiracusa's

determination on behalf of Prince Abdullah to impose orthodox corporate governance, allowing the board of SUFC to determine strategy and hold the managers to account, and Kevin McCabe's resistance to that, though the motives of each side in this respect are in dispute.

79. At Bad Ragaz, the parties discussed: board composition; the senior executive positions at SUFC; rent increases for the Stadium and Academy; the technical committee of the Club, and the Deloitte proposed benchmarking exercise.

80. The composition of the boards was agreed. Each board would now comprise three appointees of each shareholder and the two boards would be identical. Prince Abdullah and Mr Giansiracusa would come onto the boards with Mr Hawasli, and Mr Baki being removed; the SUL appointees were to be Scott McCabe, Simon McCabe and Mr Tutton.

81. No agreement was reached as to whether Mr Bettis would stay as CEO until the end of January 2018 (a weakening of Prince Abdullah's position from the terms of the board resolution of June 2017), the end of August 2017 or mid-September 2017 at the latest (Kevin McCabe's position). But it was agreed that in the meantime Mr Bettis would take steps to prepare Mr Birks to assume the CEO role at the end of the 2017/18 season. It was also agreed that, if Prince Abdullah required it, the Club must appoint a CFO chosen by the Prince (in accordance with clause 5.11 of the ISA), and that the Club would retain The Savannah Group (executive consultants) to conduct a search for suitable candidates. However, Kevin McCabe is minuted as requesting Prince Abdullah to reconsider the exercise of his right, as it could be disruptive to Mr Birks. What exactly was said about Mr Bettis at Bad Ragaz is disputed.

82. The question of rent increases had been raised by SUL once it was suspected that Project Delta would fail, leaving SUL (and UTB) with the need to find cash to fund the following season's business. The issue was raised by SUL by means of a cashflow forecast for the season, which included a rent of £1.65 million (instead of £310,000) for the Stadium and the Academy. UTB refused to consider a rent increase, both before the meeting at Bad Ragaz and at it, but Prince Abdullah expressed willingness to address the issue again the following year and stated that if the Club achieved promotion to the Premier League he would be likely to exercise the property call options. (Since the call options only allowed SUFC to exercise the options, not UTB, this must have been on the assumption either that by then UTB would have taken control of SUFC, by one means or another, or that SUL would concur in their exercise.)

83. There was agreement at Bad Ragaz to re-activate the technical football committee according to the terms of the ISA, but its membership was changed to include a shareholder representative for each side as well as the club manager, the head of football administration (Mr Shieber) and Mr Birks (or the CEO for the time being).

84. Prince Abdullah was keen to have Deloitte's professional opinion on how well and efficiently Club was being run. He did not have the right under the ISA to have accountants carry out a review of SUFC's activities, and so was dependent on the agreement of the board (or of Kevin McCabe as the appointor of SUL's board representatives) for such a review to take place. The minutes for Bad Ragaz record that Kevin McCabe did not "agree" that Deloitte should be mandated to carry out the

review (since he had no faith in consultants) but "accepted" that Deloitte should be mandated, and that this acceptance was qualified: "provided that it was postponed until 1st November 2017". After being sent the amended minutes for signing, Kevin McCabe wrote back to Mr Giansiracusa saying "think better wording is '…Accordingly he did not agree to the mandate but was happy to accept it being discussed further in November'". He was immediately challenged on this by Mr Giansiracusa, who said that Kevin McCabe was changing his position. The parties still differ as to what exactly was said about Deloitte at that meeting.

85. Two days after that, Kevin McCabe asked to see the brief given to Deloitte and asked Prince Abdullah to obtain a competitive quotation for the work from Grant Thornton. Prince Abdullah agreed to send the brief and asked: "if we don't agree on the end, will you stick to your promise in Bad Ragaz about accepting to this even if you Don't agree? [sic]" Kevin McCabe replied: "between now and November I will adhere to our debate in Zurich but at the same time do my utmost to convince you that there's no benefit in spending needless sums in employing so called 'Experts' to tell us how to run an English Football Club". He agreed to instruct Grant Thornton to give a quotation for the work.

86. Shortly before this, with the agreement of Charwell, £1.6 million of the Charwell loan was novated to UTB. Under the Subscription and Novation Agreement, Blades was released from liability for that amount, UTB assumed liability for that amount and Blades (acting by Mr Tutton) confirmed and agreed that the Charwell loan remained in full force and effect to the extent of a debt of £1.4 million. It was SUL's original pleaded case that this transaction was a disguised gift and therefore a bribe to Prince Abdullah, but that case was all but abandoned at the end of the trial.

87. On 24 August 2017, Mr Bettis emailed Mr Giansiracusa and told him that Kevin McCabe had expressed a desire not to proceed with the recruitment of a CFO. Mr Giansiracusa told Mr Bettis that SUL had no say on the CFO, since the ISA gave the right to appoint a CFO to UTB, and he instructed Mr Bettis to proceed with The Savannah Group's work in that regard.

88. On 20 September 2017, Kevin McCabe sent his sons an email expressing the wish that SUL's board representatives would continue to address the disputed issue of the recruitment of a CFO and stating that he had "agreed also with Steve [Bettis] he should step down as CEO as at 31st October". By this stage, Mr Tutton was suggesting to Kevin McCabe (email of 11 September 2017) that, in view of the Project Beta/Delta debacle, SUL could not trust UTB and that Kevin McCabe should refuse to cooperate further until the ISA was amended to provide for, among other things, a rent review. The email ends: "How much time are you prepared to lose with these awful partners?"

89. Ahead of a board meeting of SUFC due to take place on 26 October 2017, Kevin McCabe sent the SUL appointees (including Mr Bettis, who had by that time been re-appointed a director in place of Scott McCabe) a memorandum expressing his wishes about the stance that should be taken on various issues at the board meeting. As regards the technical football committee, the memorandum records that Kevin McCabe wished to see Jan van Winckel (a Belgian football coach known to Prince Abdullah) replace Mr Baki, though recognising the need to work harmoniously with the team manager in that regard. It states that Kevin McCabe did not wish to see a

high-ranking new executive appointment made, but rather that Mr Birks and Mr Tutton could bring a new finance person on board at a modest salary. While recognising SUL's right to appoint a CFO, he suggested that it was totally inappropriate to do so at such a high salary, which was unaffordable.

90. As regards Mr Bettis, the memorandum reads:

> "I suggest Stephen writes to Prince Abdullah and myself confirming that he wishes to step down as CEO as from 31st October but of course retain his position as a Director on the Boards of BLL/SUFC representing SUL."

Since this memorandum was sent to Mr Bettis, it was in effect an instruction to Mr Bettis to tender his resignation.

91. As regards Deloitte, the memorandum stated that all were as one in reaffirming to Prince Abdullah that there was no point in undertaking a benchmarking exercise of SUFC, and that any costs incurred or to be incurred should not be the responsibility of Blades/SUFC. The memorandum urged the appointees to continue to press on the property rents issue, and it reminded them that the Charwell loan was intended to be phase 1 of Project Delta and was as such a responsibility of Prince Abdullah, so that the residual £1.4 million debt "also remains as his responsibility to the Club in order to extinguish this unforeseen debt". This was an issue that had not previously been raised with Prince Abdullah or anyone else, after Kevin McCabe declined Mr Tutton's suggestion in February 2017 that SUL ought to ask Prince Abdullah to guarantee the Charwell loan, but the memorandum making this assertion (and the other points summarised above and below) was sent to all SUFC directors, including UTB appointees, prior to the board meeting.

92. Finally, Kevin McCabe stated in the memorandum that there was a clear implication in the stated aim underlying the ISA that Prince Abdullah would secure sufficient finance to get back into the Premier League. There were to be no further funds for SUFC provided by SUL "given current circumstances".

93. By this time, Kevin McCabe had opened negotiations with Alan Pace of ALK Capital Inc ("ALK") to sell SUL's interest in Blades. UTB had been notified of this interest and a draft non-disclosure agreement was provided to give ALK access to the data room that had been set up.

94. Against this background, the board meeting of SUFC took place on 26 October. Contrary to Kevin McCabe's instruction, Mr Bettis had not resigned. It is evident from the transcribed recording of the meeting that: UTB did not want Mr Bettis to resign but to continue part-time until the end of the season; Mr Bettis did not want to resign but agreed to do so if that was what either of the owners required, rather than be the cause of disharmony; and that neither Mr Tutton nor Mr Green (the SUL-appointed directors) stated at the meeting that SUL did require Mr Bettis to resign, though Mr Tutton challenged Mr Bettis's ability to do the job properly even on a part-time basis. The proper interpretation of what happened at this meeting, against the background leading up to it, is a matter of dispute between the parties, though it is common ground that no matter was voted upon. Kevin McCabe's understanding (though he was not at the board meeting) was that Mr Bettis was to stop working for

SUFC on 31 October 2017. UTB's understanding (both Prince Abdullah and Mr Giansiracusa were at the meeting) was that the question was unresolved.

95. As regards the Deloitte benchmarking, Mr Giansiracusa again explained why the work was required and Mr Tutton agreed to raise the matter again with Kevin McCabe, but no further decision was made. There was however unanimous agreement that Mr van Winckel would be a suitable replacement for Mr Baki on the technical committee, and Mr Bettis agreed to discuss Mr van Winckel's financial terms with Kevin McCabe. Mr Tutton raised once more the question of rent review, to which Mr Giansiracusa responded that "the rent would be reviewed in good faith if and when the club attained [Premier League] status, but whilst deficits existed UTB would stand behind the legal agreement". The suggestion that the balance of the Charwell loan was the liability of Prince Abdullah was rejected by both the Prince and Mr Giansiracusa.

96. Following the board meeting, Scott McCabe and Mr Tutton exchanged emails about Mr Bettis. Scott McCabe said that his father had asked him to establish whether Mr Bettis was "off the SU payroll", to which Mr Tutton replied: "no far from it". Scott McCabe then asked: "does Stephen want to remain in title/position?", to which the reply was: "of course he does". "And salaried?" "He thinks he is on half salary at his current rate". It would therefore have been clear to Kevin McCabe then that Mr Bettis had not resigned and wished to remain in position.

97. Prince Abdullah and Kevin McCabe met at the Corinthia Hotel on 1 November 2017 for a "clear the air" meeting. Emails exchanged after the meeting show that Kevin McCabe confirmed UTB's decision to proceed with Deloitte and accepted it, and that it was agreed that Mr van Winckel would work for three months on a probationary consultancy arrangement, with the precise role and terms to be confirmed.

98. Oddly, the resignation or continuation in office of Mr Bettis appears not to have been discussed at the Corinthia Hotel. Neither did Kevin McCabe tell Prince Abdullah what he had instigated as regards Mr Bettis the day before their meeting. This was to remove Mr Bettis from the SUFC payroll without notifying anyone (including Mr Bettis) other than Mr Birks and Mr Tutton, who were instrumental in stopping Mr Bettis's pay. The sequence was as follows:

i) On 31 October 2017, Kevin McCabe emailed Mr Birks on a private and confidential basis, copied to no one, saying:

> "as I believe you're aware Steve B steps down as an assumed CEO of SUFC as from close of play today. This accords with sensible discussions that Steve and myself have held over a good few weeks/months… Now you've settled in very well to your COO duties and responsibilities then as in past months where you need guidance and direction then I'm always to hand and am available in an 'untitled CEO type role' to help. So please request Neal Barber to remove him from the payroll as from the end of October."

ii) The following day, Mr Birks replied:

> "… In order to stop his pay, technically HR need a letter or an email confirming his resignation or otherwise we can be accused of constructive (not that he would) dismissal. Is this possible?"

iii) Kevin McCabe responded:

> "not needed. Speak tomorrow"

iv) On 6 November 2017, Mr Tutton emailed Mr Birks, on Kevin McCabe's instruction, copying in no one else:

> "further to your telephone request please accept this email, in my capacity as Director of SUFC, and remove Stephen Bettis from the SUFC payroll as from 31 October 2017."

99. The result was that Mr Bettis's pay was stopped, but neither he nor the UTB directors were told about it. Mr Bettis continued to work (the amount of work he did is disputed) during November without realising that he was not going to be paid. SUFC's head of HR was only obliquely informed that Mr Bettis's status had been changed by SUL when she emailed him (copied to four other directors) about a proposed contract of employment for the new CFO, Simon Ratcliffe. Mr Tutton replied (copied to no one):

> "I am perplexed by this, why are you dealing with Stephen Bettis since he has stepped down from his CEO role which he has clearly been unable to fulfil since he moved abroad?"

Prince Abdullah and Mr Giansiracusa first learned of what Kevin McCabe had done when Mr Bettis complained to them, in an email of 30 November 2017, that he had only just discovered that he had been working for a month and would not be paid.

100. On 8 November 2017, Kevin McCabe emailed Mr Giansiracusa stating that the mandate to Deloitte:

> "… should not be triggered at this particularly busy period of the year and critical time for first-team football. Logic says that once the mandate is understood and approved then February would seem to be more appropriate giving Andy and his key people time to prepare."

In his reply on 11 November Prince Abdullah said:

> "I have to be frank with you, if after what we agreed on our last meeting in London regarding Jan and Deloitte doesn't start this week, I see it very difficult that we can work on any thing together, I hope both of these things move forward this week."

There was subsequently no movement on either from SUL.

101. On 10 November 2017, Mr van Winckel had emailed Prince Abdullah, after meeting Kevin McCabe, to say that he considered that Kevin McCabe was seeking to postpone

Mr van Winckel's appointment on the grounds that it would disrupt the momentum that had been developed at the Club. Kevin McCabe wrote to Prince Abdullah two days later and said:

> "I like Jan… However at SUFC we have a very 'British cultured' + 'Sheffield centric' football management team… Let matters rest until the end of this season and then we can sensibly readdress."

The following week, Kevin McCabe emailed Mr van Winckel telling him that his attendance at the Club was contradicting Kevin McCabe's decision, and telling him not to interfere with the smooth running of the Club and to let colleagues concentrate on their jobs without distraction. Later, he told Prince Abdullah in an email that Mr van Winckel could not now be appointed to the technical committee or be employed in any shape or form by the Club.

102. By mid-November 2017, Mr Ratcliffe had been identified as the preferred candidate for appointment as CFO. On 14 November, Mr Birks emailed Mr Giansiracusa requesting clarification:

> "in order for Catherine [Frost] to send out the offer letter to Simon Ratcliffe, we need confirmation of the reporting line please. I have attached the new starter authorisation form but need this information to complete the form…"

103. Mr Giansiracusa replied on 15 November, copying in Mr Bettis:

> "regarding the reporting lines, Simon will have a solid line to UTB (Prince Abdullah) and a dotted line to the CEO. The Investment Agreement mandates only the solid line but I think a dotted line to the CEO is good corporate governance and UTB agrees."

A similar email, with an explanation, was sent to Ms Frost and Mr Bettis, copied to Mr Tutton. Ms Frost had prepared a draft offer letter, stating that Mr Ratcliffe would be directly responsible to the CEO and the board of SUFC, and copied in Mr Tutton, among others. Mr Tutton forwarded it to Kevin McCabe (saying "this is moving fast") and shortly afterwards received from Mr Birks Mr Giansiracusa's email about reporting lines, which was similarly forwarded by him to Kevin McCabe. As a result, Kevin McCabe attended Bramall Lane that afternoon (he had been in London but was planning to travel to Sheffield that day in any event) and a meeting took place with Ms Frost and Mr Tutton.

104. As a result of that meeting, Ms Frost amended the offer letter and draft contract so that Mr Ratcliffe was to report to the COO, i.e. Mr Birks, not the CEO, as instructed by Mr Giansiracusa, who no longer existed at the Club so far as Kevin McCabe and Mr Tutton were concerned. No further change was made by Ms Frost to the reporting lines. However, Ms Frost copied the amended letter and contract to all the SUFC directors and indicated that Kevin McCabe had required changes to be made. As a result, Mr Giansiracusa discovered that Kevin McCabe had intervened in the preparation of the contract. He drew Kevin McCabe's attention to clause 5.11 of the

ISA, which entitled UTB to appoint a CFO, and stated that he was wrong to interfere and that any further interference on this issue would represent a breach of the ISA. The email was copied to Ms Frost.

105. Kevin McCabe responded:

> "you're a gentleman who certainly lacks grace and has of yet learnt so little as to understanding the business of Sheffield United FC. This in part is emphasised by sending your email to Catherine an employee of the club creating confusion and at the same time besmirching myself… My direction and leadership is always to benefit SUFC and my partner and does not waver as Prince Abdullah recognises."

He added that Mr Giansiracusa should have the bravery to pick up the phone and not dictate email traffic that indicated a desire to create disputes. This email was copied to Prince Abdullah and the directors of Blades.

106. Prince Abdullah responded to this the same day:

> "i have had the pleasure of knowing Yusuf for over 20 years, I can honestly from experience say that he has more grace than most of the people I met all my life, he is also a man of his word, classy, intelligent and educated, above all he is a good Muslim, as for our partnership, it is obviously deteriorating to the point I'm afraid it is very difficult to fix, he is only communicating with you via email because meetings as I tried many times is not working, i got your ok in Bad ragaz for Deloitte a few months ago, i met you with you again in London three weeks ago and you gave your word and agreed to Deloitte and Jan and that didn't happen yet, please be sure that things will not continue as they were before and time will prove that, i will not be writing to you anymore."

107. Following those exchanges (and before Prince Abdullah and Mr Giansiracusa became aware that Mr Bettis's pay had been stopped), Mr Giansiracusa sent a detailed response to Kevin McCabe's email on 19 November 2017. The response had been considered by those on the UTB side. It characterised Kevin McCabe's interference in Mr Ratcliffe's appointment as "duplicitous" and a blatant attempt to deceive UTB. The email referred to Kevin McCabe's "seemingly uncontrollable insistence on meddling in matters which neither concern you nor benefit from your involvement". It accused Kevin McCabe of being a bully and refusing to compromise, yet lacking the intellectual integrity to make out an argument. The email criticised Kevin McCabe for going back on his promises in relation to Deloitte and Mr van Winckel:

> "when a person has integrity, when his word is his bond, a handshake is enough. This is how Prince Abdullah usually operates and it usually serves him quite well. Regrettably, it is no longer how we can do business with you. When a person manipulates facts to serve his purpose, promises one thing and then does another and in general, openly and notoriously flouts

> the truth, then those around him would be foolish not to put things in writing. We are not foolish people and you have only your own weak grasp on honesty to blame for the fact that we want everything in writing…
>
> In short, if you cannot act as a constructive and co-operative partner, we shall likewise stop indulging you in what has proven to be a misguided effort at achieving informal consensus and require that all directions to management be given through formal board processes. If, on reconsideration, you wish to preserve a more harmonious and co-operative working relationship, you will withdraw any objections to the Deloitte mandate and will allow Prince Abdullah to manage Jan [van Winckel]'s retention as a consultant. We do not need you to 'promote' anything or be otherwise involved …
>
> While I am under no illusion that this will be seen as a welcome or friendly communication, let me close by emphasising that despite your disruptive and frequently malignant behaviour, we, as your partners, have no such instincts. We respect the people you have around you, including Jeremy, Stephen and Martin, while accepting their duty of loyalty to SUL. We bear no animus and seek nothing but the best interests of the Club and the benefit of our bargain for rights under the [ISA]. While we are neither petty nor vindictive, please do not underestimate our resolve. We will take counsel given in good faith from all quarters but we shall no longer tolerate your version of business as usual. "

This email was tough and uncompromising in its language: probably more personally offensive than it needed to be to convey the message that it conveyed. It does reflect UTB's anger at the way that (as it perceived it) Kevin McCabe had reneged on commitments that he had made to Prince Abdullah and was seeking to interfere in UTB's exercise of its rights under the ISA. What UTB and SUL were each seeking to achieve at this time are matters that are hotly disputed.

108. In response to Prince Abdullah, Kevin McCabe characterised Mr Giansiracusa's email as "long winded" and "disrespectful and threatening". He expressed himself to be at a loss as to why there was so much infighting when business on and off the field was performing well. He said:

> "by the way I'm not 'interfering or meddling' - my remarks are always meant to help as SUFC's business is in Sheffield, England not Riyadh, Saudi Arabia where managing people is not best achieved via 'edicts and resolutions' produced as if the recipients are subservient. It's accomplished by adapting to our culture and being present, talking and explaining. To my knowledge Yusuf has only been to Sheffield twice so he cannot possibly have an affiliation with SUFC personnel."

109. Kevin McCabe told Mr Giansiracusa in reply that he had no desire to have further dialogue with him and wished to know whether his "edict demanding missive" was written as a legal adviser on behalf of Prince Abdullah, directors of UTB or directors of Blades/SUFC, or written in his capacity as a director of Blades/SUFC. He added:

> "the partnership between Prince Abdullah and myself relates to a Football Club that has for 162 years been situated in Sheffield, England. The culture of individuals from the North of England is naturally far different from those based and living in Riyadh, Saudi Arabia. We are not subservient people who respond to 'edicts demands and resolutions' in a fearful way. The 'need for change' rests with you as should always have been apparent to an experienced professional businessman. "

110. On 24 November 2017, Kevin McCabe sent Prince Abdullah a further email referring to various points discussed at the Corinthia Hotel on 1 November 2017. He suggested that the Deloitte exercise was underway, even though he didn't agree with it, but that the proposals for Mr van Winckel's involvement on the technical committee could not now be agreed by him as it would be detrimental to the club. In fact, the Deloitte exercise was not underway. Kevin McCabe said in evidence that he had spoken to Deloitte in Manchester about the possibility of starting work in February 2018. As for Mr van Winckel, Kevin McCabe wrote to the SUL directors the next day, stating:

> "… There's only one issue that for the moment needs to be firmly addressed and thus confirmed by you as Directors of SUFC namely to confirm that Jan van Winckel does not have our approval to sit as a member of the clubs Technical Committee or in any shape or form be employed - directly or as a consultant - by the club. Can I assume you're all in agreement?"

111. Later that day, Kevin McCabe emailed Mr Bettis stating that he had received confirmation from Mr Green and Mr Tutton regarding Mr van Winckel and would be grateful for Mr Bettis's reply that Mr van Winckel was not needed. He added: "sense that this will bring the dispute with HRH to a head".

112. Shortly after this, Kevin McCabe received a proposal from Mr Pace at ALK in America relating to the acquisition of up to 90% of SUFC. This proposal was a response to a previous proposal made by Kevin McCabe to Mr Pace. Between 1 and 3 December 2017, Kevin McCabe and Mr Tutton discussed proposed heads of terms that included an initial advance of £10 million by ALK to allow SUL to serve a call option notice on UTB under clause 11 of the ISA. Kevin McCabe proposed buying out UTB's interest so that ALK and SUL could together seek to promote the Club's interests and reunite the property assets with the Club, with a view to ALK taking in due course an 85% stake of both. He explained the terms of clause 9.1.12 and clause 11 of the ISA to Mr Pace, pointing out that the clause 9.1.12 mechanism requiring SUFC to exercise the property call options was drafted for SUL's benefit and that it was potentially onerous for UTB because they would have the "headache" of procuring the substantial monies required to pay for the property assets. He expressed the view that, in view of UTB's past reluctance to "go for it", a "modest but sensible and respectful offer" would suffice to obtain full control of the Club. Draft heads of

terms followed the next day for an initial sale and purchase of 60% of the shares in Blades with an option to acquire up to 85%, the price for the shares to be agreed and the price for the property assets to be market value.

113. On the same day that the draft heads of terms were sent to Mr Pace, Kevin McCabe sent Prince Abdullah a further email, asking whether it was UTB's intention to litigate against SUL and expressing the view that the relationship with UTB was not working ("your colleagues – including new appointment Jan – are nowhere near either understanding or managing SUFC's day to day business operations on and off the field of play"), that there were decisions to be made and that he and Prince Abdullah should meet before Christmas.

114. On 12 December 2017, Kevin McCabe emailed Prince Abdullah seeking to convene a Blades board meeting on 11/12 January 2018 in Sheffield and informing him that the McCabes would again become directors of Blades and SUFC. On the same day Mr Bettis sent Prince Abdullah and Mr Giansiracusa formal notice of his resignation as CEO, following his discovery that his pay had been stopped at the direction of Kevin McCabe. Also on the same day, Mr Giansiracusa sought to give notice to the directors of SUFC, Mr Birks and Mr Ratcliffe of an emergency board meeting of SUFC to take place on 18 December 2017 to consider the recent conduct of Kevin McCabe, to reaffirm Mr Bettis's status, to discuss steps to enhance and assure compliance with the ISA, establish proper reporting lines and discuss the Club's plan for the January 2018 transfer window. The proposed resolutions included apologising to Mr Bettis, Mr Birks and Ms Frost for what had happened.

115. Mr Tutton on behalf of SUL objected to the notice calling for an emergency meeting (and its contents). On the same day, he sent revised heads of terms to Mr Pace suggesting that a conference call should take place early the following week to finalise them "as we are keen to trigger the Call Option with UTB LLC as soon as possible". The revised heads of terms still included a £10 million cash facility, to fund the acquisition of UTB's shares, and ALK would pay a further £7 million for its 85% holding, fund the club in future, and pay higher rents for the principal property assets with a five-year option to acquire the property assets at an aggregate price of about £66 million, or such other amount as might be agreed.

116. On 17 December 2017, Mr Giansiracusa sent Kevin McCabe a more conciliatory email, suggesting that they ought to be able to work together constructively, but without Kevin McCabe expecting to get his way by using brute force. He expressed a wish to move forward and to discuss and address issues in a mutually respectful way. The email pointed out that the alternative, a trajectory of confrontation, was one in which SUL could expect to see its commercial interests adversely affected in various ways. By way of brief response, Kevin McCabe agreed to speak to Mr Giansiracusa the following day.

117. In the event it appears that they spoke on 20 December 2017. Before then, Kevin McCabe and Mr Tutton had exchanged emails about the tactics for exercising the call option on UTB's shares. Mr Tutton proposed offering to subscribe under the ISA for £5 million of new capital, to see whether UTB was in a position to offer to match it, to maintain equality. He said: "if they say they can match we know we should just go for the Texas shoot out at our higher end of £10m – If they cannot match we go in at a much lower price". Kevin McCabe replied stating that it potentially was a wise move

and that he would discuss quietly with the club manager the January transfer window requirements as a proper reason for "upping the ante by investing above the agreed £1m".

118. On 20 December 2017, Mr Giansiracusa emailed Prince Abdullah in the following terms:

> "I'll fill in the colour when we talk. KM and I spoke for over an hour. It was much more productive than I had expected. Not so much on Jan or Deloitte but on longer-term issues.
>
> KM says he wants to sell but wants the real estate to be part of the deal. The concept he offered is this:
>
> 1. Purchase price for 100% of SUL's shares of BLL = £10 million
>
> 2. Fair market rent for Bramall Lane and the Academy
>
> 3. Purchase of Bramall Lane with payment over 3-5 years
>
> 4. Purchase of other real estate within 5-6 years
>
> obviously an opening offer but he seemed to be in a mood to exit and he clearly and thought about it [sic]
>
> We agreed that he would keep up the discussion with me. I told him you were upset about his behaviour and didn't want to speak with him but that I'd convey to you whatever KM and I discussed. We agreed to keep this among the three of us for now "

119. Notwithstanding that offer to sell the SUL shares, Kevin McCabe was preparing to serve a call option notice. On 22 December 2017, Mr Tutton sent a draft notice with a price of 30.12p per share, resulting in an aggregate price of £5 million.

120. On 23 December 2017, Kevin McCabe emailed Mr Pace with festive greetings stating:

> "working on the Sharp proposals over the holiday period as instinct tells me Prince Abdullah realises it's best for him to depart. Thus with the importance of the January transfer window - which brings with it decision-making re-new players etc. - dealing now seems sensible. I'll keep you posted as matters progress and reaffirm we are up for Sharp to knock the transaction in place during the coming weeks."

"Sharp" was the agreed name given by the negotiating parties to the proposed acquisition by ALK of control of SUFC.

121. On 29 December 2017, a call option notice pursuant to clause 11 of the ISA was served on UTB, under which (in accordance with its terms) SUL offered to buy

UTB's shares at 30.12p each and also offered to sell their shares to UTB at the same price ("the Call Option Notice"). A completion date of 2pm on 6 February 2018 was specified. No prior notice to UTB of SUL's intention to serve the Call Option Notice had been given.

122. So far as SUL was concerned, the die was now cast and matters were out of its control. UTB had the power either to sell for £5 million or to accept the alternative offer and buy SUL's shares for the same price. As UTB was by this time aware, an acceptance of the alternative offer would trigger the obligation in clause 9.1.12 of the ISA and require SUFC to exercise the property call options. That in turn would require SUFC (controlled by UTB) to pay for the property assets within 12 months.

123. On 10 January 2018, Prince Abdullah decided to accept the alternative offer. But UTB did not serve a counternotice at that time. It waited until the last working day before the contractual deadline for service of a counternotice, namely 26 January 2018. Before that date arrived, UTB took a number of steps with a view to defeating the operation of clause 9.1.12 of the ISA upon completion of the share sale.

    i) On 22 January 2018, UTB and Mr Giansiracusa entered into a written agreement, under which Mr Giansiracusa agreed to buy for £3,000,000 60 percent of the shares to be acquired by UTB from SUL and UTB agreed to ensure that these shares were transferred by SUL to Mr Giansiracusa on completion. The agreement gave Mr Giansiracusa a put option to sell all or a proportion of the shares to UTB and UTB a call option to acquire the shares from Mr Giansiracusa.

    ii) On the same day, Prince Abdullah's lawyers caused to be incorporated a company in Nevis called UTB 2018 LLC ("UTB 2018").

    iii) On 24 January 2018, a stock transfer form was executed by UTB for the transfer of 13,280,000 shares in Blades, amounting to 80% of its existing holding in Blades (40% of the Blades share capital) to UTB 2018 for the expressed consideration of £1. The stock transfer form was signed on behalf of UTB by Mr Giansiracusa. On the same day, UTB and UTB 2018 executed a deed of adherence in accordance with the form annexed to the ISA, by which UTB 2018 covenanted with the parties to the ISA to comply with its terms.

    iv) On 25 January 2018, Jones Day on behalf of UTB sent Mr Tutton as secretary of Blades the stock transfer form and the deed of adherence. The email stated that UTB 2018 was under the control of Prince Abdullah and that the transfer was therefore permitted under the articles of association of Blades. The email asked Mr Tutton to write up the transfer in the register of members as soon as possible. Mr Tutton in response raised some questions about UTB 2018 and pointed out that the deed of adherence needed to be revised, given that UTB was going to remain a shareholder of Blades. He asked what the reason was for the transfer and whether a counternotice was to be served by UTB to the Call Option Notice.

124. Before UTB's counternotice was served on 26 January 2018 ("the Counternotice") the solicitors acting for SUL emailed Mr Giansiracusa, asking whether he could confirm that (as they had been advised) it was UTB's intention to serve a counternotice. Mr

Giansiracusa replied the following day (25 January) stating: "I don't have instructions from my client. You'll be notified if and when I do." When it was served the following day, the Counternotice confirmed a completion time of 2pm on 6 February 2018.

125. After service of the Counternotice, Mr Tutton and Jones Day agreed that the deed of adherence should be amended to remove the reference to the release of UTB from the terms of the ISA.

126. On 29 January 2018, an undated written agreement was prepared, under which Prince Musa'ad agreed to buy for £1,000,000 20% of the shares to be acquired by UTB from SUL (on terms similar to those of the agreement made with Mr Giansiracusa on 22 January) and it was sent to Prince Musa'ad. It was apparently signed on a different version of the document by Prince Abdullah's son, Prince Abdulrahman, on behalf of UTB.

127. On 30 January 2018, SUL's solicitors wrote to the directors of SUFC contending that UTB had acquired all of the share capital of Blades, on the basis that it remained the legal registered owner of its own 50% of the shares and had acquired a beneficial interest in SUL's 50%. The letter stated that the directors were required to execute and serve option notices under clause 9.1.12 of the ISA in relation to all the property assets on or before 4pm on 1 February 2018, and pointed out that a failure to do so would be construed as a refusal and a breach of clause 9.1.12.

128. On the same day, Prince Abdullah emailed his fellow directors:

> "please be advised that Jones Day will be writing to the directors tomorrow on behalf of UTB LLC responding to Shepherd and Wedderburn's letter. The position as set out in the Shepherd and Wedderburn letter is not accepted. In the meantime, I am advised that no action should be taken by the board or any individual director on behalf of the board to execute and serve the option notices to which Shepherd and Wedderburn refer in their letter nor should any other precipitous action be taken in this regard. If any such action were to be taken, particularly without the agreement of a majority of the board, I am advised that this would constitute a breach of the duties we have as directors."

The following day, 31 January 2018, Jones Day wrote to the SUFC directors to the same effect, disagreeing that the obligation under clause 9.1.12 had been triggered and stating that a dispute existed between SUL and UTB. They stated that until such time as Jones Day confirmed that the obligation had been triggered, or a majority of the board of SUFC resolved to execute option notices, the directors must not take any action in that regard. The letter then reminded the directors of their fiduciary and statutory duties, warning that UTB would treat very seriously any action taken by an individual director to execute and serve option notices.

129. The transfer of UTB's shares to UTB 2018 was not registered by Blades. Completion of the sale and purchase of SUL's shares did not take place and no property option notices were executed. On 6 February 2018, Shepherd & Wedderburn purported to

terminate the ISA and the contract of sale and purchase. UTB issued proceedings on 9 February 2018.

130. After the proceedings had been issued and legal battle was joined, SUFC continued to suffer severe financial difficulties. £1.4 million had to be repaid to Charwell by 30 April 2018. The parties could not agree how that money would be raised. In the event, each of SUL and UTB provided a loan of £1,000,000 to Blades, but only after an application to the court had been issued by SUL to be heard urgently on 30 April 2018. Blades repaid its £1.4 million on time. UTB was unable to repay £1.6 million to Charwell, though it did prepay £100,000 on 12 April 2018. The remainder of UTB's debt was not repaid until 25 June 2018.

131. By that time, SUFC had a further funding crisis necessitating another application to the court. The parties were unable to agree whether each should give or lend a further £1 million Blades, despite their having agreed at a board meeting in May 2018 that they would contribute equally to the deficit in the 2018/19 season. SUL sought an order compelling UTB to lend £1 million. I declined to make that order in June 2018 on the basis that further funding was not as it turned out absolutely necessary, given the recent sale of a valuable player.

132. There was no evidence about how the Club's deficit was in fact funded during the 2018/19 season. It may be that player sales covered the deficit, or that the shareholders contributed equally whatever funds were needed, in accordance with the board resolution. There is no evidence or suggestion that SUL injected further capital or made loans that were not matched by UTB, or vice versa. On any view, SUFC was clearly surviving on a tight budget, with both shareholders unwilling to invest or lend more than was necessary to keep the Club afloat. In those circumstances, it is remarkable – and likely to be to the credit of the Club manager and the independent executive team headed by Mr Bettis (who returned to the position of CEO in the summer of 2018) – that the Club secured automatic promotion to the Premier League in April 2019, shortly before the start of the trial.

133. On 25 April 2019, two weeks before the start of the trial, Jones Day on behalf of UTB and UTB 2018 wrote to Shepherd & Wedderburn giving their consent to the exercise of the property call options by SUFC, subject to formal confirmation that the Club was promoted. Promotion to the Premier League meant that SUFC would have hugely increased revenue during and before the 2019/20 season and could therefore afford to buy the property assets. UTB sought SUL's confirmation that a board meeting of SUFC should take place to resolve to exercise the options. This was done during the course of the trial and the options were then exercised.

C. The ISA: Quasi-partnership and Implied Terms

134. SUL's case (in brief outline) is that UTB (and Prince Abdullah and Mr Giansiracusa personally) acted unlawfully in the period from November 2017 to January 2018, contrary to the terms of the ISA and its duty to act in good faith and fairly and to seek to work in co-operation with SUL to achieve the objectives of the ISA, and instead acted in a manner unfairly prejudicial to the interests of SUL as a shareholder of Blades.

135. A substantial part of SUL's case depends on there being an obligation on UTB to act in good faith, fairly and openly towards SUL. There is no such express obligation, either in the articles of association or in the terms of the ISA. There is no assertion by SUL of a collateral contract to that effect. SUL contends that nevertheless the obligation exists and that UTB breached it by seeking to drive SUL out of the joint ownership of Blades and by seeking to deprive SUL of its rights under clause 9.1.12 of the ISA.

136. The alleged obligation of good faith is said to arise in two distinct ways.

137. First, SUL contends that Blades is a quasi-partnership, not just a company limited by shares where the rights of its shareholders are as stated in the articles of association and the ISA. If Blades is a quasi-partnership then the shareholders (UTB and SUL) owe each other equitable obligations of trust and confidence, openness and fair dealing, and of good faith, in the same way as partners of a partnership owe each other such duties.

138. Second, SUL contends that the ISA is a 'relational' contract between UTB and SUL, such that as a matter of law there is implied into the contract an obligation on each party to deal fairly and act in good faith towards the other.

139. If either of those arguments succeeds, SUL argues that UTB was in dereliction of those duties: first, in its sustained attack on Kevin McCabe in November and December 2017 that was calculated to end their cooperation, and, second, in the way in which UTB devised and sought to hide until the last minute its scheme to avoid the obligations in clause 9.1.12 being triggered upon purchase of the shares of SUL.

140. In addition to arguing for an implied obligation of good faith, SUL says that further terms are to be implied into the ISA if they are not express terms, namely:

    i) A shareholder may not transfer part only of its shareholding in Blades;

    ii) A shareholder must not wilfully obstruct or hinder the re-unification of the property assets pursuant to clause 9.1.12 of the ISA;

    iii) A recipient of a call option notice under clause 11 of the ISA must not allow its shares to be encumbered or otherwise act to prevent it from being able to transfer its shares free from any incumbrances on completion;

    iv) Following receipt of a call option notice, the recipient must not take any step that would materially diminish the value of the other party's (the offeror's) shares, and

    v) No party to the ISA must deliberately prevent or hinder any other party from fulfilling its obligations under the ISA.

(i) The express terms of the ISA

141. In order to address these arguments, it is necessary to examine in detail the contractual basis of the parties' venture. Although heads of terms and a term sheet

were agreed and exchanged during the summer of 2013, the contractual terms that the parties agreed are contained in the bespoke articles of association of Blades and the ISA. The rights of the parties as shareholders in Blades are also impacted by the subordinate documents made between companies in the Scarborough Group and SUFC: the new leases of the property assets and the property call options that SUFC was granted.

142. The articles of association govern, materially, the basis on which shares in Blades could be assigned and the rules for convening and holding board meetings of Blades. Article 49.1 provides that the company is not concerned with any beneficial interests in its shares and article 62.4 that a transferor of a share remains the holder of the share until the transferee's name is registered. The articles entitle a shareholder to sell its shares, subject to pre-emption provisions in favour of existing shareholders; but, under article 9.1, these restrictions on a transfer of shares do not apply to a transfer to certain categories of transferee, including a "privileged relation", a family trust, a nominee or bare trustee and a company controlled by the shareholder. In the last case, a company controlled by Prince Abdullah or by Kevin McCabe is deemed to be a company controlled by UTB and SUL respectively. Article 62.5 provides that the directors of the company may only refuse to register a transfer in limited circumstances (none of which is relevant in this case) and by article 62.6 any refusal to register must be notified with reasons within 30 days of the transfer being lodged.

143. By article 13, subject to the power to delegate, the management of Blades is a matter for its directors, and by article 17 decisions of the directors, unless taken unanimously, are to be by majority decision at a meeting (unless the company at any time has only one director). A quorum of two directors (at least one appointed by each of SUL and UTB) is required. The chairman is chosen by the directors at the meeting and has no casting vote.

144. The ISA is expressed to prevail in the case of any conflict or inconsistency between its terms and the articles (cl. 25), and the defined terms in the articles apply also in the ISA.

145. As previously noted (para 29 above), the parties' overriding objectives (promotion to the Premier League and reunification of Club and property assets) are set out in recital (B). Recital (C) states that the ISA sets out the terms on which UTB is investing in Blades and regulates the basis on which Blades and SUFC shall be operated. That is reinforced by clause 26, which provides:

> "This Agreement, the documents in the Agreed Form and all agreements entered, or to be entered into, pursuant to the terms of this Agreement or entered into between the parties in writing and expressly referring to this Agreement:
>
> 26.1.1 together constitute the entire agreement and understanding between the parties with respect to the subject matter of this Agreement; and
>
> 26.1.2 (in relation to such subject matter) supersede all prior discussions, understandings and agreements between the parties and their agents (or any of them) and all prior representations

> and expressions of opinion by any party (or its agent) to any other party (or its agent). ”

146. Clause 28.1 provides that a waiver of any term, provision or condition of the ISA shall be effective only if given in writing and signed by the waiving or consenting party. Clause 28.4 provides that any variation of the ISA is valid only if it is in writing and signed by all the parties.

147. Clause 24 provides that nothing in the ISA is to be deemed to constitute a partnership between the parties or any of them.

148. By clause 2.3, UTB’s subscription monies were to be made available by Blades to SUFC solely for the Improved Performance Purpose, which was improving the on-pitch performance of the SUFC first team. That was therefore consonant with the overriding objective of achieving promotion to the Premier League.

149. Clause 5 specifies how the board and the shareholders are to conduct the business of Blades and SUFC. The board was not to have responsibility for the management of Blades and its business to the extent of matters specified in schedule 3 as requiring Investor Consent. Thus, a number of important matters were to be subject to a veto by UTB. These include: the adoption of any operating budget that includes any line item more than 10% ahead of the previous year’s actual results, or that reflected negative free cash flow; the admission of any new shareholder into Blades or any member of the Blades group of companies; any material activity outside the Business Plan; any expenditure outside the annual Player Transfer/Management Protocol; and the initiation of any litigation or claim. Similarly, various matters were specified in schedule 4 as requiring either the approval of a majority of shareholders’ or a supermajority of shareholders’ votes. The board could not, in the conduct of the ordinary business of Blades, override these matters. Each of UTB and SUL was therefore in practical terms given a veto in relation to these matters, which include: the making of any loan by or to the company, other than by its bankers in the course of ordinary business; any transaction other than by way of bargain at arm’s length upon normal commercial terms; transactions involving expenditure of more than £50,000; any distribution; the appointment of any employee earning in excess of £40,000 a year; and the delegation of any matter to a committee.

150. While there was no majority shareholder the board was deadlocked, with each shareholder having the right to appoint four directors, with no more than eight directors in total permitted. A resolution could not be passed at a board meeting without at least one director appointed by each shareholder being present. If either shareholder had appointed fewer than the permitted maximum number of directors, or a director so appointed was absent, the directors present at the meeting would nevertheless have the full number of votes that the maximum permitted number of directors would have had if they had been in attendance (clause 5.10).

151. By clause 5.11, UTB alone was given the power to appoint its choice to the office of Finance Director of Blades and SUFC and to agree the terms of appointment of such person on behalf of the companies. The Finance Director was an ex officio member of the Technical Football Board, alongside the CEO of SUFC, the Head of Football Operations and the Team Manager.

152. Unlike in the pre-contract documents exchanged, the ISA imposed no obligation on UTB or SUL to inject further capital or make loans to the companies. Clause 6.1 provides:

> "The Shareholders acknowledge that, in addition to the subscription monies referred to in clause 2.2, the Company may require further finance to fund its and SUFC's projected cash requirements under the Business Plan. The parties agree that each of [SUL] and [UTB] has the right to subscribe for further shares in the Company for cash at any time, subject to pre-emption rights on the issue of new shares in the share capital of the Company, provided that the right to do so shall cease for so long as: (i) either Shareholder holds, or will following the issue of such shares hold, 75% or more of the fully diluted share capital; or (ii) Sheffield United football club is in the English Premier League (or any successor thereof)."

Clause 6.2 fixed the price at which any such further subscription be made. By clause 6.5, any subscription that would result in a shareholder holding 75% or more of the issued share capital required the written approval of both shareholders.

153. By clause 8, Blades undertook to the shareholders that it would (and the shareholders were to exercise their voting rights and powers of control to that end): prepare and deliver a draft Business Plan and a draft Player Transfer/Management Protocol by a specified time each year; prepare and provide management accounts and audited accounts; deliver to the shareholders monthly Technical Football Board reports.

154. By clause 9, Blades gave further undertakings to SUL and UTB and the shareholders were to exercise their voting rights accordingly in various respects. These included procuring that none of the matters set out in schedule 3 occurred in relation to any Blades company without the consent of UTB; that none of the matters set out in schedule 4 occurred in relation to any Blades company without either supermajority shareholder consent or majority shareholder consent, as the case may be, and most importantly:

> "**on any Shareholder acquiring 75% or more of the entire issued share capital of the Company, SUFC shall be compelled to exercise and each party hereby authorises and instructs SUFC to forthwith execute and serve Option Notices in respect of each and every Property Call Option on the date that the shareholder acquires 75% or more of the entire issued share capital of the Company, unless each of [SUL] and [UTB] agree otherwise**" (clause 9.1.12).

155. Clause 10 of the ISA contains the deadlock provisions. Deadlock exists where the shareholders are unable to arrive at a decision on any matter that a shareholder reasonably considers to be fundamental to the business of the Blades group because of disagreement between them, having first exhausted the dispute resolution procedure in clause 33. That clause requires any dispute to be referred first to the directors of each shareholder for resolution, failing which the dispute is referred to Mr Phipps and Kevin McCabe to resolve. If Mr Phipps and Kevin McCabe cannot reach agreement,

the dispute is to be mediated. Thereafter, if the dispute remains, either party is entitled to serve a notice under clause 10. Thereupon, within 21 days, the matter is again referred to Kevin McCabe and Mr Phipps (or their successors) for each to "use all reasonable endeavours in good faith to resolve the dispute". If the deadlock has not been broken, both parties are entitled to serve a purchase notice within 10 business days offering to buy all the other party's shares in Blades at a specified price ("a Roulette Notice"). The offer is deemed to comprise an offer to buy all the offeree's shares at that price and an alternative offer to sell to the offeree all the offeror's shares at that price. The offeree has 30 days in which to serve a counternotice accepting the alternative offer, failing which it is deemed to have accepted the offer to buy its shares.

156. Clause 11 of the ISA contains similar provisions conferring on each shareholder the right to exercise a call option to purchase all of the other shareholder's shares. There are specified option periods during which the option can be exercised. A call option notice served within the defined option periods operates in exactly the same way as a Roulette notice served under the clause 10 deadlock provisions.

157. The following provisions are directly material in this case:

> "11.1 Each Shareholder grants to the other Shareholder a right to exercise a call option to purchase all of its Shares (Option Shares) in accordance with this clause 11 (Call Option).
>
> 11.2 The Call Option may only be exercised:
>
> 11.2.1 within the period 1 June to 31 July in each year from 1 June 2017 to 31 July 2021 (inclusive) (Option Periods) or
>
> 11.2.2 at any time (i) after the end of Season 2015/2016 if Sheffield United Football Club does not achieve promotion to the English Premier League by the end of Season; or (ii) if Sheffield United Football Club is relegated from any League at any time after Completion
>
> 11.3 …..
>
> 11.4 The Call Option shall be exercised by one Shareholder (Shareholder Exercising Option) giving the other Shareholder (Other Shareholder) written notice (Option Notice) in accordance with clause 22 which shall include:
>
> 11.4.1 the date on which the Option Notice is given;
>
> 11.4.2 a statement to the effect that it is exercising the Call Option;

11.4.3 the number of Option Shares in respect of which the Call Option is being exercised, such number being all of the Shares of the other Shareholder;

11.4.4 an:

(a) offer by the Shareholder Exercising Option to purchase all (but not some only) of the Other Shareholder's shares at the price per share specified (Option Price);

(b) an alternative offer by the Shareholder Exercising Option to sell to the Other Shareholder all (but not some only) of the Shareholder Exercising Option's shares at the Option Price;

11.4.5 a date on which option completion is to take place, which shall be no less than 20 Business Days and no more than 30 Business Days following the date of the Option Notice;

11.4.6 a signature by the Shareholder exercising the Call Option.

11.5 Once given, an Option Notice may not be revoked without the prior written consent of the Other Shareholder.

11.6 Within 30 days of service of the Call Option Notice, the Other Shareholder may by counter-notice (the 'Call Option Counter Notice') to the Shareholder Exercising Option require the Shareholder Exercising Option to sell all (but not some only) of its shares to the Other Shareholder at the Option Price.

11.7 Service of the Counter Notice shall constitute an acceptance of the offer referred to in clause 11.4.4(b) and a rejection of the offer referred to in clause 11.4.4(a) and the Shareholder Exercising Option shall be bound to sell, and the Other Shareholder shall be bound to purchase, the Shareholder Exercising Option's Shares subject only to the receipt of the Option Price by the Shareholder Exercising Option.

11.8 If no counter-notice is served by the Other Shareholder under clause 11.6 then the Shareholder Exercising Option shall be bound to purchase, and the Other Shareholder shall be bound to sell, the Other Shareholder's shares subject only to receipt of the Option Price by the Other Shareholder.

11.9 Completion of the sale and purchase contemplated by this clause 11 shall be at the date, time and place specified in the Call Option Notice, or, if a Call Option Counter Notice is

> served, at the date, time and place specified in the Call Option Counter Notice…
>
> 11.10 No Call Option Notice or Call Option Counter Notice may be withdrawn except with the written consent of the Shareholder to which it was given and save as aforesaid shall constitute a binding obligation on the Shareholders to sell and purchase the relevant Shares in the manner contemplated by this clause 11.
>
> 11.11 Any shares sold pursuant to this clause 11 shall be transferred free from any claims, equities, liens and encumbrances whatsoever and with all rights attached to the relevant shares as at the date of service of the Call Option Notice, but without the benefit of any other warranties or representations whatsoever. ”

158. Clause 12.2 of the ISA provides:

> “each of [SUL] and [UTB] undertakes to the other that they or it will (so far as it is lawfully able) exercise the powers vested in it from time to time as shareholder (as the case may be) of the Company to ensure that the Company complies (insofar as they are able by the exercise of such powers) with the Articles, this Agreement and all other agreements referred to in this Agreement.”

159. The ISA contains numerous other detailed provisions and extends to 94 typed pages in all (excluding the execution pages). The ISA balances the rights of the two shareholders and confers particular rights on UTB alone. It establishes a 50/50 deadlock on the board with no casting vote, so that the SUL and UTB appointed directors (or some of them) will have to reach agreement in order to pass resolutions of Blades. In the event that agreement cannot be reached, there is informal and then formal mediation, and if that is unsuccessful a final requirement for a resolution to be sought in good faith. If no resolution is achieved, either party can make an offer to acquire the other’s interest and the offeree has the choice whether to sell or buy at the specified price.

160. At that stage, all attempts to resolve an important disagreement having failed, each shareholder must necessarily be entitled to have regard to its own interests in deciding whether to serve a Roulette Notice and if so what price to specify. That is particularly so since the Roulette Notice can be accepted by the offeree (in its own interest) either as an offer to buy or as an offer to sell.

161. Clause 11 confers a similar right on both parties, but is not dependent on inability to agree how the affairs of Blades are to be conducted. Thus, unless the Club has achieved the desired promotion to the top level within 3 seasons, and even if it is progressing well and the relationship between the shareholders is good, each has the right to force separation by making an offer to buy out the other, but at risk that it may itself be bought out. In making the decision whether to serve a call option notice, a

shareholder must therefore necessarily be acting in its own interests and not in furtherance of any cooperative endeavour.

(ii) Quasi-partnership

162. A quasi-partnership is a company where the basis on which the shareholders are associating gives rise to equitable obligations as between them, which are capable of overriding or qualifying the strict terms of the company's constitution, so as to prevent one of them from taking unfair advantage of his strict rights. The paradigm (but not the only) case of quasi-partnership is where it is understood that each of the shareholders will be personally involved in managing the company's affairs with the other(s) and remunerated as such, rather than by dividends. Because of the nature of the association based on mutual cooperation and trust, the minority shareholder will not have the ability to sell his shares in the market and achieve a fair price for his interest. In those circumstances, if one of the shareholders has a majority holding and could vote to remove the other as a director and employee of the company, equity intervenes to prevent the majority shareholder from doing what the articles of the company allow him to do, where that would in all the circumstances be unconscionable.

163. The origin of the use of the expression "quasi-partnership" in relation to a particular type of limited company is Ebrahimi v Westbourne Galleries Ltd [1973] A.C. 360. The only shareholders of the company in that case were two former partners of the business and the son of one of them. After a disagreement, one partner was removed as a director, using the majority voting rights of the other two shareholders in accordance with the company's articles of association. The profits of the company had only ever been distributed by way of directors' remuneration. The judge held that the respondents had done the appellant a wrong in equity, notwithstanding the rights conferred by the articles. It was a breach of good faith to exclude the appellant from participation in a business upon which they had embarked on the basis that all the shareholders should participate in its management and be remunerated as such. It was therefore just and equitable to wind up the company.

164. The Court of Appeal allowed an appeal, holding that it had not been shown that the shareholders' voting rights had been exercised in bad faith. On appeal, Lord Wilberforce held that the statutory jurisdiction to wind up a company where it was just and equitable to do so acknowledged that there was room in company law for recognition of the fact that, behind the corporate status and personality of the company, there were "individuals with rights, obligations and expectations among themselves, which were not necessarily submerged in the corporate structure". While in most cases the corporate constitution adequately defined the rights of the members, the just and equitable criterion allowed courts to subject the exercise of legal rights to considerations of a personal character, arising between one individual and another, which might make it unjust or inequitable to insist on legal rights or to exercise them in a particular way.

165. His Lordship then identified the extra considerations, above purely commercial ones, that could indicate that equitable rights or considerations could be superimposed:

> "… typically [they] may include one, or probably more, of the following elements: (i) an association formed or continued on

> the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.
>
> It is these, and analogous, factors which may bring into play the just and equitable clause… "

166. Lord Wilberforce then observed that, in very many cases, exercise of statutory rights or rights conferred by a company's articles would be unexceptionable and part of the risk that a director or shareholder of a company accepts, and continued:

> "the just and equitable provision nevertheless comes to his assistance if he can point to, and prove, *some special underlying obligation of his fellow member(s) in good faith, or confidence, that so long as the business continues he shall be entitled to management participation, an obligation so basic that, if broken, the conclusion must be that the association must be dissolved*" (emphasis added)

167. In O'Neill v Phillips [1999] 1 WLR 1092, a case brought under the predecessor of section 994 of the Companies Act 2006, Lord Hoffmann said that he agreed with Jonathan Parker J. when he said, in In Re Astec (B.S.R.) plc [1998] 2 BCLC 556, 588:

> " … in order to give rise to an equitable constraint based on 'legitimate expectation' what is required is a personal relationship or personal dealings of some kind between the parties seeking to exercise the legal right and the party seeking to restrain such exercise, such as will affect the conscience of the former."

Lord Hoffmann added:

> "… I think that one useful cross-check in a case like this is to ask whether the exercise of the power in question would be contrary to what the parties, by words or conduct, have actually agreed. Would it conflict with the promises which they appear to have exchanged? In *Blisset v Daniel* the limits were found in the 'general meaning' of the partnership articles themselves. In a quasi-partnership company, they will usually be found in the understandings between the members at the time they entered into association. But there may be later promises, by words or conduct, which it would be unfair to allow a member to ignore. Nor is it necessary that such promises should be independently enforceable as a matter of contract. A promise may be binding as a matter of justice and equity although for one reason or

> another (for example, because in favour of a third party) it would not be enforceable in law."

168. In the instant case, SUL does not rely on the existence of a quasi-partnership to seek to restrain UTB from exercising rights given to it by the articles or by the ISA. Rather, SUL seeks to establish an additional obligation binding UTB by reason of the existence of a quasi-partnership, namely an obligation to act towards SUL in good faith. However, SUL may in substance be seeking to use equitable rights as a shield rather than as a sword, because it contends that UTB is not entitled to rely on or enforce the contract of sale and purchase arising from the Call Option Notice and Counternotice, or to rely on the intended transfer of shares to UTB 2018 (in accordance with the articles and the ISA) as a means of defeating SUL's contractual rights under the ISA. In both cases, it contends that UTB has only been able to assert contractual rights under the ISA by reason of breaches of obligations of good faith and that therefore it is unconscionable for it to do so. If the obligation, the breach and a causative link were established, equity would be acting in a conventional way in refusing to grant specific performance, either at all or unless UTB performed its obligations.

169. SUL contends that Blades was or became a quasi-partnership for the following reasons:

i) The parties accepted in evidence that their objectives were in the nature of a joint venture;

ii) They accepted that the contractual relationship could only work if they got on, cooperated and had a common vision for Blades and SUFC;

iii) The parties treated and referred to each other as partners;

iv) There was a recognition that the parties' rights and responsibilities were not exhaustively defined by the ISA (e.g. in relation to Prince Abdullah's wish to appoint Deloitte to appraise SUFC, he said "I didn't think about the [terms of the ISA] I thought that it's a matter between two partners").

170. It is not clear to me what rights and obligations equity should recognise on account of this, beyond a mutual obligation of fair dealing and good faith, but that obligation is sufficient for SUL's purposes. Indeed, the whole quasi-partnership argument advanced by SUL seems to be advanced solely for that purpose. However, to the extent that SUL contends that from 30 August 2013 the relationship of UTB and SUL was governed or affected by such equitable rights and obligations, the contention runs directly into the entire agreement clause of the ISA.

171. By that clause, Blades, SUFC, SUL and UTB and their guarantors agreed that there was no understanding between them beyond the completion documents in relation to the subject-matter of the ISA and that the ISA superseded all previous discussions and understandings in that regard. Mr Downes QC sought to characterise clause 26 as "boilerplate" in nature, but that epithet does not mean that, in a carefully drafted, detailed contract between sophisticated and professionally-advised parties, a term of this type can simply be ignored or given little weight. While such terms do not preclude the implication into the contract of unexpressed terms, or deprive any

binding collateral contracts of legal effect (or indeed prevent rectification of mistaken omissions or words), such terms do (and are intended to) prevent parties from seeking to rely on a different or additional understanding that may have been identified - or even provisionally agreed - in pre-contract negotiations but which has not been included as a term of the contract.

172. Entire agreement clauses have (subject to the above-mentioned limitations) been assumed to be effective. Their effectiveness has recently been affirmed by Lord Sumption, giving the leading judgment in the Supreme Court in the case of Rock Advertising Ltd v MWB Business Exchange Centres Ltd [2018] UKSC 24; [2019] A.C. 119, a judgment with which Lady Hale, Lord Wilson and Lord Lloyd-Jones agreed. The case was concerned with the validity and effectiveness of a "no oral modification" clause in a contract, but in reviewing that issue Lord Sumption considered the effect of comparable provisions such as "no reliance" and "entire agreement" clauses. At para [14] he said:

> "Entire agreement clauses generally provide that they 'set out the entire agreement between the parties and supersede all proposals and prior agreements, arrangements and understandings between the parties.' An abbreviated form of the clause is contained in the first two sentences of clause 7.6 of the agreement in issue in this case. Such clauses are commonly coupled (as they are here) with No Oral Modification clauses addressing the position after the contract is made. Both are intended to achieve contractual certainty about the terms agreed, in the case of entire agreement clauses by nullifying prior collateral agreements relating to the same subject-matter. As Lightman J put it in *Inntrepreneur Pub Co (GL) v East Crown Ltd* [2000] 2 Lloyd's Rep 611, para 7:
>
> > 'The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need which may arise in its absence to conduct such a search. For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly any promises or assurances made in the course of the negotiations (which in the absence of such a clause might have effect as a collateral warranty) shall have no contractual force, save insofar as they are reflected and given effect in that document. The operation of the clause is not to render evidence of the collateral warranty inadmissible in evidence as is suggested in *Chitty on Contract* 28th ed Vol 1 para 12-102: it is to denude what

> would otherwise constitute a collateral warranty of legal effect.'

But what if the parties make a collateral agreement anyway, and it would otherwise have bound them? In *Brikom Investments Ltd v Carr* [1979] QB 467, 480, Lord Denning MR brushed aside an entire agreement clause, observing that 'the cases are legion in which such a clause is of no effect in the face of an express promise or representation on which the other side has relied.' In fact there were at that time no cases in which the courts had declined to give effect to such clauses, and the one case which Lord Denning cited (*J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 1 WLR 1078) was really a case of estoppel and concerned a different sort of clause altogether. In *Ryanair Ltd v SR Technics Ireland Ltd* [2007] EWHC 3089 (QB), at paras 137-143, Gray J treated Lord Denning's dictum as a general statement of the law. But in my view it cannot be supported save possibly in relation to estoppel. The true position is that if the collateral agreement is capable of operating as an independent agreement, and is supported by its own consideration, then most standard forms of entire agreement clause will not prevent its enforcement: see *Business Environment Bow Lane Ltd v Deanwater Estates Ltd* [2007] L&TR 26 (CA), at para 43, and *North Eastern Properties Ltd v Coleman* [2010] 1 WLR 2715 at paras 57 (Briggs J), 82 to 83 (Longmore LJ). But if the clause is relied upon as modifying what would otherwise be the effect of the agreement which contains it, the courts will apply it according to its terms and decline to give effect to the collateral agreement. As Longmore LJ observed in the *North Eastern Properties Ltd* case, at para 82:

> 'if the parties agree that the written contract is to be the entire contract, it is no business of the courts to tell them that they do not mean what they have said.'

Thus in *McGrath v Shah* (1989) 57 P&CR 452, 459, John Chadwick QC (sitting as a Deputy Judge of the Chancery Division) applied an entire agreement clause in a contract for the sale of land, where the clause served the important function of ensuring that the contract was not avoided under section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 on the ground that the terms were not all contained in one document. Outside the domain, in some ways rather special, of contracts for the sale of land, in *Deepak Fertilisers and Petrochemical Corpn v ICI Chemicals & Polymers Ltd* [1998] 2 Lloyd's Rep 139, 168 (Rix J) and (1999) 1 Lloyd's Rep 387, para 34 (CA), both Rix J and the Court of Appeal treated the question as one of construction and gave effect to the clause according to its terms. Lightman J did the same in the *Inntrepreneur* case. Since then, entire agreement clauses have been routinely applied… "

Lord Briggs, agreeing with the disposal of the appeal proposed by Lord Sumption but for different reasons, did not accept that entire agreement clauses were a useful analogy to "no oral modification" clauses because they did not attempt to bind the future conduct of the contracting parties in the same way.

173. In my judgment, it is therefore no answer to contend that clause 26 is a "boilerplate" clause. It negatives any other understanding between the parties relating to the affairs of Blades and the rights and obligations of its shareholders between themselves. There is no suggestion that a binding collateral agreement was made incorporating the obligation for which SUL contends, or that by mistake the ISA omitted it. Mr Downes QC contended that the equitable jurisdiction of the court could never be excluded and so such clauses could not have effect to prevent the assertion of equitable rights outside the terms of the contract. However, equity in such a case – though not excluded – will "follow the law" by recognising and not contradicting the legal effect of the express term that the parties have agreed. In any event, it does not seem to me that equitable rights are being asserted, but rather SUL is seeking to establish the existence of a contractual obligation of fair dealing and good faith.

174. It cannot therefore be contended that, from its inception, Blades was a quasi-partnership and that on that account SUL and UTB owed each other obligations to act fairly and in good faith.

175. Even in the absence of the entire agreement clause, I would not have held that Blades was a quasi-partnership as at 30 August 2013. Although the indicia of a quasi-partnership are not rigidly defined or exhaustively identified by Lord Wilberforce in the Ebrahimi case, the essence of a quasi-partnership is, as the name suggests, that the corporators or shareholders of a company intend to conduct their business affairs not as directors and shareholders whose rights are defined by the corporate constitution but *on the basis of* mutual confidence and mutual duties of fidelity, trust and openness and their joint management of the company's affairs. A limited company is not to be treated as a quasi-partnership merely because the shareholders and directors do in fact have or need to have confidence in each other and work together openly and in cooperation to manage the company affairs. The question is rather *on what basis* the parties understand the company's affairs to be run.

176. In this case, the affairs of Blades are governed by its articles of association and the very detailed terms of the ISA, which regulate to what extent each of the shareholders has rights and obligations and what controls exist on the way in which the business of Blades and its subsidiaries is run. This is certainly not the case of a convenient corporate wrapper being placed over a relationship that is in substance a partnership or an undefined joint venture. The particular rights and obligations of each of the shareholders are identified with care and in detail in the ISA. Each of the shareholders is a corporation, which will appoint directors of Blades and SUFC to act on its behalf. Blades itself is only a holding company, but its principal subsidiary, SUFC, was at the time carrying on a sophisticated business with the benefit of professional management and executives in place. Although loss-making, SUFC was a substantial and complex business enterprise. The business was to be managed by the managers subject to the control of the directors of the company (which might or might not include Prince Abdullah and Kevin McCabe as the principal owners of UTB and SUL respectively) and a Technical Football Committee that would report to

the board. The business was not to be managed by Prince Abdullah and Kevin McCabe.

177. There was a joint venture in the sense that both shareholders agreed and shared the objective of achieving promotion to the Premier League and reuniting the Club with the property assets over a 3-5 year period. It is true that the principals of the shareholders must have understood and recognised that those objectives were likely more readily to be achieved if there was harmony between the principals and their appointed directors and agreement on the strategy for the Club, and were correspondingly likely to be undermined if there was no cooperation between them. But those factors do not mean that the business of Blades was to be carried on on the basis of trust, confidence and cooperation between the two shareholders rather than on the basis of the terms agreed in the ISA and the supervision of the management of the Club by the board of directors. As at 30 August 2013, Prince Abdullah and Kevin McCabe – the principals of the two shareholders – hardly knew each other and had no established business dealings. For that reason, their professional advisors drafted detailed agreements about the basis on which the affairs of Blades and its subsidiary SUFC would be run.

178. It is also pertinent to observe that the ISA was not simply an agreement about how jointly to achieve the overriding objectives. The ISA catered for a number of different eventualities: the relegation of the Club; its promotion; and the failure to achieve Premier League status within 3 seasons. It conferred rights for one or other of the parties (though it was expected to be UTB) to take over Blades at any time before promotion to the Premier League by investing more capital, and rights to offer to buy out the other shareholder, at risk of being bought out on equivalent terms. This was not simply an elaborate mechanism for terminating the joint venture: clause 10 is such a mechanism, where deadlock exists, but clause 11 confers freestanding rights for one or other of the shareholders to exclude the other and continue alone if the overriding objective has not been achieved, and in any event at specified times between years 4 and 8 regardless of the success or otherwise of the venture.

179. The ISA is therefore not merely a joint venture agreement under which the parties are to work together on the basis of trust and cooperation to achieve the specified objectives. The fact that the board and equity is set up as a 50/50 deadlock and that the parties therefore called and regarded each other as "partners" does not mean that they were partners. Smooth running of SUFC at board level (but not at management level) would require agreement of the principals or at least some of the directors, but the ISA catered for what would happen in case of dispute and deadlock. It imposed, at a late stage of the dispute resolution process, an obligation of good faith, and it provided machinery for terminating the joint venture if deadlock remained. I therefore reject the argument that the 50/50 deadlock arrangement drives a conclusion that Blades was a quasi-partnership or that the shareholders owed each other obligations of good faith.

180. In Re Coroin Ltd (No.2) [2013] 2 BCLC 583, David Richards J rejected an argument of legitimate expectation of participation in management derived from understandings outside the articles and shareholders agreement in that case and held that equitable considerations had no part to play. He said at [635]-[636]:

> "Equitable considerations, affecting the manner in which legal rights can be exercised, will arise only in those cases where there exist considerations of a personal character between the shareholders which makes it unjust or inequitable to insist on legal rights or to exercise them in a particular way. Typically that will be in the case of a company formed by a small number of individuals on the basis of participation by all or some of them in the management of the company.
>
> In my judgment, there is no room for equitable considerations of this kind in the present case. The company was formed by a group of highly sophisticated and experienced business people and investors with a view to the purchase of a well-known group of hotels for a price running into many hundreds of millions of pounds, and to retaining and managing some of those hotels. There was little prior relationship between many of the investors and some were unknown to each other until a few days before the company was formed. More importantly, Articles of Association and a shareholders' agreement were negotiated and drafted, containing lengthy and complex provisions governing their relations with each other with the company. I find it hard to imagine a case where it would be more inappropriate to overlay on those arrangements equitable considerations of the sort discussed by Lord Wilberforce and Lord Hoffmann."

181. The same reasoning applies in the instant case. Blades and SUFC were not to be managed on the basis of a personal relationship of cooperation and trust between Prince Abdullah and Kevin McCabe. SUFC was to be managed by professional executives and management staff subject to strategic control by directors appointed by SUL and UTB in accordance with the matters agreed in the ISA. If the directors were unable to agree on a matter of importance, the dispute resolution provisions of the ISA required Kevin McCabe and Mr Phipps (not Prince Abdullah) to attempt to resolve the disagreement. Although it would have been anticipated at the date of the ISA that Prince Abdullah would be one of the UTB appointed directors and that Kevin McCabe or one or more of his sons would be SUL appointed directors, it cannot have been envisaged that Prince Abdullah would personally be present or deeply involved in managing Blades or SUFC. There was in my judgment no relationship of a personal character between Prince Abdullah and Kevin McCabe on the basis on which the affairs of Blades and SUFC were to be managed.

182. SUL's alternative case on quasi-partnership is that Blades became a quasi-partnership on the basis of an understanding that arose between Prince Abdullah on behalf of UTB and Kevin McCabe on behalf of SUL after the date of the ISA. In light of Lord Wilberforce's reference to "an association formed *or continued* on the basis of a personal relationship" and Lord Hoffmann's dicta quoted above, it is now accepted that equitable rights and obligations can arise subsequently to the incorporation that may change the character of the company to that of a quasi-partnership. The matters relied on by SUL are the following:

i) A shared emotional enthusiasm and bond that Kevin McCabe and Prince Abdullah developed for the Club;

ii) A subsequent agreement to fund the Club equally after the initial two seasons of UTB's £10 million funding had ended;

iii) A shared understanding that Kevin McCabe would be the "strong partner" having a regular "hands on" presence at the Club, looking after its best interests, while Prince Abdullah was absent on government duty in Saudi Arabia;

iv) The fact that the two principals referred to and regarded each other as "partners" in such a way as to convey an assurance of an obligation to act in good faith.

v) This was reflected in Mr Giansiracusa's acceptance at the 26 October 2017 board meeting that, on promotion to the Premier League, the rent for the Stadium and Academy would be reviewed in good faith.

183. SUL is not precise about when the change from a company to be run on the basis of its articles and the ISA to a company to be run on the basis of a personal relationship between the principals of the corporate shareholders arose. SUL faces a similar difficulty to the one that it faced in establishing an agreement or understanding at the time that the ISA was made. Clause 28.4 of the ISA provides that: "Any variation of this Agreement is valid only if it is in writing and signed by all the parties hereto". As confirmed by the decision in the Rock Advertising case, that means that any oral agreement or understanding to different effect from the terms of the ISA and articles would be ineffective to vary them. Without prejudice to that answer to SUL's case, I will also address its factual basis.

184. SUL places reliance on the terms of Prince Abdullah's letter to Kevin McCabe dated 29 June 2014, after he had been appointed minister of state in Saudi Arabia, in which he refers to "our beloved Sheffield United Football Club". The language used is, certainly, redolent of a family relationship, and Prince Abdullah emphasises his commitment to and affection for the Club and the values that they "hold dear as Blades" and his desire to achieve the goals that he and Kevin McCabe had set. There was a shared emotional enthusiasm for the Club and to that extent a bond between them, in June 2014. However, in the same letter, Prince Abdullah explains how he will fill the spaces on the boards of Blades and SUFC, so there is no suggestion that the affairs of Blades are to be conducted on the basis of a personal relationship between him or Mr Phipps and Kevin McCabe.

185. Since 30 August 2013, Prince Abdullah had attended only one match at Bramall Lane, and there had been only one board meeting, on 18 December 2013, which Prince Abdullah attended by Skype. He had had few meetings with Kevin McCabe and otherwise the two of them communicated by email. They had agreed on the sacking of Mr Weir as manager and the appointment of Mr Clough and Mr Brannigan, though all of these were instigated by Kevin McCabe. Prince Abdullah said in evidence that, in the first year, he was conscious that he knew little about running an English football club in League One and was happy to be guided by Kevin McCabe's greater knowledge and rely on his presence in Sheffield. It is obvious that Prince Abdullah

had nevertheless been warmly treated by the McCabe family in the initial year, on the few occasions when they did meet, and had developed a real enthusiasm and affection for the Club. By 25 June 2014 there were no financial problems. However, Kevin McCabe was about to tell Mr Phipps that he was not intending to put a penny more into the Club. Mr Tutton told Mr Brannigan (the CEO) so on 15 August 2014 ("there is no more available from Scarborough or Kevin … enough is enough. The club must stand on its own two feet"), and Scott McCabe told Mr Phipps the same by email dated 17 August 2014.

186. Following that, there was no agreement about further funding from SUL until the July 2015 Funding Agreement. In the meantime, relations between Kevin McCabe and Prince Abdullah had deteriorated, with Prince Abdullah in effect threatening (in a letter written by Mr Phipps dated 28 May 2015) that if SUL did not honour its obligation to invest 50/50, Prince Abdullah would pull out, leading to the collapse of SUFC. Although this caused Kevin McCabe to soften his approach, Mr Phipps accused Kevin McCabe on 25 June 2015 of violating the spirit of the original deal, and Kevin McCabe finally climbed down on 1 July 2015 and agreed, formally, to inject £3 million by no later than 15 October 2015 and a further £1 million by no later than 1 May 2016. But this was an ad hoc resolution and neither established any agreement beyond the 2015/16 season nor acknowledged a 50/50 obligation as having existed in the spirit of the original agreement. I reject the argument that, by making this agreement (which Kevin McCabe then flouted) the parties reached an understanding that they would fund the deficit in equal shares going forwards.

187. It matters not for present purposes who was right about the spirit of the original deal, but what is significant is that there were substantial differences between Prince Abdullah and Kevin McCabe about fundamental matters relating to their venture. On Kevin McCabe's part the July 2015 Funding Agreement was reluctantly made: he believed that it had been understood that Prince Abdullah was going to take over responsibility for funding the Club, but he knew that it was impossible for him to stand by and allow the Club to collapse through lack of money. Both before and after the July 2015 Funding Agreement, the parties were looking for a new investor to buy out SUL's interest, or at least buy a substantial stake in Blades. When this did not materialise, the differences between Prince Abdullah and Kevin McCabe grew. These events are inconsistent with a new understanding and agreement that Kevin McCabe and Prince Abdullah were effectively partners going forwards.

188. It is clear (and I find) that the realisation that SUL was going to have to share the funding of the deficit for 2015/16 changed Kevin McCabe's attitude to the management of the Club. He persuaded Prince Abdullah to believe that the lack of success was attributable to Mr Clough, Mr Brannigan and Mr Phipps having too much involvement or influence in the management of SUFC's affairs, and that what was needed was more control by him. Although Kevin McCabe was of that opinion earlier, he was not so bothered while it was someone else's money that was being wasted, as long as the Club itself was not under threat. He was determined in any event that if he was going to be funding the Club's losses, when he had hoped no longer to need to do so, he was going to supervise the management and in particular expenditure and income from off the field activities. This is reflected in his email to Prince Abdullah dated 7 July 2015, in which he says "…as part of the new arrangements between us, as promised I am involving myself much more than in the

past two years in the various activities that ensure from Bramall Lane, Shirecliffe and Crookes". It is clear from the rest of that email that Kevin McCabe had a particular problem with the fact that the property assets leased by SUFC were not being made to "sweat", i.e. to produce income, and Kevin McCabe had it in mind to change that, but his mind was also on the amount of football expenditure.

189. The reality was, of course, that Prince Abdullah was a continent away, engaged on heavy governmental business and with little time to consider SUFC's affairs, whereas Kevin McCabe was present in Yorkshire for much of the time. It was therefore inevitable that he would have a much greater presence at the Club and would be more able to watch over what management were doing and more influential in conveying the wishes of the owners. Prince Abdullah recognised that, though he still used Mr Phipps to maintain some presence and involvement. In the autumn, Kevin McCabe set about persuading Prince Abdullah to remove Mr Phipps, with whom by then he felt unable to work, and whom he blamed for some of the financial misfortunes that had occurred during the initial two-year period.

190. However, none of this amounted to a new basis on which the affairs of Blades and SUFC were to be managed, turning Blades into a quasi-partnership. On the contrary, trust and confidence were being slowly eroded by this point, and were about to suffer a further substantial blow when, on 15 October 2015, SUL did not pay the agreed £3 million because Kevin McCabe decided that it would be better discipline for the Club's management to have the funds drip fed (by him) as and when they were needed, to avoid imprudent expenditure. Prince Abdullah was greatly offended by that conduct, being a deliberate and clear breach of what had been agreed, at a time when he was personally "cutting into flesh" to make his agreed contribution. Despite the rebuke of Prince Abdullah and his insistence that the money be paid, SUL did not make payment of its agreed £3 million in full until 15 February 2016 (the first tranche was paid on 23 November 2015).

191. By 29 October 2015, Prince Abdullah had decided that he would not renew Mr Phipps' contract when it expired in December that year. The intimation that he felt that he needed a lawyer to help him in his relations with Kevin McCabe and the Club reflected distrust and uncertainty rather than a new relationship based on trust and confidence. By early 2016, faced with Kevin McCabe exerting greater control over the affairs of SUFC, Prince Abdullah decided that he needed help and instructed Messrs Howard and Hawasli to go to Sheffield and appraise what they saw. The Howard Report was damning about the degree to which Kevin McCabe had effectively taken control and side-stepped proper corporate governance.

192. I do not accept that there was a shared understanding that Kevin McCabe would be the strong partner and that Prince Abdullah, by implication, would be a weak one. Prince Abdullah and Kevin McCabe shared an unhappiness with the way that the £10 million invested by UTB had been spent and the lack of success on the pitch. That had happened under the watch of Mr Phipps, so Prince Abdullah's position was weakened in terms of real influence over day-to-day affairs at the Club. It is also evident that his other appointed directors were not effective in securing proper corporate governance. Kevin McCabe seized the initiative at the time when he was again required to pay towards the deficit of the Club. He told Prince Abdullah that he would become more involved. Up to a point Prince Abdullah was pleased that someone with an eye for financial rigour would be exerting some control. That

limited understanding and coincidence of financial interests does not make Blades a quasi-partnership at that time, and in any event the limited understanding did not last once Prince Abdullah had received the Howard Report.

193. The fact that the parties regarded each other as "partners" reflects the fact that there was a corporate joint venture on which they were both engaged, working to achieve the overriding objectives, but that does not mean that a quasi-partnership existed. Both Kevin McCabe and Prince Abdullah recognised that they had a duty to act in the best interests of both of them, and in good faith in that respect, but that was inherent in the responsibilities of all the directors of Blades and SUFC, each of whom owed the companies a duty in good faith to act in the best interests of their company. It is telling that, in seeking to find an example of an acknowledged obligation of good faith, SUL relies on what was said by Mr Giansiracusa in October 2017, in relation to rent reviews, at a time when the relationship between the shareholders was in rapid decline. By that time, each of them was, to a significant degree, seeking to influence the Club's affairs in their own interests. Within 3 weeks of that occasion, the relationship had irretrievably broken down. Moreover, although an agreement to review the rent in good faith on promotion to the Premier League is relied upon, at that time the rent review would be inconsequential as the property call options would then be likely to be exercised, leading to an end to the rental liabilities. Further, from 2014 until 2017 UTB had consistently declined to agree a rent review, which was in the best interests of SUFC but was adverse to the interests of SUL and Scarborough Group as landlords.

194. In short, SUL's case on the creation of a quasi-partnership amounts to extracting from the totality of dealings between SUL and UTB after the date of the ISA those particular instances that might lend support to its case that SUL and UTB agreed to run Blades and SUFC on the basis of mutual trust and confidence rather than in accordance with the articles and the ISA. In my judgment, those particular instances do not amount to a change in the agreed basis on which Blades and SUFC were run. The total picture is different. As a result of Prince Abdullah's ministerial appointment, and through inadequate representation on the boards of the companies, UTB allowed the proper corporate governance of the companies to slide to an extent that Kevin McCabe, by himself and through his chosen appointees to executive positions, was able to take virtual control of what was happening. This was not governance on the basis of cooperation and mutual trust and confidence, nor was it by agreement with Prince Abdullah, but rather as a result of his lack of sufficient care and attention. The position was slowly remedied between 2016 and 2017. In fact, throughout the period from August 2014 to October 2017, the relationship between SUL and UTB was gradually declining and trust and confidence were evaporating, such that by 2017 a battle for control of Blades and SUFC had developed. I reject SUL's claim that, at some time after the ISA was made, the affairs of those companies were conducted on the basis of a quasi-partnership.

(iii) Implied term of good faith

195. The alternative way in which SUL seeks to establish obligations of fair dealing and good faith that bound UTB in late 2017 is to contend that the ISA was a "relational" contract, into which – as a matter of law – there are implied such obligations.

196. The law on this subject has evolved rapidly since the (as it now appears) landmark decision of Leggatt J in Yam Seng Pte Ltd v International Trade Corp Ltd [2013] EWHC 111 (QB). However, the law has not yet reached a stage of settled clarity, nor is there binding authority, though there is a body of first instance decisions and dicta in the Court of Appeal that establish various principles.

197. The general law of implied terms in contracts has been comprehensively restated by the Supreme Court in Marks and Spencer plc v BNP Paribas Securities Trust Company (Jersey) Ltd [2015] UKSC 72; [2016] Q.C. 742. That decision reaffirms the traditional approach that, however reasonable it may be, a term will not be implied into a contract unless, at the time the contract was made, a reasonable reader of it would consider the term to be so obvious as to go without saying or the term is necessary for business efficacy. As Lord Neuberger of Abbotsbury PSC observed at para [21], although these limbs are theoretically alternatives, in most cases both will be satisfied: a term will be obvious to the reasonable reader because it is necessary to give the contract commercial and practical coherence in accordance with its intended effect. Excluded from that general approach are contracts of a particular type where, as a matter of law, a term is treated as being implied if not expressed, such as an obligation of fidelity in an employment contract or, as in Liverpool City Council v Irwin [1977] A.C. 239, a right to safe access to and egress from a flat let under a contract of tenancy.

198. In Yam Seng, Leggatt J implied an obligation of good faith into the distributorship contract as a matter of fact and not because the contract was a distributorship contract or, more generally, a "relational" contract:

> "Under English law a duty of good faith is implied by law as an incident of certain categories of contract, for example contracts of employment and contracts between partners or others whose relationship is characterised as a fiduciary one. I doubt that English law has reached the stage, however, where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts. Nevertheless, there seems to me to be no difficulty, following the established methodology of English law for the implication of terms in fact, in implying such a duty in any ordinary commercial contract based on the presumed intention of the parties [131]
>
> ….
>
> In some commercial contexts the relevant background expectations may extend further to an expectation that the parties will share information relevant to the performance of the contract such that a deliberate omission to disclose such information may amount to bad faith English law has traditionally drawn a sharp distinction between certain relationships – such as partnership, trusteeship and other fiduciary relationships – on the one hand, in which the parties owe owner's obligations of disclosure to each other, and other contractual relationships in which no duty of disclosure is

> supposed to operate. Arguably at least, that dichotomy is too simplistic. While it seems unlikely that any duty to disclose information in performance of the contract would be implied where the contract involves a simple exchange, many contracts do not fit this model and involve a longer term relationship between the parties in which they make a substantial commitment. Such 'relational' contracts, as they are sometimes called, may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements. Examples of such relational contracts might include some joint venture agreements, franchise agreements and long-term distributorship agreements. [142]"

It is clear therefore that, while certain types of joint venture agreements may require the implication of such a term, in order to give them business efficacy, other types of joint venture agreements may not do so.

199. The dichotomy is illustrated by a later judgment of Leggatt LJ (sitting at first instance), Sheikh Tahnoon bin Saeed bin Shakhboot Al Nehayan v Kent [2018] EWHC 333 (Comm). In that case, an oral joint venture had been agreed relating to the acquisition and operation of hotels, and part of the business was later demerged under a rudimentary framework agreement. The express terms were very limited, and yet the joint venture had been intended as a long-term collaboration requiring the cooperation and commitment of both parties. It was based on a strong personal friendship between them.

200. Leggatt LJ held that implication of an obligation to act in good faith was essential to give effect to the reasonable expectations of the parties, i.e. the term was implied in fact on the conventional approach. The contract was of course a "relational" contract, and Leggatt LJ held that the term would also have been implied as a matter of law, given the nature of the contract. Two paragraphs of the Judge's judgment are particularly apposite:

> "[167] It does not follow from the conclusion that he did not owe any fiduciary duties to Mr Kent that the Sheikh's entitlement to pursue his own self-interest was untrammelled. I have previously suggested in [*Yam Seng*], at para 142, that it is a mistake to draw a simple dichotomy between relationships which give rise to fiduciary duties and other contractual relationships and to treat the latter as all alike. In particular, I drew attention to a category of contract in which the parties are committed to collaborating with each other, typically on a long-term basis, in ways which respect the spirit and objectives of their venture which they have not tried to specify, and which it may be impossible to specify, exhaustively, in a written contract. Such 'relational' contracts involve trust and confidence but of a different kind from that involved in

> fiduciary relationships. The trust is not in the loyal subordination by one party of its own interests to those of another. It is trust that the other party will act with integrity and in a spirit of cooperation. The legitimate expectations which the law should protect in relationships of this kind are embodied in the normative standard of good faith.
>
> [174] In the circumstances the contract made between these parties seems to me to be a classic instance of a relational contract. In my view, the implication of a duty of good faith in the contract is essential to give effect to the parties' reasonable expectations and satisfies the business necessity test which Lord Neuberger in [*Marks and Spencer*] at paras 16 to 31 reiterated as the relevant standard for the implication of a term into a contract. I would also reach the same conclusion by applying the test adumbrated by Lord Wilberforce in *Liverpool City Council v Irwin* [1976] A.C. 239 at 254 for the implication of a term in law, on the basis that the nature of the contract as a relational contract implicitly requires (in the absence of a contrary indication) treating it as involving an obligation of good faith."

In my judgment, it is clear that Leggatt LJ is there explaining that a particular type of contract, which may be called a "relational" contract, is one that will as a matter of law include an obligation of good faith. But the type of contract in issue is not any contract that involves a long-term relationship between the parties; it is a contract that requires the parties to collaborate in future in ways that respect the spirit and objectives of their joint venture *but which they have not specified or have been unable to specify in detail*, and which involves trust and confidence that each party will act with integrity and cooperatively. The contract in that case was exactly as described above and, as explained by Leggatt LJ, in fact necessarily required such a term to be implied if it was to work in accordance with the parties' reasonable expectations.

201. The *ratio* of the decisions in Yam Seng and Sheikh Tahnoon are ones that any first instance judge must follow unless he or she were satisfied that they were wrong. I shall follow them. In other recent cases, there has been a tendency to substitute for the question whether a reasonable reader of the contract would consider a term to be necessary or obvious the question of whether the contract is a "relational" contract: see, e.g., the decision of Fraser J in Bates v Post Office [2019] EWHC 606 (QB). At para 725, Fraser J asked what the characteristics are that are expected to be present that will determine whether a commercial contract ought to be considered a "relational contract". The Judge set out nine relevant factors, of which only the first was determinative, namely that there must be no express term of the contract that prevents a duty of good faith being implied.

202. If by "relational contract" it is clear that one means a relational contract of the kind described by Leggatt LJ in Sheikh Tahnoon and not all relational contracts in a broader sense, then there is no difficulty and the characteristics identified by Fraser J may assist to identify such a contract. But there is a danger in using the term "relational contract" that one is not clear about what exactly is meant by it. There is a great range of different types of contract that involve the parties in long-term

relationships of varying types, with different terms and varying degrees of detail and use of language, and to characterise them all as "relational contracts" may be in one sense accurate and yet in other ways liable to mislead. It is self-evidently not all long-term contracts that involve an enduring but undefined, cooperative relationship between the parties that will, as a matter of law, involve an obligation of good faith. As Beatson LJ said (*obiter*) in Globe Motors, Inc v TRW Lucas Varity Electric Steering Ltd [2016] EWCA Civ 396 at para [68]:

> "… as seen from the *Carewatch Care Services* case, an implication of a duty of good faith will only be possible where the language of the contract, viewed against its context, permits it. It is thus not a reflection of a special rule of interpretation for this category of contract."

203. Rather than seek to identify and weigh likely indicia of a "relational contract" in the narrower sense used by Leggatt LJ, it is, I consider, preferable to ask oneself first – as Leggatt LJ did in the Sheikh Tahnoon case – whether a reasonable reader of the contract would consider that an obligation of good faith was obviously meant or whether the obligation is necessary to the proper working of the contract. The overall character of the contract in issue will of course be highly material in answering that question but so will its particular terms, as recognised by the principle that (as restated in the Marks and Spencer case) no term may be implied into a contract if it would be inconsistent with an express term.

204. That approach is, in my respectful opinion, preferable also because the exact content of any implied obligation of fair dealing, or to act with integrity, or to act in good faith, will be highly sensitive to the particular context of the contract, as observed by Dove J in D&G Cars Ltd v Essex Police Authority [2015] EWHC 226 (QB) at [175]. The greater part of that context is the express terms of the contract. Thus, to imply a general obligation to act at all times in good faith towards the counterparty because the contract is a relational contract may fail to have regard to rights and obligations created by the express terms, to which any implied obligation must be tailored if it is not to be excluded as being inconsistent with them. In the instant case there is a real example of just such a question, to which I return in para 214 below.

205. The question, therefore, is whether a reasonable person reading the ISA at the time that it was made, with knowledge of the circumstances in which it is entered into (though not the negotiations of the parties or their drafts and preparatory documents) and the other agreements made as part of the same transaction, would consider that it was obvious that UTB had to act in good faith in all its dealings with SUL, and vice versa, or whether such an obligation is necessary to give coherent business effect to the ISA.

206. The starting point is that the ISA and the associated contractual documents are extremely detailed and professionally (and skilfully) drafted. This case is therefore at the opposite end of the spectrum from the Sheikh Tahnoon case in that regard. Where detailed, professionally-drawn contracts exist, it is more difficult to imply terms because there is a strong inference that the parties have given careful consideration to all the terms by which they agree to be bound (though the test for implying terms remains the same). That inference is less strong if the subject-matter of the contract is such that, by its nature, it is difficult to set out and agree in advance all the terms that

will govern the relationship. The ISA is, however, not that kind of contract, as demonstrated by the quantity and detail of the express terms.

207. Further, as regards implying a term of good faith, the ISA does in two places specify that the parties owe each other obligations of good faith. The first is in clause 29.2, which provides for severance of any void, illegal or invalid term of the ISA and for the parties then in good faith to negotiate the terms of a lawful substitute term. More significantly, clause 10.3 – in the deadlock provisions – requires the principals of each shareholder to use reasonable endeavours in good faith to resolve the dispute that has not been resolved by them in the first instance and has not been resolved by mediation. There is therefore an argument that where the parties meant to impose an obligation of good faith they did so, that elsewhere they did not intend any such obligation to exist, and that implying a more general good faith obligation would be inconsistent with the structure of clause 10 in particular.

208. A further substantial point is that the ISA does not only operate by pointing in a single collaborative direction. Although the overriding aim is to obtain promotion and reunite the property assets within 3-5 years, and that is expressed as a shared objective, the ISA will not necessarily operate in that way. Both parties (but in practice UTB, since SUL wanted to "hand on the baton") have the right to dilute the other and obtain super-majority control. It does not make sense for the exercise of such rights to be subject to an obligation to act in good faith, not least because super-majority control can only be obtained in that way with the consent of the other shareholder: clause 6.5 of the ISA. After a specified time or in the event of deadlock, either shareholder can (if it so chooses) offer to buy out the other, thereby becoming the owner of all the equity in Blades. But whether that shareholder succeeds in its objective depends entirely on the will of the other shareholder, who – acting in its own interests – can serve a counternotice reversing the proposed sale and purchase. The parties, when they are at the stage of preparing to serve, selecting the time at which to serve and serving a call option notice, Roulette Notice or counternotice, will very likely have adverse interests. An obligation in those circumstances to lay cards on the table, in performance of an obligation of good faith, would be inapt. Indeed, if there is a right in case of deadlock and in any event after a certain time to exit the ISA at will – in performance of the ISA and not upon a material breach of it – it is hard to see why it is necessary for each party to act on the basis of mutual trust and fair dealing; certainly not after a time (whenever it is) that the right to exit becomes available.

209. Another point is that, in entering the ISA, SUL and UTB had different interests, although they both aspired to promotion to the Premier League for financial and other reasons. SUL was expecting to be diluted and left with a minority interest, and upon UTB obtaining 75% of the share capital SUL's principal interest was in SUFC – by then under the control of UTB – buying the property assets from SUL and other Scarborough Group companies. In the meantime, SUL expected UTB to finance the club and wanted there to be rent reviews under the leases of the property assets. UTB's interests were in Blades being financed on a 50/50 basis until it was ready to exercise its right or agree with SUL to take control, and in the meantime for the rent to remain unreviewed. Once the Club had been promoted to the Premier League, UTB could not dilute SUL and could only acquire control under clause 11, by making an offer for SUL's shares. If the offer were too low, SUL could acquire its shares at

the same price. This demonstrates that clause 11 was a substantive part of the operation of the ISA, not simply an exit mechanism.

210. Against that background, can it be said that it would have been obvious on 30 August 2013 to an informed observer that each of UTB and SUL owed the other obligations of fair dealing, open cooperation and good faith for the duration of the ISA? Or that the ISA is devoid of commercial and practical coherence, to use the expression in the judgment of Lord Neuberger in para [21] of the Marks and Spencer case, unless such obligations are implied?

211. SUL contends that the ISA is in such terms that it needs the parties to cooperate in good faith for it to succeed in achieving its primary objective. That is because Blades was deliberately set up as a 50/50 deadlock company. It can be said that, in order for strategic business to be done, the shareholders would need to agree, and in order to agree they need to deal with each other fairly and openly and in good faith. Some (but not all) of the characteristics identified by Fraser J as typical of the sort of contracts where an obligation of good faith is implied are present here: in particular, the contract is (reasonably) long-term, though of variable duration; Blades will function more smoothly if the parties collaborate with each other, which will need a high degree of communication; and there is a significant financial contribution by UTB to the venture.

212. Looking at the principal way in which the ISA may operate to achieve its overriding aim, open collaboration between the representatives of UTB and SUL would be likely more effectively to achieve promotion to the Premier League and reunification of the property assets with the Club. But the directors appointed by UTB and SUL each owe a duty to Blades and SUFC to act in good faith in the best interests of those companies. Moreover, the ISA does not operate only on the basis that UTB and SUL will remain equal owners of Blades until that happens. Had UTB had unlimited funds (as perceived by Kevin McCabe when signing the deal in 2013), it would have sought to dilute SUL at an early stage and then funded the acquisition of the property assets. SUL, which wanted to hand on the baton, would have agreed. That outcome does not depend in any way on performance of obligations of good faith; nor would the exercise by either party of its rights under clause 11, possibly as soon as the end of the first season. If there had been genuine deadlock before then, the same buy-out would have been achieved under clause 10.

213. In these circumstances, I cannot accept that a mutual obligation of good faith is obviously what the parties meant to prescribe, or that such an obligation is necessary to give business efficacy to the ISA. The ISA is a sophisticated and complex mix of unequal rights and obligations for two parties who have, in some respects, conflicting interests, which can work well enough even if the parties are entitled to look after their own interests to a degree that the implied term would prevent. The shareholders are not individuals and Blades and SUFC as companies operate through boards of directors. Each director owes statutory and fiduciary duties to Blades and SUFC. A majority of directors' votes is perfectly possible (it would have been achieved in October 2017 if Mr Bettis's continuation as CEO had been put to a vote, despite Kevin McCabe's opposition), but if there is deadlock the provisions of clause 10 come into play. These include an obligation in good faith to seek to resolve the dispute. If there is genuine deadlock, both parties have the right to seek to acquire the shares of the other. It is impossible in those circumstances to say that the ISA does

not function effectively, in the way that the parties envisaged, unless there is an obligation on both parties to act at all times in good faith.

214. Even if that were wrong, and each shareholder owed the other an obligation of good faith while pursuing collaboratively the primary objective of the ISA, it cannot be right that such an obligation continues when either side has the right under clause 10 of the ISA to serve a Roulette Notice, or is considering how and when to exercise the right under clause 11 of the ISA. Mr Downes QC submitted that it was particularly at that time and in those circumstances that each side had to act openly and fairly towards the other, but in my judgment that is not right, as the parties at that time have conflicting interests.

215. The difficulty is illustrated by asking whether a party who is considering serving a Roulette Notice must tell the other that it is proposing to do so. There is only a limited period of time in which such a notice may be served after a failed attempt to resolve the dispute. Both parties agree that the machinery benefits the party that receives rather than serves the notice, so the effect may be that the offeree, who was about to serve its own Roulette Notice, desists from doing so. As a result the offeror is disadvantaged. Further, it cannot be the case that the offeree is obliged to give advance notice of its decision whether to serve a counternotice. The same considerations apply in the same way under clause 11. Moreover, the time at which a Call Option Notice is served and the price specified are likely to be calculated to benefit the offeror, and it cannot be right that the offeror has to be open about his intentions in advance. Mr Downes's contention that such protection is needed to prevent the offeree shareholder from "encumbering" its shares is in my judgment wrong, for reasons that I will come to under Part D below.

(iv) Other implied terms

216. As stated in para 140 above, SUL also contends that other terms are to be implied into the ISA. For the reason given in para 206 above, it is more difficult to imply terms into a detailed, professionally-drawn contract, but the test is nevertheless whether such terms are obviously what the parties meant or are necessary to give business efficacy to their contract.

217. The first term sought to be implied – if not an express term – is that a shareholder may not transfer part only of its holding in Blades. This raises in the first instance a difficult question of interpretation of the ISA, namely whether a part of SUL's or UTB's holding can be transferred, or whether their holdings can only be transferred as a whole. For the reasons given in paras 229-235 below, I consider that the terms of the ISA compel the conclusion that a part of SUL's or UTB's holding can be transferred, although it does produce rather odd results in terms of the operation of the other terms of the ISA. Since I consider that the terms of the ISA provide for and permit transfer of part only of a shareholder's holding, it is impossible to imply a term to contrary effect.

218. The second term sought to be implied is that a shareholder must not wilfully obstruct or hinder the re-unification of the property assets pursuant to clause 9.1.12 of the ISA. Re-unification was one of the overriding objectives of the ISA. Clause 9.1.12 is a term intended to benefit SUL when UTB acquires control of Blades. It confers no equivalent benefit on UTB if SUL purchases UTB's shares because SUL or the

Scarborough Group already have control of the property assets and, if they control SUFC, can do as they please in terms of selling the assets to SUFC. Under the ISA, UTB would acquire the requisite control in one of two ways: by agreement with SUL, following dilution of SUL's interest by UTB, or following service of a Roulette Notice or call option notice under clauses 10 and 11. In the latter cases, UTB would be acquiring all of the holding of SUL; in the first case, SUL would retain up to 25% of the shares in Blades. In both cases, clause 9.1.12 is clearly intended to come into play so that the Scarborough Group's SUFC-related property assets are bought from it within a year of UTB acquiring super-majority control.

219. It was obviously not intended that UTB should be entitled to acquire SUL's shares or take effective total control of Blades without SUFC being obliged to buy the property assets. If SUFC were not, in those circumstances, obliged to buy the property assets, SUFC would be able to continue to enjoy the benefit of very substantially reduced rents for the property assets for the remainder of the 25-year term of the new leases or until it chooses to exercise the property call options. SUL would have no control of Blades or SUFC, no ability to activate a rent review and no means of compelling SUFC to buy the property assets from it and the other Scarborough Group companies. Although UTB has in fact, upon securing promotion to the Premier League in April 2019, chosen to exercise the property call options, it was not obliged to do so if clause 9.1.12 was not triggered by its purchase of SUL's shares. UTB would then be able to buy out SUL's interest but prevent it from obtaining a fair return on the property assets. In effect, SUL and Scarborough Group companies would be subsidising companies in which they had no interest for up to 25 more years.

220. In my judgment, it would have been obvious to the reasonable person reading the ISA that the parties intended that if UTB acquired SUL's shares under clauses 10 or 11 of the ISA, or if it acquired super-majority control by dilution, it was at that point obliged to cause SUFC to exercise the property call options. Buy-out or dilution of SUL cannot happen without UTB choosing to bring it about, so UTB cannot be forced into having to fund the purchase of the property assets at an inopportune time.

221. UTB contended that it could not be necessary or reasonable to imply a term requiring it to ensure that the property call options were exercised at a time when SUFC could not afford to pay for the property assets, which would have the effect of making Blades and SUFC insolvent. It says that it could only have been intended that the property call options would be exercised if and when Blades could pay the price, which would be likely to be upon promotion to the Premier League. Recital (B) in the ISA contemplates that the two overriding objectives of promotion and re-unification would take place together. Accordingly, submits UTB, it is not implicit that it must not obstruct or hinder exercise of the property call options at a time when SUFC could not afford to buy the property assets.

222. I disagree with UTB's argument. If the question is posed as being whether UTB must trigger the property call options when SUFC cannot afford to perform, the answer to the question appears obvious and in UTB's favour. But what is implicit is that *if* UTB chooses to bring about the circumstances in which clause 9.1.12 will be triggered, it must not wilfully obstruct or hinder its taking effect. UTB has the choice whether to subscribe for sufficient new shares to give it super-majority control and whether to serve a Roulette Notice or call option notice seeking to buy SUL's shares or serve a counternotice to SUL's Roulette or call option notice. If it takes those steps, and will

obtain control as a result, it is obliged to trigger the property call options (unless it and SUL agree otherwise) and then cause SUFC to pay for the property assets within 12 months. If it was not willing or able to do that, it should not have taken the steps that it did to bring clause 9.1.12 into play. There is no third alternative. Moreover, it is not the case that the notices will only be given under clauses 10 or 11 when the Club is a rich Premier League club, and achieving super-majority control by dilution cannot happen at such a time.

223. What happened in this case was that UTB was unwilling to sell its shares to SUL for £5 million and so resolved to serve a counternotice; but it was unwilling to fund the purchase of the property assets within a year and so took steps calculated to prevent that obligation from arising. Whether those steps were in fact effective will be considered in Part D below. But it is in my judgment implicit in the ISA that if UTB (or SUL) chooses to take control of Blades it must comply with clause 9.1.12. It was not entitled to buy out SUL but defer acquisition of the property assets. Evasion of clause 9.1.12 produces uncommercial and unreasonable results and was obviously not what the parties intended. It is clear that SUL was never to be placed in that position. Clause 9.1.12 is of course of benefit to SUL and not UTB, but that is the bargain that the parties struck.

224. I therefore agree with SUL that neither SUL nor UTB must wilfully obstruct or hinder the re-unification of the property assets pursuant to clause 9.1.12 where this would otherwise take effect in connection with the operation of clauses 10 or 11.

225. Turning to the third implied term for which SUL contends, I do not consider that it is necessary to imply a term that a recipient of a call option notice must not allow its shares to be encumbered or act to prevent itself from being able to transfer its shares free from incumbrances on completion. In the first place, a recipient of a call option notice has it within its power to serve a counternotice, the result of which will be that its shares will not be sold. It is difficult to see why any restriction (other than what is expressed in the articles and the ISA, including the express prohibition in clause 16.1) should be placed on what a shareholder may do with its shares in those circumstances. The implied term contended for appears to be a counterpart of the positive obligation in clause 11.11 to transfer any shares sold free from claims, equities, liens and encumbrances, but if so there is no need for any negative prohibition. Unless the recipient of the call option notice serves a counternotice, it is obliged to sell to the offeror, subject only to receiving the price. In those circumstances, the offeree will have equitable duties to preserve and not encumber the shares, so that they can be transferred on completion, and the express terms of clause 11.11 go further than that in imposing an obligation on the seller to remove any equities, liens and encumbrances that already exist. If the seller does not comply with those obligations it will be in breach of contract. If it does something that will prevent it from complying, it is in anticipatory breach of contract. It is superfluous to create another term that the seller will breach before performance of the obligation to transfer is due.

226. The fourth implied term contended for is a term that the recipient of a call option notice must not take any step that would materially diminish the value of the offeror's shares. Mr Downes QC described this, in an appropriate metaphor, as a prohibition on the goalposts being moved once the free kick has been taken. Once again, presented in that metaphorical way, the answer that SUL wants seems to be implied: of course the goal posts should not be moved. But I am unclear why it is that the

recipient of a call option notice is forbidden to diminish the value of the offeror's shares. One can follow the logic of an argument that the value of the shares to be purchased by the offeror must not be diminished, since the offeror has specified in the call option notice the price that it is willing to pay. Instead, the term sought to be implied is one that relates to the value of the offeror's shares. It appears, however, that the purpose of this implied term is to prohibit UTB from reorganising its shareholding to avoid triggering clause 9.1.12 and thereby reduce the value of SUFC, or alternatively of SUL itself.

227. The value of SUL's shares in Blades depends on the assets and liabilities of Blades and its subsidiaries. If SUFC were obliged to exercise property call options when it was unlikely to be able to afford them, one would expect the value of Blades's shares to be reduced on account of the very substantial future liability to SUL that it was unable to meet. A reduction in the value of Blades shares would be avoided, not caused, by avoidance of the clause 9.1.12 obligation. What may be diminished is the value of SUL's own shares, not the shares in Blades that SUL owns, and SUL's real complaint is that it will not be receiving the price for the property assets payable under the property call options.

228. In view of the conclusion that I have reached on the second implied term, above, it is unnecessary to ponder further the appropriateness of this fourth alleged implied term. I am not persuaded that it is obvious, or adds anything to the other alleged implied terms, or that any such term is necessarily implicit in the ISA.

229. The fifth and final implied term that is asserted is that no party to the ISA must deliberately prevent or hinder any other party from fulfilling its obligations under the ISA. It is generally implicit that where performance of a contract between A and B depends on matters to be done by B, A must not seek to prevent B from performing and may be obliged to take any steps that he can take to enable B to perform: see Mackay v Dick (1881) 6 App Cas 251, 263. That is uncontroversial, but I cannot see to what issue in this case such an obligation is relevant. It may be that it was at one time considered relevant to the question whether UTB was in breach of contract in seeking on 31 January 2018 to prevent the directors of SUFC from executing property call option notices. However, if UTB was obliged on that date to cause SUFC to execute notices under clause 9.1.12 then it is in breach of contract for refusing to do so and the extra implied term adds nothing to the analysis.

D. The Contractual Obligations Arising from Service of the Call Option Notice and the Counternotice.

(i) Introduction to the remaining issues

230. The Counternotice served on behalf of UTB on 26 January 2018 put an end to the proposed purchase by SUL of UTB's shares in Blades and gave rise to a contract for the sale of SUL's shares in Blades to UTB for £5 million. That is the stated effect of clause 11.7 of the ISA.

231. Under clause 9.1.12 of the ISA, SUFC is obliged to exercise the property call options if UTB acquires 75% of more of the issued share capital of Blades. Prior to January

2018, UTB held 50% of Blades' shares and under the contract of sale and purchase it was entitled to purchase the remaining 50% of the shares. Clause 9.1.12 would therefore apparently be triggered.

232. UTB's case is that the contract of sale and purchase of SUL's shares in Blades for £5 million is valid but that, as a result of the transfer of most of its shares in Blades to UTB 2018 and a direction that SUL's shares should be transferred mostly to Mr Giansiracusa and Prince Musa'ad, UTB did not acquire and at no time would acquire 75% or more of the share capital of Blades. Accordingly, its case is that the Court should order SUL to transfer its shares in Blades as UTB has directed, upon payment of £5 million, and decide that UTB was right to contend by Jones Day's letter dated 31 January 2018 that SUFC should not execute property call option notices.

233. SUL's case is that UTB's attempts to avoid acquiring 75% of the shares of Blades were unsuccessful, and that it did acquire 100% of the shares upon service of the Counternotice, such that clause 9.1.12 was enforceable from that time. If that is wrong, SUL says that it made a mistake as to the terms that it offered by the Call Option Notice, because the price of £5 million offered depended on the fact that (as Kevin McCabe assumed) SUL (or Scarborough Group companies) would also be paid the purchase price for the property assets under the property call options. It contends that that mistake was known to UTB and that accordingly the contract of sale and purchase of SUL's shares in Blades that prima facie arose from service of the Counternotice should be avoided by the Court.

234. Since April 2019 UTB has accepted and agreed that the property call options should be exercised (and they were in fact exercised by the board of SUFC and deemed to have been exercised on 1 July 2019). In consequence, if the contract of sale and purchase is enforced SUL will indeed receive in due course the £5 million for its shares and the price payable for the property assets, as it envisaged would be the case when it served the Call Option Notice in December 2017. However, it is still necessary to resolve the question of whether clause 9.1.12 was triggered in January 2018. That is because SUL is no longer content to receive the sum of £5 million for its shares in Blades. Even if the contract of sale and purchase is not avoided for mistake, SUL claims that UTB was in repudiatory breach of the ISA and the contract of sale and purchase, such that SUL was entitled to and did terminate both contracts by notice on 6 February 2018 and is therefore not obliged to sell its shares in Blades to UTB.

235. SUL further claims that the conduct of UTB, Mr Giansiracusa and Prince Abdullah was unfairly prejudicial to SUL's interests as shareholder and that, by way of remedy for the harm caused, UTB should be ordered to sell its shares in Blades to SUL at their current value. So, instead of receiving £5 million and (in due course) the price for the property assets, SUL seeks the right to buy out UTB at valuation. SUL argues that such an outcome is eminently fair, given that one shareholder or the other has to step aside in the interests of the wellbeing of the Club. On the other hand, it contends that for SUL to have to sell its shareholding to UTB for £5 million (which it is common ground is only a small percentage of its current market value) would be an unfair result.

236. The remainder of this judgment will address all these remaining issues and the further question of whether UTB, Mr Giansiracusa and Prince Abdullah conspired to use unlawful means to harm SUL.

(ii) Did the Scheme succeed in evading clause 9.1.12 of the ISA?

237. The first set of issues relates to UTB's attempt to avoid triggering clause 9.1.12: was it successful? For convenience, I refer to UTB's attempts to do so as "the Scheme". The Scheme comprised two parts: a transfer of 40% of the shares in Blades to UTB 2018 on 24 January 2018 and the direction (either given or to be given) by UTB to SUL to transfer 30% of its shares in Blades to Mr Giansiracusa and a further 10% to Prince Musa'ad.

238. Mr Giasiracusa gave evidence that he first became aware of the detail of clauses 11 and 9.1.12 of the ISA on about 22 November 2017 and that about that time he realised that, by directing that the shares purchased be transferred to persons other than UTB, UTB might be able to avoid clause 9.1.12. He and Prince Abdullah both gave evidence that, following legal advice and commercial consideration, the decision to serve a counternotice was taken on (and not before) 10 January 2018. They also said that they did not identify and decide to implement a second means of avoidance of clause 9.1.12, namely transferring most of UTB's shares in Blades to a new controlled company, until 22 January 2018. None of these factual matters were seriously challenged by SUL and I find that they are true. (UTB has not waived privilege in the legal advice that it obtained at those times.)

239. In the event, although it was thought of second in time, the transfer of shares to UTB 2018 became the principal means of avoiding clause 9.1.12. Had there been a genuine sale of shares by UTB to UTB 2018 and registration of UTB 2018 before the Counternotice was served (or at least before completion of the resulting contract of sale and purchase was due), UTB would have had a strong argument that it at no time "acquired" 75% of the share capital in Blades. I find that Mr Giansiracusa and UTB's lawyers hoped that such registration would take place before completion of the contract of sale and purchase, but in fact that did not happen and UTB 2018 has still not been registered.

240. The first point of challenge raised by SUL to the validity of the share transfer is that, on the true interpretation of the articles and the ISA, part only of the holding of UTB could not be transferred, only the entire holding.

241. The articles of association are drafted so as to permit the transfer of any share or number of shares. Any restriction on transfer of part of a holding must therefore derive (if it exists) from the ISA. There is no express term of the ISA that prohibits the transfer of part of a Shareholder's holding. Clause 16, which deals with dealings in shares, provides as follows:

> "16.1 No Shareholder shall do, or agree to do, any of the following during the continuance of this Agreement except with the prior written consent of the other Shareholder or otherwise in accordance with this Agreement:

> 16.1.1 pledge, mortgage, charge or otherwise encumber any Share or any interest in any Share;
>
> 16.1.2 grant an option over any Share or any interest in any Share; or
>
> 16.1.3 enter into any agreement in respect of the votes attached to any Share.
>
> 16.2 No Shareholder shall transfer or dispose of any Share or any interest in any Share other than in accordance with this Agreement and the Articles or with the prior written consent of the other Shareholder.
>
> 16.3 Subject always to the Articles, [UTB] and [SUL] shall be entitled to transfer their Shares with all rights attaching to those Shares (including, without limitation, any rights set out in this Agreement) and the parties to this Agreement agree to allow the transferee to enter into a Deed of Adherence. "

242. The prohibition in clause 16.1 is on creating subordinate interests in or over any share. It is not a prohibition on transfer. Clause 16.2 is a general prohibition on transfer or disposal, but is subject to the articles of association and clause 16.3. Clause 16.3 refers to a transfer of Shares, which might be a contrast with the use of the singular form in clauses 16.1 and 16.2; but clause 1.9 of the ISA states that references to the singular include references to the plural, and vice versa.

243. The express reference in clause 16.3 to the Deed of Adherence lends some support to the inference that what is contemplated is a transfer of all the shares of UTB or SUL. That is because the Deed of Adherence must be in the form attached at schedule 7. This includes a term that the parties to the ISA have agreed that the transferor is released and discharged from all the provisions of the ISA, save for certain specified provisions. However, recital (C) states that the proposed transferee "has made an offer to purchase [certain] shares in the capital of the Company currently held by the Transferor", rather than "… an offer to purchase the Transferor's shares".

244. A further argument why a transfer of part of a holding of SUL or UTB might not have been envisaged is that certain clauses of the ISA work better if there are only two shareholders, as there were at the date of the ISA. The effect of clause 5 is that directors of Blades can only be directors appointed by SUL or UTB and on transfer of all the shares of a Shareholder it must procure the resignation of each director appointed by it (clause 5.6). There is no requirement to remove any director on transfer of some of a shareholder's shares, so UTB or SUL could sell all but one of their shares and retain all their directors, with the purchaser having no board representation. That looks quite odd, though it is not an impossible outcome. The deadlock provisions of clause 10 are drafted on the assumption that only SUL and UTB are involved in attempts to resolve the deadlock. The provisions are capable of having sensible effect for so long as UTB and SUL have a majority of the votes of the shareholders, but not if they become a minority. The call option provisions of clause

11 can work on the basis that any shareholder can serve a call option notice on any other shareholder.

245. What appears to me to be conclusive of the answer to this question is clause 18 of the ISA, which restricts the ability of UTB and SUL to assign the benefit of rights under the ISA with their shares. They can only be assigned in accordance with clause 18.2, which provides:

> "If any Shares held by [UTB] or [SUL] shall at any time be transferred in accordance with the Articles their rights and benefits under this Agreement may be assigned in whole or in part to the transferee of such Shares (without prejudice to the continuing rights and benefits of the transferor under this Agreement, *for as long as it continues to hold any Shares,* provided always that the transferee shall have executed a deed of adherence *in a form agreed between the Shareholders* (acting reasonably) and provided further that no party to this Agreement shall have any greater liability to such transferee than it would have had to the transferor as a party to this Agreement. " (*emphasis added*)

This clause establishes that a part of the holding of UTB or SUL may be assigned, together with rights under the ISA, on the basis that the transferor retains its rights under the ISA for as long as it continues to hold any shares. Rights may be assigned with some shares provided that a deed of adherence is signed, and in this case it must be a deed in such form as the shareholders reasonably agree. That is because the form of the deed in schedule 7 is recognised as being appropriate only in the case where all the shares of the transferor are transferred.

246. For these reasons, on balance I consider that the ISA does permit UTB to transfer a part of its holding. Rights under the ISA can only be assigned with the shares, however, if a deed of adherence has been executed in a form agreed between the shareholders, acting reasonably. There is therefore no objection to the execution of the stock transfer form in favour of UTB 2018 as such.

247. The next question is: what is the effect of the executed transfer dated 24 January 2018? The transfer has not yet been registered, so UTB remains the shareholder. Given that UTB 2018 is under the sole control of Prince Abdullah, Blades has no right under the articles to object to the transfer or refuse to register it. It is not disputed by UTB that, until registered, UTB still has legal title to the shares and its principal case is that it is the legal title that matters, not the beneficial interest. On that basis, on 24 January 2018, UTB retained 50% of the Blades shares for the time being. But when UTB 2018 is registered in Blades' share register as the holder of 40% of its shares, will UTB then cease to have an interest in them?

248. That depends on whether the shares will be held by UTB 2018 on resulting trust or other bare trust for UTB. The ISA permits UTB to take shares in the name of a nominee (clause 2.5) and, in the light of that, it is not disputed that if shares are owned by a nominee or bare trustee they are to be treated as owned by UTB for the purposes of clause 9.1.12 of the ISA. However, UTB contends that the shares are beneficially

owned by UTB 2018 and will therefore not be held on any trust once UTB 2018 is registered as the holder of them.

249. On its face, the stock transfer form suggests that consideration of £1 was paid for the shares. That is an undervalue of £3,999,999 on the basis of the price offered in the Call Option Notice. The evidence about the transaction underlying the executed transfer of shares to UTB 2018 was extremely odd. The cross-examination of Prince Abdullah included the following:

> "Q. Did you know anything about that transaction?
>
> A. I know that Yusuf [Giansiracusa] will – or, like, my lawyers will find another company or, like, another company, something like this.
>
> …
>
> Q. Did you apply your mind at all to that transaction?
>
> A. No, I know, I trust Yusuf that he will do a good job and he will not fool me or steal money from me anything.
>
> Q. No, not the sale to Yusuf; the sale to UTB 2018.
>
> A. No, I know he would not, like, whatever number you call the company, he will not make me do something that is not in my interest.
>
> Q. No, he said he didn't know anything about that transaction. I asked him about this. He said he didn't know anything about that one.
>
> A. So how would I know then?
>
> Q. Well, who is running this show, Prince Abdullah? Who is making the decision to transfer 40% of Blades from UTB to UTB 2018? Whose decision was that?
>
> A. Did you ask Yusuf?
>
> Q. Yes.
>
> A. Okay, so I'm sure you gave a better answer –
>
> Q. No, he didn't know about that transaction.
>
> A. Okay.
>
> Q. Whose decision was that?
>
> A. If Yusuf does not know, how would I know? … So I'm sure it was, that if I have to guess, it will be Jones Day.

> Q. Jones day made the decision?
>
> A. No, I mean, if you… I leave all things to yourself, so I don't remember at the time I have another lawyer, I'm sure I did not have any other lawyer to consult.
>
> Q. So all that you can say is that you don't know anything about this transaction?
>
> A. No, I left everything to Yusuf and I did not have any lawyer that I was – like, to lawyers representing me; it was only Yusuf."

250. Mr Giansiracusa had previously been asked in cross-examination about his understanding of the underlying transaction:

> "Q. … Finally, the transfer from UTB to UTB 2018, the shares that were being transferred had an implied value of £4 million did they not? £3 million for 30%, £4 million for 40%?
>
> A. Okay.
>
> Q. On that basis. Was there any contract drawn up to govern that transfer?
>
> A. I didn't handle that part of the transaction.
>
> Q. The consideration on the face of the stock transfer form is £1. Do you know whether that £1 was ever paid?
>
> A. No, I wasn't involved.
>
> Q. So you don't have any evidence about that transaction at all?
>
> A. I wasn't involved, I have nothing – "

251. The inference is irresistible that the transfer from UTB to UTB 2018 was just "papered" by Jones Day, probably on the instruction of Mr Giansiracusa on behalf of UTB, following the realisation on 22 January 2018 that if a transferee were registered as holder of Blades shares, UTB would or might not be the owner of them for the purposes of clause 9.1.12. I find that there was no transaction that was agreed by anyone, and no consideration was paid.

252. Mr Gledhill QC submitted, on the strength of Pennington v Waine [2002] EWCA Civ 227; [2002] 1 WLR 2075, that although UTB 2018 was a volunteer nevertheless the gift of the shares in Blades was perfected by UTB's executing the stock transfer form and delivering it to the secretary of Blades for registration. In that case, however, it was common ground that the 400 shares were a gift of the deceased; the question was whether the gift had been perfected, since the stock transfer form had only been sent to the deceased's accountant. The question in this case is whether there was intended to be a gift of the shares by UTB to UTB 2018.

253. Mr Gledhill argued that UTB, a company controlled by Prince Abdullah, had power with the consent of its shareholder, Prince Abdullah, to make a gift of property it owned to another company. That is doubtless so, subject to any questions of insolvency and the interests of creditors (which do not arise here) and assuming that the law of Nevis is the same in this respect as the law of England and Wales. But there is no evidence of any such intended gift or Prince Abdullah's consent: Prince Abdullah said that he knew nothing about it. The stock transfer form was no more than a piece of paper and did not reflect any underlying transaction.

254. In those circumstances, there was no transfer of the beneficial interest in the shares of Blades. Even if registered, UTB 2018 will (as things stand) hold the shares on resulting trust for UTB. The presumption of advancement does not apply, as between two limited companies, and so unless there is evidence that a gift was intended the law presumes that UTB 2018 was to hold the shares on behalf of UTB. In Westdeutsche Landesbank Girozentrale v Islington LBC [1996] A.C. 669 at 708, Lord Browne-Wilkinson explained the circumstances in which a resulting trust arises as follows:

> "Under existing law a resulting trust arises in two sets of circumstances: (A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a *presumption*, which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of A's intention to make an outright transfer… "

255. In relation to personal property, Snell's Equity (33rd ed.) states, at para 25-019:

> "For property other than land, the general law about the presumption of resulting trust applies unmodified. On a voluntary transfer of personal property the transferee is presumed to hold on a resulting trust for the transferor unless the presumption of advancement applies or the transferor is proved to have had an actual intention to make the transferee the beneficial owner of the property. Where the voluntary transfer is made by a husband, father or other person in loco parentis the presumption of advancement will apply."

256. Absent any evidence of an intention to make a gift of the shares to UTB 2018, the beneficial interest in the shares did not pass on the execution of the stock transfer form and, when UTB 2018 is registered, it will hold the shares on resulting trust for UTB. At that stage, therefore, UTB will be the beneficial but not the legal owner of the shares.

257. The next question is whether, as UTB contends, that means that UTB will no longer be the shareholder, or be treated as having those shares, for the purpose of clause 9.1.12 of the ISA. The word "acquired", in the context of SUL and UTB having 50% of the shares already, connotes obtaining more than the 50% already held, viz. additional shares that would take the holder above 75%. On obtaining another 25% of the shares, UTB would be "acquiring 75% or more" of the shares. If, on the other hand, UTB sold its shares, and then later acquired 25% at a time when it held no other shares, it would not have acquired 75%. But what if the original 50% are held by a nominee or trustee for UTB? In those circumstances, in my judgment, UTB would have acquired 75% even though 50% was at the time registered in the name of (and for the purposes of the articles held by) another person. Given that UTB was entitled under clause 2.5 of the ISA to take its shares in the name of a nominee, those shares would be treated for the purpose of the ISA as held by UTB. It would be perverse, in those circumstances, for UTB to be able to escape clause 9.1.12 merely by transferring shares to a nominee.

258. Accordingly, I conclude that UTB did own all its original 50% holding of Blades shares at the time of the Counternotice and will continue to own those shares even if, at a future time, UTB 2018 is registered as holder of 40% of the shares.

259. The next question is whether, upon service of the Counternotice, UTB "acquired" SUL's 50% of Blades shares. If it did then at that time the trigger in clause 9.1.12 was satisfied and SUL was right in contending that UTB was obliged to procure that SUFC execute the property call option notices. UTB's case in this regard is that legal ownership is what matters, so that although upon service of the Counternotice UTB became the equitable owner of those shares, it did not thereby "acquire" them. SUL contends, on the contrary, that beneficial ownership suffices for these purposes.

260. In the context of the ISA, I consider that UTB cannot be said to have "acquired" SUL's shares upon service of the Counternotice. Subject to SUL's claim for avoidance on the basis of mistake, which I address in Part E of this judgment, upon service of the Counternotice a contract of sale and purchase came into existence. As with a contract to sell and buy land, that contract means that, for certain purposes, the buyer is treated as the owner in equity, subject to payment of the price on completion. That is because the buyer has it within his power to compel transfer of the property on the completion date: a court of equity will specifically enforce the contract if the buyer pays the price. However, the question here is not whether UTB was an equitable owner of the shares on 26 January 2018 but whether it "acquired" them within the meaning of clause 9.1.12.

261. In my judgment, the parties cannot have meant that the property call options should be irrevocably triggered at a time when the price for the shares had not yet been paid. Until the price was paid, the shares did not fully belong to the buyer. There might well be circumstances in which the buyer was unable to pay the price, for a time or at all. A recipient of a low bid for its shares might be unwilling to sell and therefore forced to buy, but not immediately have the means to do so. That is not far from the actual circumstances that pertained in December 2017. If the price were not paid, completion would be delayed and the contract of sale and purchase might be rescinded, in which case the parties would continue to own Blades jointly and the company might well be deadlocked. It was obviously not intended that in those circumstances the property call options should be triggered. Once the price is paid,

however, the seller becomes a bare trustee for the buyer and then the buyer has "acquired" the shares, even though it is not yet registered as the holder of them. Accordingly, UTB would only "acquire" SUL's holding on completion of the contract of sale and purchase.

262. The next question is whether a different conclusion on the acquisition of the shares must be reached if, instead of paying the £5 million and receiving a stock transfer form in relation to all SUL's shares in Blades, UTB paid the £5 million and received a transfer of only one-fifth of SUL's shares, with stock transfer forms in respect of the other four-fifths of SUL's shares being delivered to Mr Giansiracusa and Prince Musa'ad, at UTB's direction.

263. Clause 11.9 of the ISA states that at completion the transferring shareholder [SUL] must deliver or cause to be delivered to the purchasing shareholder [UTB] *or as it may direct* a duly executed transfer or transfers in favour of UTB *or as it may direct.* There is therefore no doubt that UTB is entitled to nominate other persons to take transfers of SUL's holding. But it is the purchasing shareholder (UTB) that is required by clause 11.9 to deliver to SUL a banker's draft or telegraphic transfer for value in an amount equal to the option price multiplied by the number of shares being sold. It is therefore not the nominees who stand in the shoes of UTB to complete the contract: UTB completes the contract and directs SUL to execute transfers in favour of other persons nominated by it.

264. Although UTB, as of right, could have simply directed a transfer of shares to Mr Gianisracusa and Prince Musa'ad, agreements were made between them to give some colour to the direction that UTB was intending to give SUL. The agreements are in substance sale agreements under which a deposit of 10% is paid by the buyer on completion and the remainder of the purchase price is deferred to be paid on or before 30 June 2018, subject to various options. There is a put option for the buyer to sell some or all of the shares to UTB and the price for the shares sold to UTB is the deposit paid by the buyer on completion (paid pro rata if the option is exercised in respect of fewer than all the shares). There is also a call option for UTB to buy some or all of the shares from the buyer at a price 30% above the deposit paid by the buyer.

265. Thus, in substance, the contracts made with Mr Giansiracusa and Prince Musa'ad are sub-sales of the shares to be purchased by UTB from SUL, with the same time and date for completion as the completion date for the contract of sale and purchase between SUL and UTB. But the sub-sales contain put and call options that, if exercised, will result in the ultimate transferee of the shares (or some of them) being UTB.

266. The relevant question is therefore whether UTB "acquires" the shares of SUL, within the meaning of clause 9.1.12, if it completes the contract of sale and purchase by paying the price of £5 million to SUL (and otherwise complying with the requirements of clause 11.9 as regards completion) but directs that some of the shares be transferred to others, against the background that those others have made agreements with UTB to buy shares from UTB.

267. In my judgment, UTB "acquires" all the Blades shares sold by SUL in those circumstances. It does so because it completes the contract of sale and purchase, under which it has agreed to buy those shares, by paying to SUL the full price for all

the shares. The fact that it directs that certain shares be transferred to others, as it is entitled to do under the ISA, cannot mean that it has not at that time acquired the shares within the meaning of clause 9.1.12. It has acquired them from SUL. A buyer who purchases shares and enters into a back-to-back contract to sub-sell them to another acquires the shares when he completes the principal contract and he does not cease to acquire them because he exercises a right to have the shares transferred to someone else. The sub-sale agreements with Mr Giansiracusa and Prince Musa'ad are *res inter alios acta*, so far as the rights of SUL are concerned. It cannot have been intended that clause 9.1.12 would not be triggered simply because UTB exercised its right (expressly given by the ISA) to have transfers executed in favour of third parties. The fact that UTB does so because it is sub-selling the shares, with an option to reacquire them, rather than because the transferee is a pure nominee, makes no difference to the analysis. The purchase of the shares pursuant to clause 11 of the ISA is one of the principal means of "acquisition" of more than 75% of the shares by UTB, and completion of a contract arising under clause 11, entitling UTB to take the shares from SUL, must have been intended by the parties to be acquisition for the purposes of clause 9.1.12.

268. For these reasons, I consider that UTB is wrong in contending that, upon registration of the transfer in favour of UTB 2018 and completion of the contract of sale and purchase, it will not acquire more than 75% of the shares in Blades. However, SUL is wrong in contending that UTB acquired 75% or more of the shares in Blades on 26 January 2018. It would have done so only on completion of the contract of sale and purchase on 6 February 2018. Had completion taken place, UTB would have been obliged at that time to cause the directors of SUFC to exercise the property options. UTB was therefore technically right to require the directors of SUFC not to sign the property call options when called upon to do so by SUL's solicitors on 30 January 2018, but it was not entitled to seek to prevent signature after completion of the contract of sale and purchase. Although UTB tried to prevent the triggering of clause 9.1.12, it failed to achieve that. Its refusal to cause SUFC to execute property call option notices on completion was therefore wrongful.

269. It follows that Kevin McCabe was not wholly mistaken as to the liabilities that would arise when he caused SUL to serve the Call Option Notice specifying £5 million as the purchase price. He said (and I accept) that he did so only in the belief that, if UTB elected to buy SUL's shares, UTB would also be obliged to cause the property call options to be exercised, with the result that within 12 months SUL or other Scarborough Group companies would receive the purchase prices specified in the five property call option agreements. On the basis of my conclusions, he was in fact correct in that assumption, although if UTB had genuinely sold or gifted most of its existing shares to another person and that other person had become registered as holder of those shares before completion of the contract of sale and purchase, the outcome would have been different.

270. Kevin McCabe was mistaken in his assumption that UTB would not attempt to avoid the obligation in clause 9.1.12 and claim that it had done so, but it is clear from Mr Tutton's email to Kevin McCabe headed "Texas shoot out" dated 22 November 2017 that they did consider the risk that UTB would serve a counternotice but then be unable or unwilling to find the money to pay for the property assets 12 months later. So SUL were aware of the risk that the property assets might not be paid for on time,

but they did not foresee that this might be because UTB disputed its obligation to do so. That kind of mistake – as to the motives and likely conduct of the counterparty – is clearly not the kind of mistake that entitles a party to avoid a contract, as I shall explain. In case I am subsequently held to be wrong in my conclusion that UTB would acquire 75% of more of Blades shares, I will go on to consider whether Kevin McCabe's (assumed) mistake about clause 9.1.12 being triggered was such as to entitle SUL to have the contract of sale and purchase arising from the Call Option Notice and the Counternotice avoided.

E. Mistake

271. On 29 December 2017 SUL gave UTB written notice that it was exercising the call option in clause 11 of the ISA. The notice contained two offers in compliance with clause 11.4.4: an offer by SUL to purchase all UTB's shares in Blades at an aggregate price of £5m, and an alternative offer by SUL to sell all its shares in Blades to UTB at the same price. The notice specified 6 February 2018 as the date on which completion was to take place.

272. The effect of the offer notice was (and was understood to be) that if UTB did nothing in response by 28 January 2018 it would be bound to sell its shares to SUL for £5m on 6 February 2018, and that if by 28 January 2018 UTB served a valid counternotice SUL would be bound to sell its shares to UTB for the same price on that date. Kevin McCabe on behalf of SUL believed that, if a valid counternotice was served by UTB, UTB would have to cooperate with SUL to cause SUFC to exercise the property share options. He had no specific belief or assumption about how or when that would have to happen, but he assumed that it would happen as part of the sale of SUL's shares to UTB. As I have explained, he was aware that there was a risk that SUFC, by then controlled by UTB, would not comply with its obligations under the property call options, but he did not identify as such a risk that UTB would seek to avoid (or would dispute) the obligation to exercise the property call options.

273. If UTB served a valid counternotice then, under clauses 11.7 and 11.10 of the ISA, a contract of sale and purchase of SUL's shares would come into existence on the date of service of the counternotice, to be completed on the date specified in the counternotice. In view of the language of clauses 11.4.4(b) and 11.7, I agree with Mr Downes QC that the contract of sale and purchase of SUL's shares would be formed by express offer and acceptance of the terms of the alternative offer contained in the Call Option Notice. Although clause 11.7 says that the obligations in those circumstances are "subject only to the receipt of the Option Price", it is clear from clause 11.9 that payment of the Option Price is a matter of completion and that a binding contract of sale and purchase would come into existence upon service of the counternotice, with an obligation to pay the price on completion.

274. The contract of sale and purchase arising from the service of the Counternotice is, of course, a separate contract from the contracts in the articles of association and the ISA. The terms of the contract of sale and purchase are principally those stated in the Call Option Notice and the Counternotice, in part by reference to clause 11 of the ISA. The fact that the ISA specifies terms of the contract of sale and purchase does

not mean that there is no separate contract. The contract of sale and purchase and the ISA exist in parallel.

275. SUL argues that the contract of sale and purchase is void, or voidable, by reason of unilateral mistake made by SUL. The nature of the mistake that Mr Kevin McCabe asserts is explained in paras 269, 270 above. Although I have held that he was not mistaken about the obligations that bound UTB but only about the motives of UTB, for the purposes of this part of the judgment I assume that UTB had successfully avoided the obligation in clause 9.1.12 and that Kevin McCabe accordingly was mistaken as to the obligations that would flow from service of a counternotice by UTB. I will consider in the alternative the significance of SUL's actual mistake (as I have found it to be) about the motives of UTB.

276. It was frankly accepted by Mr Giansiracusa and Prince Abdullah that they knew that Kevin McCabe must have assumed that the Counternotice would trigger the property call options under clause 9.1.12 of the ISA, otherwise he would not have risked being bought out for £5 million. They therefore knew that he was mistaken in believing that the property call options would be exercised because they had it in mind to prevent those options being triggered. The mistake as to the consequences of service of a counternotice was one made by SUL only: it was a unilateral mistake, not a common mistake.

277. There is only a limited jurisdiction to avoid a contract on the grounds of unilateral mistake. The law in this regard is now reasonably clear, although for half a century or more it was bedevilled by confusion. The relevant distinctions are twofold: between common mistake and unilateral mistake, and between mistake as to the terms of the contract (or the identity of the contracting parties) and mistake about relevant facts or the law: see Chitty on Contracts (33rd ed), paras 6-001, 6-002. In the case of unilateral mistake, only mistakes as to the terms of the contract or identity (a "type 1 mistake") will suffice to prevent a valid contract from coming into existence, not some other mistake as to facts or motive (a "type 2 mistake"). The fact that one party knows that the other party has entered into the contract under some kind of mistake is not sufficient to avoid a contract.

278. The law was summarised by Aikens J in Statoil ASA v Louis Dreyfus Energy Services LP [2008] 2 Lloyd's Rep 685 as follows:

> "[87]…The general rule at common law is that if one party has made a mistake *as to the terms of the contract* and that mistake is known to the other party, then the contract is not binding. The reasoning is that although the parties appear, objectively, to have agreed terms, it is clear that they are not in agreement. Therefore the normal rule of looking only at the objective agreement of the parties is displaced and the court admits evidence to show what each side subjectively intended to agree by way of terms. If it is clear from such evidence that there was not consensus, then there can be no contract, because the parties have not truly agreed on the terms. Some of the cases talk of such a contract being "void", but I think it is clearer to say that there was never a contract at all.

> [88] However, if one party has made a mistake about a fact on which he bases his decision to enter into the contract, but that fact does not form a term of the contract itself then, even if the other party knows that the first is mistaken as to this fact, the contract will be binding. That was the effect of the decision of the Court of Queen's Bench on appeal from the County Court in *Smith v Hughes* (1871) LR 6 QB 597, see particularly at page 603 per Cockburn CJ, and page 607 per Blackburn J. The correctness of that decision and the analysis in it has never been doubted. "

279. In that case, the buyers and sellers of a cargo of gas negotiated a compromise of the sellers' demurrage claim. In calculating their claim, the sellers made a mistake about the date on which the vessel's lay time ended. The buyers knew that the sellers had made a mistake but decided not to draw it to their attention. The claim was compromised for a figure significantly less than the amount of the claim. When the buyers realised their mistake, they claimed that the contract of compromise was not binding, or that it should be set aside in equity. The judge held that it was not a term of the compromise that the discharge of the cargo was completed on a particular date. There was therefore no mistake about a term of the contract. The reasoning of Aikens J was cited with apparent approval by Hamblen J in Merrill Lynch International v Amorim Partners Ltd [2014] EWHC 74 (QB) at [55].

280. Aikens J also rejected the argument that there was a wider jurisdiction in equity to rescind a contract formed on the basis of a unilateral mistake about a fundamental assumption that a party has made where the mistake was known to the other party. He referred to the decision of the Court of Appeal in Great Peace Shipping Ltd v Tsavliris Salvage International Ltd [2003] QB 679, and said:

> "[103] … The Court of Appeal reiterated the rule that a contract would only be held void at common law by reason of common mistake if the mistake of both sides concerned a fundamental assumption of a state of affairs (positive or negative) and the mistake rendered performance of the essence of the obligation impossible.
>
> [104] The Court of Appeal also considered whether there was any equitable principle which widened the circumstances in which a court could rescind a contract for common mistake when the common law would hold it was binding. The court declared that there was no jurisdiction to grant rescission of a contract on the ground of common mistake where that contract is valid and enforceable according to ordinary principles of contract law: para 157.
>
> [105] With respect to Andrew Smith J, I must disagree with his conclusion that there is an equitable jurisdiction to grant rescission of a contract where one party has made a unilateral mistake as to a fact or state of affairs which is the basis upon which the terms of the contract are agreed, but that assumption does not become a term of the contract. None of the cases he

> cites… is authority for the existence of that jurisdiction. The *Great Peace* decision strongly suggests that there is no such jurisdiction in the case of a unilateral mistake. If there is no such jurisdiction in the case of a common mistake, I fear I am unable to see how, in logic, one can devise a rationale for an equitable jurisdiction in the case of a unilateral mistake, at least where there has been no misrepresentation by the other party."

In my judgment, that correctly states the law, though Aikens J was not addressing the different question of whether a unilateral mistake other than as to the terms of the contract or identity might lead a court of equity to decline specifically to enforce a valid contract.

281. Mr Downes QC submits that Kevin McCabe's mistake was one as to the offer price, in that the price offered mistakenly assumed that a counternotice would trigger clause 9.1.12 of the ISA. He submits that the offer to sell was based (as a matter of obvious inference) on the operation of clause 9.1.12 and therefore could only be accepted on those terms. I reject this attempt to categorise Kevin McCabe's mistake as a mistake as to the price payable. The price payable was £5 million, as specified by SUL in the Call Option Notice, which made an alternative offer to UTB to sell SUL's shares in Blades at that price and which was accepted in terms by UTB. The offer was not £5 million plus the price payable under the property call options. The fact that Kevin McCabe believed (but UTB did not believe) that if a contract of sale and purchase of SUL's shares was made clause 9.1.12 would operate was not a mistake about the price but a mistake as to the circumstances in which a contract of sale and purchase of SUL's shares would trigger the obligations in clause 9.1.12 of the ISA. It was also a mistake of motive because it was a mistake about the risk or possibility of UTB acting so as to avoid triggering clause 9.1.12, if it could. The mistake involved an understanding about the meaning and effect of the ISA (which was a different contract) and about the conduct of UTB, but those matters were not terms of the contract of sale and purchase.

282. There is in any event no persuasive evidence that, but for its mistake, SUL would have specified a different price in the Call Option Notice. In his witness statement, at para 416, Kevin McCabe asserts that "if I had thought that UTB were going to attempt to renege on obligations under [clause 9.1.12] then the Option Notice would have provided a considerably higher figure". However, Mr Tutton's third witness statement, at para 192 states: "We would not have called for their shares at all if we had any knowledge whatsoever that they would seek to perform a purported manoeuvre so as to seek to evade the Property Call Option". On this point, I consider that Mr Tutton must be right and I reject Kevin McCabe's evidence. The price payable for the property assets was of much greater significance to Kevin McCabe than whether he received £5 million or £10 million for SUL's shares in Blades. He would not have taken the risk of losing all control over Blades if there was a real prospect of UTB not having to procure payment for the property assets, nor would he have risked a higher offer for UTB's shares being accepted by UTB.

283. Accordingly, the ratio of the Statoil case applies and the result must be the same: there was no unilateral mistake as to a term of the contract of sale and purchase of SUL's shares in Blades.

284. Mr Downes also argued that there was an equitable jurisdiction to set aside the contract on the basis that SUL's mistake was known to UTB and that it was unconscionable for UTB not to draw the mistake to SUL's attention. He referred to the equitable jurisdiction to rectify a contract where one party takes unconscionable advantage of another's mistake. He went as far as to say that the failure to draw attention to the mistake amounted to dishonesty on the part of Prince Abdullah and Mr Giansiracusa. I reject those arguments. There is no equitable jurisdiction to avoid a contract on the ground of a unilateral mistake of a "type 2" character, as explained by Aikens J. Rectification cases are, by definition, cases of mistake as to the terms of the contract, and so the equitable jurisdiction to rectify in cases of unilateral mistake follows the approach of the common law to cases of "type 1" unilateral mistakes, though providing the additional remedy of correction of the written document to reflect what equity regards as the true bargain, rather than concluding that no valid contract was made. The question of whether equity will decline specifically to enforce a contract where there is unconscionable conduct (or "sharp practice" as it is characterised in some of the rectification cases) is a different question. But in my judgment the contract of sale and purchase cannot be set aside on account of UTB's knowledge of Kevin McCabe's mistake of motive.

285. Whether the contract should be specifically enforced, as UTB claims, is a question to which I will return after considering all the circumstances in which the contract came into existence in January 2018. There are wide-ranging disputes of fact about the conduct of the parties during 2017, in particular who was to blame for the total breakdown in relations in November 2017; whether UTB, Prince Abdullah and Mr Giansiracusa conspired together to injure SUL by unlawful means; and whether they conducted the affairs of Blades in a manner unfairly prejudicial to SUL's interests as shareholder.

286. Another important part of SUL's case is the alleged breaches of contract by UTB. SUL argues that UTB was in breach of implied terms of fair dealing and good faith (between November 2017 and January 2018) and in breach of other implied terms (in January 2018) in pursuing the Scheme to avoid clause 9.1.12 of the ISA. SUL contends that the breaches of contract were repudiatory breaches of contract, such that it was entitled to and did terminate the ISA and the contract of sale and purchase of Blades shares by notice on 6 February 2018. Although I have held that there is no implied term of fair dealing and good faith and that the Scheme was unsuccessful, I will make findings about the facts alleged in case it is later held that I was wrong in relation to the alleged implied terms. I will then address the question of what breaches of contract are proved and whether the breaches were repudiatory breaches, so that SUL was entitled to put an end to the ISA or the contract of sale and purchase, or both.

F. The Disputed Events in 2017

287. I heard evidence from several witnesses from each side about the events of 2017 that led to a complete breakdown in the relationship between Kevin McCabe and Prince Abdullah, and between those acting on their behalf as directors of Blades and SUFC. The evidence that I heard covered the full history of the contractual relationship and up to date. Understandably, the witness statements and the cross-examination dwelt

on matters of dispute in the years 2014, 2015 and 2016 as well as the more recent and directly relevant events in 2017 and 2018. What happened prior to January 2017 is important background and each side sought to identify aspects of the other side's conduct that was unsatisfactory in itself, or that in some way laid the ground for future disagreement or proved character traits of the principals. With some exceptions, however, it is not necessary for me to attempt to resolve all disputed matters in those earlier years, for example whether spending money on particular players was or was not approved specifically by the board to the knowledge of Kevin McCabe. These disputes are peripheral to the important issues that lead directly to the breakdown in November 2017 and the steps that both parties took thereafter.

288. From the lead up to 2017, I reach the following general conclusions:

i) The parties had not been clear at the outset about how SUFC would be funded after the initial two years of UTB's funding (i.e. from about the end of the 2014/15 season). Each side had different assumptions and the ISA was non-specific about it.

ii) Kevin McCabe was in principle keen to pass on the baton of responsibility for the Club's affairs, but in his mind that depended on UTB proving themselves to be capable and suitable as custodians of the Club's future and willing to inject much more money. He wished to be rid of the constant cash drain on Scarborough Group's resources, but he did not want to hand on the baton to someone who would be unable to lead the Club to a better place.

iii) Kevin McCabe was devoted to the Club and wished above all to see it succeed. I find that he felt very personally the failure of the Club since 2007, when it was relegated after only one season in the Premiership (as it then was) at the time of the Carlos Tevez controversy and then relegated again, and he was determined to see it regain top-tier status.

iv) Prince Abdullah, though mostly absent, also became fired with enthusiasm for (and, in due course, love of) the Club and genuinely wishes to see it succeed, though from June 2014 he was preoccupied with ministerial duty in Saudi Arabia and had less influence on the Club as a result. The directors that he appointed to look after his interests did not perform well, and the Club suffered in 2014/15 from having its affairs principally controlled by the manager, Mr Clough, the then CEO, Mr Brannigan, and Prince Abdullah's attorney, Mr Phipps, who became close to them both.

v) Kevin McCabe was disappointed with the way that things had developed while Prince Abdullah's £10 million was funding the Club's losses. He determined to remove all three of the above-mentioned individuals. This coincided to a large extent with the realisation that Prince Abdullah would only invest further in the Club if that investment was matched by SUL. Although Kevin McCabe did not wish to invest further, he ultimately had to agree to do so, in order to keep the Club solvent.

vi) As a consequence of being required to fund the Club, Kevin McCabe determined to exert greater control over the way that the Club was being run, in an attempt to reduce the losses that it was incurring (while still stuck in

League One, contrary to the overriding objectives of the ISA). He put in place (with Prince Abdullah's acquiescence) a new manager and new executives, all of whom were known to the McCabe family personally or worked for Scarborough Group companies. Messrs Clough, Brannigan and Phipps were removed.

vii) However, Prince Abdullah encountered very serious cash flow difficulties in 2015, which only began to improve in 2017 when he made difficult decisions to sell investments at a substantial loss. Those financial difficulties and SUL's reluctance to invest further made it inevitable that another investor would have to be found. Both sides realised that and set about trying to find one, but the search proved unsuccessful. Early in the 2016/17 season, Prince Abdullah was unable to meet his share of the funding needed to keep the Club afloat and he left SUL to inject (very reluctantly) further money that was urgently needed.

viii) Disagreements about funding, then SUL's deliberate failure to honour the July 2015 Funding Agreement and Prince Abdullah's failure to inject money during the 2016/17 season led to a deterioration of the personal relationship between Kevin McCabe and Prince Abdullah. UTB appointed Messrs Howard and Hawasli to conduct a review of the Club's operations and the Howard Report showed Prince Abdullah that steps urgently needed to be taken to impose good corporate governance on Blades and SUFC and to change the way in which Kevin McCabe was running the Club. The new manager was not a success and was replaced a year later, with the Club still in League One.

ix) A hoped-for investment from the Qatari Investment Authority had not materialised and at the end of 2016 Prince Abdullah was working on contacts in Saudi Arabia to try to find a new purchaser for SUL's interest in Blades. By the end of 2016, he had had meetings with Dr Rakan Al Harthy of Sela Sport, who was expressing interest in the Club.

x) The Club was, at that time, in serious financial difficulty. Mr Bettis had come on board as CEO and was bringing some financial rigour to the budgets and cash flows, but the Club was still loss-making and needed cash investment of about £8 million a year. Neither side was willing to invest further, pending the arrival of a new investor, but SUL had to pay further money to SUFC in order to protect it from insolvency.

xi) There was, in short, an extremely difficult and rather stressful position by January 2017. There was no progress in terms of promotion from League One, the owners were unable or unwilling to invest further in the Club and, despite serious endeavours, no white knight had agreed to buy a stake in the Club's future, though Sela Sport was perceived to be the next possibility.

289. Before embarking on resolving the disputed events of 2017, it is appropriate to say something about the witnesses that I heard and the quality and reliability of their evidence.

290. Kevin McCabe gave a remarkable performance in the witness box. He is now in his 70s and, on his own admission, has been slowing down and is ready to hand over the affairs of the Club. He was cross-examined for the best part of three days and

appeared to relish the experience, as presenting an opportunity to set the record straight and explain why he was right. He is clearly a man of considerable physical reserves, appearing to be as fresh and alert at the end of the three days as at the beginning, and willing and able to engage in detailed debate and often lengthy answers and explanation throughout. He is a self-made man and entitled to feel proud of his achievements, but on the other hand he gave every impression of there being little in the way of truth or objective fact that differed from his own understanding or opinion. He plainly believes that his way is the only proper way of doing things.

291. The other principal characteristic that was evident was his ability to talk forcefully and persuasively on any subject. He has the gift of eloquence and was never at a loss for a reasoned and detailed explanation of a matter that he was questioned about, and indeed many points that he was not being asked about. It was easy to imagine his being a considerable personal force at the Club and a dominating presence. There is a recurring theme in the emails in 2017 of Kevin McCabe wishing to have face-to-face meetings with Prince Abdullah and Prince Abdullah and Mr Giansiracusa preferring to communicate by email. It is easy to understand Kevin McCabe's preference. He knows that he is able, by force of personality and a command of words, to dominate a conversation and thereby seek to impose his own will on those to whom he speaks.

292. He demonstrated to me an ability to turn any question that he was asked or any particular issue into an argument or exposition of his choice, often replete with self-justification. It would be an exaggeration to say that he did not answer questions that he was asked, but he rarely answered questions directly, often answered a different question rather than the one that he had been asked, or used the question as a springboard from which to assert his own perception and opinion, and he sometimes avoided answering questions that he did not wish to answer. His answers to questions too often involved assertions that were patently at odds with the documents to which he was taken, or implausible explanations for the difference. These included (on a repeated basis) that emails were "only banter between colleagues"; minutes were unreliable because they were drawn up weeks or months late; social media was inaccurate and unreliable, and he was too busy with other business to reply to emails correcting a false statement.

293. I consider that Kevin McCabe is only able to recall events or even look at documents through the prism of his own subjective beliefs and understanding of how things were, or how in his opinion they must have been, and his belief about who was in the right and who was wrong. There are numerous instances in which the account that he vigorously asserted and defended in the witness box was obviously wrong, or the opinion that he espoused was without any proper factual basis. I shall address some of these in the sections of this judgment that follow.

294. In one case he accepted that he had been in the wrong, namely the failure to tell Mr Bettis that his pay had been stopped, and he apologised for that; yet the real question is not whether he was in the wrong, which he plainly was, but why he acted in the underhand way that he did. I have come with regret to the conclusion that Kevin McCabe was being manipulative and devious in relation to the Deloitte, Van Winckel, Bettis and Ratcliffe incidents, and some of his evidence about those matters was disingenuous. Kevin McCabe was not out-and-out dishonest in the evidence that he gave, though at times disingenuous and less than fully frank. But his perception of

events that happened in the past is distorted in important respects by his own beliefs and prejudices about what was right and wrong at the Club and I feel unable to rely solely on his evidence about those events. It is also clear that to a degree he has re-cast events in order to suit the case that is being advanced on his behalf.

295. It would be wrong, however, to leave the subject of Kevin McCabe's evidence without acknowledging his devotion to the Club and the considerable generosity of his funding of it over many years. He deserves respect for that. Another admirable characteristic was his unwillingness to make unsubstantiated allegations of serious wrongdoing against others, even though he has felt himself to have been badly wronged by Prince Abdullah and Mr Giansiracusa.

296. Mr Tutton also gave an extraordinary performance in the witness box. He was extremely nervous and uncertain in much of the evidence that he gave, and eager to blame others for things that had gone wrong and absolve himself from responsibility. I regret to say that I consider that some of the evidence that he gave in his witness statements, particularly in relation to the Charwell loan, was a fabrication. He readily abandoned his account of how he was told by Charwell's solicitors that Sela Sport was behind the Charwell loan, when pressed to explain the conversations that he said that he had had. His evidence from the witness box about how the Charwell loan "stank" and SUL were the victims in the matter and Prince Abdullah personally responsible was a bravura performance but not at all convincing. He readily accepted that SUL's solicitors had written parts of his witness statements for him, as if that absolved him from responsibility for what was in them.

297. I formed the very clear view from Mr Tutton's evidence, his body language, the content of contemporaneous emails and documents and his constant presence in court, sitting next to SUL's solicitors throughout, that he has acted in this case as Kevin McCabe's trusted lieutenant and has been largely responsible for shaping the way in which its case was presented, by the account and instructions that he has given. It was only he who was willing to say in his oral evidence that Prince Abdullah had taken a bribe from Sela Sport, notwithstanding the documents produced on disclosure from third parties that showed conclusively that the ultimate beneficial owner of Charwell was the bin Laden family, not Sela Sport, and that the Charwell loan had been repaid in full. I feel unable to place reliance on Mr Tutton's evidence, save where it amounts to an admission against SUL's interests or is supported by other reliable witnesses or documentary evidence.

298. Scott McCabe was implacable in his defence of his father on certain issues, even where the line of defence was obviously wrong, for example the specification and sponsorship of the new dugouts, and he was less than completely frank on others, such as the number of non-football events able to be held on the new Desso pitch at Bramall Lane. There was, inexplicably, nothing in his witness statement about his personal involvement in signing the minutes of the June 2017 resolution about keeping Mr Bettis and appointing a COO. I treat his evidence with some caution, though there was little on which his evidence was of particular importance for the resolution of the issues in the case.

299. Simon McCabe appeared to me to be an honest and straightforward witness. He made concessions against SUL's interest where it was proper to do so. I feel that I can rely

on his evidence in general, though again there was little that he was able to add of particular importance for the resolution of the key issues in the case.

300. Mr Birks was a cautious and somewhat diffident witness, who was doing his best to assist the court. However, on one particular point on which his evidence was important I am quite satisfied that he was wrong in his claim that Mr Giansiracusa told him in October 2017 that UTB had repaid its novated part of the Charwell loan. What Mr Giansiracusa said was that part of the loan was novated to UTB so that Blades did not have to repay it. Mr Birks' only interest at the time was in knowing Blades' liability. What he and Mr Tutton say that he recalled in April 2018, upon discovering that UTB's novated debt remained outstanding, was incorrect. I see no reason to conclude that Mr Birks made anything other than an honest mistake: the language of para 74 of his witness statement, which sets out his mistaken recollection, demonstrates how easily he could have misunderstood Mr Giansiracusa's explanation that UTB had the responsibility to pay part of the Charwell loan debt. It was Mr Tutton who made the most of the mistake because it served his (and SUL's) theory at the time that the novation of part of the debt was a disguised bribe of Prince Abdullah by Dr Rakan.

301. Mr Giansiracusa was an intelligent, eloquent, careful and in my judgment truthful witness. He was accused by Mr Downes QC of having acted in a deliberately slippery way. There were undoubtedly occasions on which Mr Giansiracusa was pushing the limits of what was fair and straightforward in his dealings with SUL. In particular, he drafted the May 2017 board resolution in a way that made it more likely that SUL-appointed directors would overlook the main point, which was the agreement to retain Mr Bettis, and he misstated the extent to which that matter had been discussed with both owners. On occasions he drafted and amended minutes of meetings in a way that was calculated to provide a record favourable to UTB rather than an entirely accurate summary of what took place: the minutes of the Bad Ragaz meeting in July 2017 and the minutes of the October 2017 board meeting, in particular. In such cases, his view (and justification) was that he was not dealing with unsophisticated people and that accordingly they could be expected to read what was provided and object where appropriate to do so. Mr Giansiracusa knew that Prince Abdullah was being less than straightforward with Kevin McCabe about the Project Delta "commission" and played his part in the cover up of the use to which that commission (if paid) would have been put. These were not attractive features of Mr Giansiracusa's conduct, but they were not abusive or improper. He was not evasive or untruthful about these matters in evidence and, despite what I have said about aspects of his conduct, I found him to be a truthful witness.

302. Prince Abdullah was at a slight disadvantage in giving evidence, in that his English, though good by any standards, was not entirely fluent where sophisticated language or concepts were concerned, and there were moments where genuine misunderstandings occurred during his cross-examination and he had to ask for words to be explained. His spoken English is quite strongly accented, which led in some cases to difficulty with the transcription of his evidence. I take these matters into account in assessing the way in which he gave evidence, what he said and the reliability of his evidence. He is, however, a very intelligent man who readily understood the nature of the dispute and the criticisms made of him. Other witnesses stated that the Prince was a shy man and that is consistent with the impression that he gave in the witness box.

303. The most striking thing about Prince Abdullah's evidence was his apparently poor memory of events, in particular (as he explained) routine meetings that took place in his home. It was evident to me that Prince Abdullah is not a man for small detail: he relies on others to implement his wishes and deal with the fine print and does not immerse himself in the detail of transactions. Nevertheless, there were occasions when it was quite striking that Prince Abdullah appeared to have no memory whatsoever of meetings having taken place, or of what was said or who was present at such meetings, even when those meetings took place in hotels in London or Paris rather than at his home. A particular concern was his professed inability to remember his meetings and discussions with Dr Rakan over the period September 2016 to April 2017, other than the meeting with him in Dubai. I consider that, for whatever reason – whether to shelter his friend or protect himself or UTB's interests – Prince Abdullah was not giving as full a picture as he could have done about his dealings with Dr Rakan.

304. I am also concerned that disclosure was delayed and remained incomplete. The Prince's mobile phone, which contained business emails and Whatsapp messages, was initially not part of UTB's or the Prince's disclosure and was only disclosed under sustained pressure from SUL's solicitors. There were other areas where there must have been more documents – such as the Prince's business diary – but nothing was produced. There is also no doubt in my mind that Prince Abdullah knew and understood that he was concealing from SUL the fact that half of a very substantial commission payable by SUL on the intended sale of its shares in Blades (or some of them) was to be paid back to him. Prince Abdullah thought that this was justified, in view of the part that he had played in Project Delta and the work that his employees had done to further it, but nevertheless this was not conduct that measured up to his own description of himself as being recognised to be beyond criticism in his financial dealings.

305. Despite these matters, and subject to the qualifications that must go with them, I found Prince Abdullah to be a generally reliable witness, and where I am satisfied that he had any detailed recollection of certain meetings – for example the Bad Ragaz meeting of July 2017 and the Corinthia Hotel meeting of 1 November 2017 – I prefer his account of those meetings to Kevin McCabe's account.

306. Mr Alsaady was an impressive, honest and helpful witness. I accept his evidence, in particular that – despite the appearance given by some of the documents – he was only acting for Saleh bin Laden and not for Sela Sport.

307. Mr Bettis was called as a witness by UTB but was in a difficult position. He had the respect of both sides in the litigation (despite the unfortunate treatment of him by SUL in November 2017) but was conscious that he did not want to upset either of them by the evidence that he gave, since his future employment – in a job that he evidently loves – might depend on it. He should have been a wholly impartial witness, on whose evidence I could entirely rely, but I am left with concern about some of the evidence that he gave. He was watchful and careful, and started out in a frank and straightforward way. However, by shortly before lunch on the day on which he gave evidence he had been rattled by being criticised by Mr Downes for allowing himself to become an ally of the UTB side during 2017, after the May 2017 lunch with Prince Abdullah in Los Angeles.

308. The result – it appeared to me – was that after lunch Mr Bettis decided to say as little as possible, and broadly agreed with any leading question that was put to him. Seeing an open goal, Mr Downes took full opportunity to ask him to agree with a large number of factual propositions, or in many cases comments, that were calculated to serve SUL's interests in the trial. For the most part, Mr Bettis obliged and agreed with or acquiesced in Mr Downes' propositions with a single word or (quite often) a single noise of assent. I feel unable to give great weight to this evidence, in the circumstances. In any event, what Mr Bettis thought of Kevin McCabe as a person and employer is hardly material to the issues. The one matter on which Mr Bettis remained resolute was the suggestion that it was understood by him at any time that he was definitely to leave the position of CEO in 2017. He considered that it remained uncertain at the end of the October 2017 board meeting and was never resolved.

309. In the light of those observations about the main witnesses, I can return to the events of 2017 that are in dispute.

310. At the meeting on 9 January 2017 in Dubai, there was discussion between Dr Rakan, Prince Abdullah and Kevin McCabe about a proposed investment in Blades. Prince Abdullah had previously travelled to Jeddah to meet Saleh bin Laden on 30 December 2016, to discuss a possible investment by him. I accept Prince Abdullah's evidence that a loan or early advance of £3 million was not discussed there, though it is clear that a payment of £3 million towards 2016/17 losses was to be paid as part of the transaction. I find that this was raised and discussed in Jeddah: it was referred to as such in a Whatsapp message of 30 December 2016. Mr bin Laden had obviously expressed sufficient interest in a substantial investment that his name was – as all agree – specifically mentioned by Dr Rakan at the meeting on 9 January as a possible investor.

311. Given that Prince Abdullah had met Mr bin Laden shortly before that meeting, it is inconceivable that there was no discussion of him as a potential investor, but I find that there was also shared hope and expectation that Sela Sport itself would take a small stake. Everyone involved seemed to desire that outcome, for various reasons. Kevin McCabe was aware that Sela Sport had previously organised investment or a fund for investment in a New York football club and the expectation at that time was that Sela Sport would similarly "organise" the investment. I find that, apart from the genuine possibility that Sela would invest, it was also regarded by all involved as convenient for Sela Sport to front the proposed deal and therefore the investor was referred to throughout as Sela Sport, rather than Charwell or bin Laden.

312. Although a £3 million early loan had not previously been raised with Dr Rakan and had not been discussed with Mr bin Laden on 30 December 2016, it clearly was discussed in Dubai. It was very important from SUFC's perspective, as the owners were unwilling to fund the Club at that time. It mattered not greatly whether it was to be an advance on a larger capital investment or a loan: SUFC desperately needed the money. Although Dr Rakan evidently gave some comfort about the £3m loan, it could not have been with the authority of Mr bin Laden at that stage. However, Dr Rakan must have appreciated that if the investment was to proceed the "loan" could be treated as a part payment of the capital investment. That is what all the parties understood could be arranged. There is no evidence that Dr Rakan was offering himself or through Sela Sport to lend £3 million.

313. Dr Rakan evidently gave sufficient comfort about the investment on that occasion for Kevin McCabe to believe that everything was very promising and likely to bear fruit. I find that the McCabes believed after the Dubai meetings that a loan would be made by the investor(s), that it would be capitalised if the investment proceeded, and that it could still be capitalised if the investment did not proceed. What was not spelt out in Dubai was whether the lender or the borrower should have the option to capitalise if the investment did not proceed, but it is clear that the McCabes assumed that it should be at the borrower's option. That is what Scott McCabe told Mr Tutton in an email later on the same day.

314. Kevin McCabe said that, at the end of the meetings in Dubai, Prince Abdullah told him that whatever happened at least Blades would have a £3 million loan that did not have to be repaid. He and Mr Tutton (who was not in Dubai) later claimed to have relied on that assurance, and on its being a justification for Prince Abdullah having to repay the part of the Charwell loan that remained on Blades' books. At an even later stage, the supposed assurance of Prince Abdullah was relied upon (despite the fact that the Charwell loan had by then been repaid in full) as evidence that the financial accommodation that was being arranged was in the nature of a bribe from Sela Sport to Prince Abdullah.

315. Prince Abdullah's account was that he said at the end of the meeting that the loan might not have to be repaid if an investment was made in the Club, and that even if there was no investment the loan was interest-free and would hopefully be paid back using income from new sponsorship deals once the Club was promoted. He says that he gave Kevin McCabe no assurance that the loan would not need to be repaid in any circumstances.

316. I consider it most unlikely that Prince Abdullah gave Kevin McCabe any absolute assurance. Whether or not the loan would be made was still uncertain, even if Dr Rakan had agreed in principle that one could be arranged. Undoubtedly, all parties had fastened on the fact that any such loan would be made by the potential investor(s) and so could be converted to equity in the event that the investment proceeded. There was considerable optimism (rather too much optimism) that the investment would proceed. Kevin McCabe in particular assumed that it would. In a rather strange way (for an experienced businessman), Kevin McCabe was reassured that the investment would proceed by the fact that Dr Rakan agreed that in principle a loan could be made, and then – when the loan was made by Charwell – took that as proof that the investment was indeed going to happen.

317. I consider that both Prince Abdullah and Kevin McCabe were in optimistic mood at the end of the meetings in Dubai, not just because an investment was now a serious prospect but because there was agreement in principle that a much needed loan would be made available. I do not however accept that Prince Abdullah said anything more than that the loan would be capitalised and that (since both parties believed the investment would proceed) it therefore would not have to be repaid. I reject the evidence of Kevin McCabe that an out-and-out assurance was given that in no circumstances would the loan have to be repaid, and I also reject the embellishments that appear in Prince Abdullah's witness statement. I do not accept that Prince Abdullah had such a detailed recollection of exactly what was said to Kevin McCabe, though I do accept his evidence that he would not have given and did not give any categoric assurance.

318. Kevin McCabe was strongly of the view that the loan would not be repayable because he believed and assumed that the deal would proceed, whereupon it was accepted that it would be converted into equity. Prince Abdullah – who knew Dr Rakan well and had just met Mr bin Laden – was also optimistic that the deal would proceed. Mr Bettis was quite clear in his evidence that his understanding on the plane back to London that night was that if the deal did not proceed the loan would be repaid. That is also consistent with the note of the meeting between Prince Abdullah and Kevin McCabe that was made in Scott McCabe's notebook.

319. The draft loan agreement that Mr Tutton sent Dr Rakan on 10 January 2017 was non-specific about whose option it would be to convert the loan to equity if the investment did not proceed. Mr Tutton characterised that as inept drafting on his part. In due course, however, a different draft loan agreement came from Mr Alsaady, ostensibly acting for Sela Sport but in fact acting on behalf of Mr bin Laden and Charwell. Mr Tutton picked up the fact that this draft gave an option to capitalise to the lender, but not to Blades, and he correctly pointed out the importance of this change to Kevin McCabe.

320. By that stage, however, Kevin McCabe was not interested in such details. He (through SUL) had just had to provide another £600,000 to SUFC so that it could pay its wages bill on time. There was a desperate need for funds. As Mr Tutton put it in his third witness statement, "I was upset at the perilous state of affairs at the Club" (para 98). By April 2017, Kevin McCabe had quite forgotten that the option had been given to the lender and he had to be reminded of that fact by Mr Tutton at that time. The conclusion that I draw is that Kevin McCabe was only interested in getting in the £3 million loan, not in whether it was repayable or on what terms. For him, the loan, once made, would be further strong evidence that the investment was going to proceed, so it was important for all those reasons to ensure that the loan was provided as soon as possible. Although Mr Tutton suggested that there should be a guarantee from Prince Abdullah, Kevin McCabe was not interested in that either. He replied to the effect that the loan agreement should proceed.

321. Another matter that illustrates the urgent need for the loan was the fact that, contrary to what Mr Tutton stated in his witness statements, he did not attempt before the loan agreement was made to comply with money laundering regulations and identify the ultimate beneficial owner of Charwell, when he became aware that it would be lending the £3 million. Mr Tutton's evidence that he spoke to Marianne Kafena at Farrer & Co LLP and that she volunteered that the owner of Charwell was Dr Rakan was a fabrication. On 2 February 2017, Mr Tutton emailed Kevin McCabe:

> "I think I should sign for Blades and Scott or you sign for SUFC. At this stage I'm not going to bother with asking any questions about who the lender is unless you are particular, but a little KYC is called for I'd hate for Sheffield Star headlines BLades launder money for extremists. Please no."

Although Kevin McCabe did not reply to that particular email, another email about the loan was sent by Mr Tutton shortly after it, to which Kevin McCabe's response was:

> "J Get it done! Let's have them in our cage."

322. Kevin McCabe was in my judgment not in the least concerned whether the money was coming from a bin Laden controlled company, as he must have known it might be. Nothing had been said to him after the Dubai meeting to suggest that the loan was coming from Sela Sport rather than from Mr bin Laden. All that was known was that Charwell was lending the money. Mr Tutton's attempt to explain away his concerns about the borrowing of extremists' money as being a general warning was not convincing. I find that it is likely that Kevin McCabe had told his loyal lieutenant after the Dubai meeting that a member of the bin Laden family might be an investor and that is why Mr Tutton wrote in the terms that he did. Nevertheless, because Kevin McCabe was not bothered, Mr Tutton did no KYC or AML diligence until a week after the loan agreement had been made. On 16 February 2017 he emailed Farrer & Co asking for the AML/KYC information they held on Charwell. Farrer & Co replied that they would usually send copies of the memorandum and articles of association and the certificate of incorporation and asked whether Mr Tutton required anything else. He replied that it was best practice to have something on file and that the documents indicated would suffice. So no attempt was made to identify the beneficial owner or owners of Charwell at that stage.

323. The £3 million loan was duly made, in three instalments, and it appears that SUL just as much as UTB were delighted to have received the money, which they knew had been procured through Prince Abdullah's good contacts in Saudi Arabia and hoped would lead to a substantial equity investment in the Club.

324. The next problem that Blades faced arose in early March 2017, when Mr Bettis informed Kevin McCabe that his business interests in Los Angeles required more of his time and that he was going to move there, but that he would not leave SUFC "in the lurch". By the date of the meeting between Prince Abdullah and Kevin McCabe in the Peninsula Hotel, Paris on April Fool's Day, Kevin McCabe had clearly formed the view that Mr Bettis would be leaving at the end of the season. He told Prince Abdullah so and that he had started the process to find a replacement. The Prince's comment to Mr Giansiracusa the following day was that "I think you should make it clear to him that we should be involved and active in this process, I am afraid that if we leave it to him we will end up with another person who is loyal only to him". There was no evidence that Kevin McCabe told Mr Bettis after the dinner in March that he was to leave at the end of the season. Kevin McCabe's witness statement says that on about 26 April 2017, he agreed with Mr Bettis that a search should start for Mr Bettis's successor. Mr Bettis said that there was no agreement made with him that he should leave at the end of the season. I prefer Mr Bettis's evidence on this point. Kevin McCabe had told Prince Abdullah on 1 April that he was already seeking a successor: Kevin McCabe decided to go down that route without reaching any agreement with Mr Bettis about when he would resign. He simply assumed that Mr Bettis would go when Kevin McCabe wanted him to go. Mr Bettis was hoping that he would not have to go at all and could continue part-time from Los Angeles.

325. At the Dorchester Hotel on 3 May 2017, Prince Abdullah and Kevin McCabe were both "assuming", as Kevin McCabe put it in re-examination, that Mr Bettis would leave in due course, when a successor had been identified and appointed. Prince Abdullah had not at this stage spoken to Mr Bettis about it. Nor had Kevin McCabe. What changed matters was the lunch between Prince Abdullah and Mr Bettis in Los

Angeles later that month. Prince Abdullah wanted to keep Mr Bettis as CEO. He told Mr Giansiracusa and the latter made it his business to try to get Mr Bettis on UTB's side as regards changes to the governance of Blades and SUFC. It was in those circumstances that Mr Giansiracusa drafted and circulated his memorandum dated 23 May 2017, ostensibly relating to the search for a COO but also recording agreement that Mr Bettis should stay as CEO on a part time basis for the 2017/18 season. Mr Giansiracusa was criticised in cross-examination for concealing in recitals to the draft board resolution to search for a COO what should have been a board resolution to keep Mr Bettis on part-time basis. There was an element of craftiness in the way that Mr Giansiracusa proceeded; it would have been more straightforward to have included a resolution about Mr Bettis too. But as Mr Giansiracusa himself said, he was dealing with experienced professional directors, including Scott and Simon McCabe, who both supported Mr Bettis's retention in the short term, not individuals who did not know their way around board resolutions. The draft resolution was only one page long, and it was signed by all the directors of SUFC individually.

326. Kevin McCabe accepted in cross-examination that, in view of those documents, the position by June 2017 was that Mr Bettis was to stay part-time for the following season. In my judgment, that acceptance was realistic and correct. Although there was no formal resolution as such that Mr Bettis should remain, he was in fact employed as CEO at the time, and the recitals in the board resolution reflect agreement by the directors that he should remain part-time for at least the following season. Scott McCabe and Simon McCabe both stated in their evidence that that correctly reflected their views at the time. I reject the argument that Mr Giansiracusa's draft minutes had been so deviously presented that the board did not know what it was doing, even though Mr Bettis was led by Mr Downes to agree that he had not realised when signing the minutes what exactly he was agreeing to. Mr Bettis said on 21 May that he was happy to continue in the role of CEO if that is what the owners and board would like. The agreed position in mid-June was therefore that Mr Bettis was staying as CEO part-time for the following season.

327. Nevertheless, Kevin McCabe continued with his plan to remove Mr Bettis. His reason was that, although he recognised that Mr Bettis was an able and valuable executive for the Club, the job of running a football club in Sheffield could simply not be done by a man living in Los Angeles and only occasionally in the UK. That may well have been a valid viewpoint and was genuinely held, but the decision was for SUFC to take, not for Kevin McCabe. His plan at this time centred on recruiting Andy Birks, a friend of the family, as the new COO. Despite the fact that (as I find) Kevin McCabe knew Mr Birks and knew him as a close friend of his son, Simon, he told Mr Giansiracusa that "I have a meeting tomorrow with Andrew Birks (not met him before) who's been recommended to us by a business colleague." The business colleague was in fact Simon McCabe. Mr Birks was interviewed by Kevin McCabe, then by the committee established by the board resolution for that purpose, and Mr Birks was installed as COO on 26 June 2017.

328. Once appointed, Kevin McCabe saw Mr Birks as likely to take over as CEO and in the meantime able to take guidance not from Mr Bettis as CEO but from the three McCabes:

> "it's abundantly clear that CEO duties are impossible to administer for an organisation – SUFC – that operates only

> from one location namely Sheffield… Within two months Andy will be fully in the "pound seat" where in the interim he of course receives direct guidance (not interference) from Scott, Simon and myself…"

Mr Giansiracusa by reply criticised that approach and pointed out that UTB would be "extremely concerned" if there was any deviation from the understanding reached by the board about Mr Bettis's role. Whether Kevin McCabe's opinion was right or justified is not the issue: the question is whether it was right for him to seek to go behind the board's agreement that Mr Bettis should remain as CEO.

329. I find that Kevin McCabe at this time had determined that if Project Delta did not happen, he would de facto take control and run the Club's affairs in a different way, with a view to stopping the accrual of annual losses until a buyer could be found. On 10 May he had said to Mr Bettis in an email that "in some shape or form we have to know that Delta will definitely happen and quickly or SUFC has to change course to suit us where Scarborough will then dictate on a like it or not basis. My patience is running thin!". Asked about that in cross-examination, Kevin McCabe said that what this meant was that he would begin to look again at investors, including investors from China. I reject that explanation, which was disingenuous. Although in the autumn potential investors from the United States did come forward, looking for investors was no change of course. That would go on regardless. What Kevin McCabe meant was that, in the meantime, he would shake up the way that SUFC was run to suit SUL's agenda, which meant no further investment from SUL and close control by Kevin McCabe. Mr Birks was the means by which Kevin McCabe was going to achieve this aim, and, as Mr Birks explained, on his first day at the Club he was introduced to everyone as the CEO and the COO and the man who was going to take over the running of the Club.

330. By this time, Prince Abdullah had ceased his ministerial duties and was about to be reappointed a director of Blades and SUFC. That was one of the issues discussed at Bad Ragaz on 24 July 2017, by which time Project Delta had fizzled out entirely. Mr Bettis's position was also discussed: Prince Abdullah was willing to compromise on keeping Mr Bettis as CEO until the end of January 2018, but no agreement to that effect could be reached. Kevin McCabe had to accept that clause 5.11 of the ISA entitled UTB to appoint a finance director, but he asked Prince Abdullah to reconsider his decision to do so.

331. A further matter of dispute was the appointment of Deloitte. Kevin McCabe was implacably opposed to their involvement at the Club. Prince Abdullah wanted them to conduct a review. It is right to say that UTB had no entitlement to have such a review conducted. It was a matter on which the board would have had to decide if the two principals could not themselves reach informal agreement. When the Project Delta transaction fell through in June 2017, Prince Abdullah met Deloitte – who were intended to have been involved in the due diligence exercise for Project Delta – to request them to review, principally, payroll costs, transfer policy and the Academy's performance. At Bad Ragaz a compromise was apparently reached. The amended minutes recorded that Kevin McCabe did not agree that Deloitte should be mandated but accepted the mandate "provided it was postponed until 1 November 2017". The only natural reading of that wording is that Deloitte should be mandated to proceed but not before 1 November 2017. That is presumably how Kevin McCabe read them

too, because almost immediately on receiving the amended minutes in final draft, he sent an email asserting that all that he had agreed was that a further discussion would be held in or after November. Mr Giansiracusa refused to accept that change and suggested that if he wanted to change what had been agreed Kevin McCabe had to speak to Prince Abdullah about it.

332. After a rent review was refused at Bad Ragaz, Kevin McCabe accepts that he was "frustratedly angry". He regarded the absence of an increase in rent as unfair. Mr Tutton also agreed that he was angry about it. The matter was left until a telephone conversation between Kevin McCabe and Mr Giansiracusa on 24 August 2017. A number of issues had been raised on which Kevin McCabe said that he wanted compromise. It is not a surprise that rent review was top of the list, followed by the removal of Mr Bettis; removal of Selahattin Baki from the technical committee and Tareq Hawasli from the board; the use of loan players; and two issues that Kevin McCabe is recorded in Mr Giansiracusa's note of the conversation as objecting to as an insult to him: the proposed appointment of Deloitte and the proposed appointment of a CFO. Kevin McCabe threatened to withdraw from management completely unless Prince Abdullah compromised on these issues.

333. Mr Giansiracusa interpreted this as an invitation to concede on the issues, since no compromise position was identified, and concluded: "Basically, the guy is a bully and a blowhard. I think standing up to him continues to be the best strategy". Prince Abdullah's response to that email contained an uncharacteristic expletive and made it clear that there would be no compromise on Deloitte or the appointment of Mr Van Winckel to the technical committee. He added: "The only question is should we take more calls like this from him? I say we save our time and money and run everything through the board, do you agree?". In reply, Mr Giansiracusa said that he would just keep standing up to Kevin McCabe and see who blinked first.

334. It is clear that, by this stage, passions were already inflamed on both sides and that their positions were entrenched. Prince Abdullah was, as he confirmed in his evidence in court, particularly annoyed by the way in which Kevin McCabe would agree or concede something and then seek to go back or behind it, particularly in the case of Deloitte. He and Mr Giansiracusa had agreed that the right approach was to stand up to Kevin McCabe's attempt to do things his way and deny Prince Abdullah any say – as they saw his behaviour – and to insist on good corporate governance.

335. In the case of Deloitte, I find that Prince Abdullah's recollection of the discussion at Bad Ragaz, as minuted by Mr Giansiracusa, is likely to be correct, and that Kevin McCabe did accept that Deloitte could be instructed to start work as from 1 November 2017 but that he then sought to deny that. Although Kevin McCabe did not want Deloitte to come at all, he recognised that it was a point of central importance to Prince Abdullah at this time, but he did not want it to happen at the busiest times of the season: the two transfer windows and Christmas/New Year. Hence November. The reason why Kevin McCabe later became very anxious to keep Deloitte away from the Club in November was that, unknown to UTB, he was making substantial progress in negotiating a valuable deal for the sale of a controlling interest in SUFC to ALK, and did not want ALK to draw the wrong inference from the presence of accountants at the Club at that time. That is why he then tried to put off the Deloitte work until February and took the initiative to book them in for that month. By then he hoped that the deal with ALK would have been agreed.

336. On 20 September 2017, Kevin McCabe sent his sons an email after a discussion of certain disputed issues with Mr Bettis the previous evening. The email suggests that Kevin McCabe had agreed with Mr Bettis that he should step down as CEO on 31 October. I do not accept that there was any such final agreement, even though Mr Bettis was led in cross-examination to accept that the email suggested that an agreement had been reached. Mr Bettis is clearly principled and a man of his word. Had such an agreement been made, Mr Bettis would have told Mr Giansiracusa and would have tendered his resignation. He did not do so.

337. On 11 October 2017, Kevin McCabe sent a note to his side ahead of the board meeting that month, which indirectly called on Mr Bettis to resign. Again, he did not do so. Asked in re-examination by Mr Downes whether he remembered any detail of the conversation, Kevin McCabe suggested that he would have said something like "Come on Steve, why don't you step down at the end of this coming month", and that he "didn't have any reaction of Steve as saying 'No, no, no'; he had a reaction from Steve saying 'Whatever suits, Kevin'. I find that Mr Bettis was probably non-committal, and probably said something apparently accommodating to Kevin McCabe's wishes, such that no dispute arose and Kevin McCabe thought that he had what he wanted. I find that it is understandable that Kevin McCabe thought that Mr Bettis was willing to resign, but that Mr Bettis had not agreed to do so. It is clear that Mr Bettis wanted to stay on part-time and would not have agreed anything without referring to UTB's side.

338. The note that Kevin McCabe prepared was sent on 11 October 2017 to the SUL-appointed directors and Mr Bettis. The note promoted the appointment of Mr van Winckel to the technical committee, subject to the need to work harmoniously with the Club manager. It counselled opposition to the appointment of a CFO and suggested instead that Mr Birks might recruit a lower-level employee to assist, while recognising UTB's right to appoint a CFO "but it seems totally inappropriate to do so at such a high level paying unnecessary costs that the Club simply cannot afford". It suggested that Mr Bettis write to Prince Abdullah and Kevin McCabe confirming that he wished to resign as CEO on 31 October. It asserted wholesale opposition to Deloitte and promotion of a rent review on an equitable basis. It suggested that Prince Abdullah be told that the part of the Charwell loan on Blades' books was Prince Abdullah's responsibility. It reaffirmed that SUL was not going to provide any further funds to SUFC "given current circumstances".

339. With the exception (at that stage) of Mr van Winckel's appointment, this was a sign that Kevin McCabe was determined to continue to oppose Prince Abdullah on all fronts. He was determined to oppose the corporate governance changes that Mr Giansiracusa for UTB was trying to implement and he wanted to retain practical and effective control of the Club. Although the venture had started out with Kevin McCabe willing to hand on the baton, that was on the basis that the recipient of the baton was so rich that SUL no longer had to fund the Club and the Club would be in excellent hands for the future. When Kevin McCabe's expectations about funding were confounded, he decided that Prince Abdullah was not a suitable person to whom to hand over. He wanted to take back control of the Club until such a suitable person could be found and a buy-out (of shares and property assets) be achieved.

340. Oddly, Kevin McCabe was not a director of Blades or SUFC at this time, and so he was not present at the 26 October 2017 board meeting. Mr Tutton, Mr Green and Mr

Bettis were the SUL-appointed directors present. Mr Bettis's own future was raised at the meeting. A transcript of the meeting shows exactly what was said. Mr Bettis said that he left it in the hands of the owners to decide: he didn't want to be the cause of a fight or problems and would go if that was what they wanted. Mr Tutton stated that he was not going to tell Mr Bettis that he had better go, but asked him whether he was devoting the right amount of time to the Club, given where he was living. Mr Bettis said that he was not, but pointed out that he was being paid less than half a full-time salary. Mr Giansiracusa stated that Mr Birks was doing a reasonable job as COO but was not ready for the CEO role and that Mr Bettis, who had a good working relationship with the Club manager, was needed to provide a steady hand for the following season. Mr Bettis then said that if Kevin McCabe wanted him to leave he would leave, it was as simple as that. Mr Giansiracusa said that if Kevin McCabe made that demand it would be over UTB's objections and that the Club was best served by Mr Bettis staying in his role. Mr Green clearly agreed at that point and later spoke strongly in favour of keeping Mr Bettis. Mr Tutton did not, as he could have done, either confirm that Kevin McCabe did insist that Mr Bettis leave, or call for a vote on the question. He said that he did not see any issue. As a result, Mr Bettis's position was left up in the air: although the majority of the board was in favour of retaining the status quo, Kevin McCabe was not present. Mr Bettis's evidence was that he believed that there would be other discussions subsequently with the owners to resolve matters.

341. After the meeting, Mr Tutton sent Kevin McCabe an email reporting on matters, telling him that he had raised all his matters and received all the answers he didn't want to hear. He told Kevin McCabe that he had put it to Mr Giansiracusa that SUL would not put in more funds and that Mr Giansiracusa had replied that Prince Abdullah would not put in funds either in that case, "Therefore heading for the impasse you want". This, in my judgment, was an indication that Kevin McCabe expected that, on a number of matters, neither side was going to back down and therefore the company would become deadlocked and one side or other would have to back out. Mr Tutton commented on Mr Bettis's performance at the meeting, but did not say that he had resigned, or that that it had been agreed that he should do so. I find that there was no agreement or expectation that Mr Bettis would resign.

342. The email exchange later that evening between Scott McCabe and Mr Tutton shows that the McCabes knew that Mr Bettis had not resigned. Nevertheless, Kevin McCabe proceeded to instruct Mr Birks to remove Mr Bettis from the payroll. I find that that was done in a way calculated to ensure that UTB did not find out about it for some time. Kevin McCabe knew full well that UTB had not agreed to remove Mr Bettis and that he had not resigned. He would have known from Mr Tutton's oral report the day after the board meeting that the sentiment on the board was in favour of keeping Mr Bettis (he also received Mr Green's email to that effect dated 31 October 2017). Since Kevin McCabe was determined not to back down on this issue but knew that UTB would not agree with him, Kevin McCabe did not raise Mr Bettis's position at the meeting with Prince Abdullah at the Corinthia Hotel on 1 November 2017, even though he knew that UTB and the board supported Mr Bettis's retention and that the position therefore was that Mr Bettis had not been removed or resigned.

343. Kevin McCabe wrongly decided to act unilaterally to try to force matters and tried to conceal this from everyone, including Mr Bettis himself, even though Kevin McCabe

saw him at the football match at Loftus Road on the same day as the Corinthia meeting. In my judgment, Kevin McCabe, with Mr Tutton's support, had determined to present UTB with a fait accompli. Suborning Mr Birks into doing the dirty work with the payroll and keeping Mr Bettis in the dark, while he did a month's unpaid work before he discovered what had been done, were for them an acceptable way of achieving their objective, though in the cold light of the courtroom Kevin McCabe accepted that he had acted wrongly. Kevin McCabe acted immediately to reassure Mr Birks that he had settled in well and that when he needed guidance Kevin McCabe was "always to hand and available in an 'untitled CEO type role' to help". Kevin McCabe was, I find, using the removal of Mr Bettis to tighten his grip on the Club's business affairs.

344. Mr Giansiracusa and Prince Abdullah were incensed when they found out about that underhand behaviour, at the end of November, but that discovery was significantly after the breakdown in relations had occurred. The breakdown was caused by what happened about Deloitte and Mr van Winckel first, which led Mr Giansiracusa to start drafting his email of rebuke, and then the discovery about Kevin McCabe's interference in UTB's appointment of the finance director, Mr Ratcliffe, which provided further material to include in the email. The sequence of events was as follows.

345. Deloitte was discussed at the Corinthia Hotel on 1 November 2017. Both principals said afterwards that it was a "good meeting". Following the meeting, Prince Abdullah emailed to confirm that Kevin McCabe had agreed that the Club should carry on with the Deloitte review and that they had agreed that Mr van Winckel join the Club as a consultant for 3 months. Kevin McCabe replied that evening confirming that as regards Deloitte "your decision to proceed with them is accepted by me" and that in the case of Mr van Winckel a "punch point note" of how he saw his role was being awaited. When it was received Prince Abdullah should leave matters to Kevin McCabe to progress a three-month probationary consultancy arrangement with a view to a permanent position. That, one might have thought, would be the end of both those previously contentious matters, but within a week or so Kevin McCabe was seeking to go back on both matters.

346. In my judgment, what was agreed at The Corinthia was unambiguous. UTB was entitled following the meeting to assume that both matters would proceed without further delay. I reject Kevin McCabe's attempted explanation that all that was agreed at The Corinthia about Deloitte was that they should proceed at some time, but that the question of when was a good time had still to be decided. The start of Deloitte's work had been deferred from July until 1 November 2017. Provided that Prince Abdullah still wished to proceed with it at that time, after having thought about it again, as he promised at Bad Ragaz that he would, the work was to proceed in November. On 8 November 2017, Kevin McCabe first acknowledged to Mr Tutton that he had so agreed at the Corinthia; but then he wrote to Mr Giansiracusa saying that he would wish to see the mandate to Deloitte, that the mandate should not be triggered at this particularly busy time, and that February would be a better time.

347. Kevin McCabe met Mr van Winckel on 10 November. He had changed his mind about that appointment too. Mr van Winckel reported that Kevin McCabe was now seeking to postpone his appointment, on the basis that it was a sensitive time and momentum at the Club should not be disrupted. It is clear from Mr van Winckel's

email that Kevin McCabe had leaned on him, in an attempt to persuade him to sell the idea of a postponement to Prince Abdullah, in order to avoid a storm.

348. Prince Abdullah intervened by email on 11 November:

> "I have to be frank with you, if after what we agreed on our last meeting in London regarding Jan [van Winckel] and Deloitte doesn't start this week, I see it very difficult that we can work on any thing together, I hope both of these things move forward this week."

They did not move forward. Kevin McCabe replied asking Prince Abdullah to let matters rest until the end of the season in the case of Mr van Winckel, and later that month he said only that Deloitte could start "at an appropriate time".

349. The issue here is not whose judgment about the value of Deloitte and the timing of Mr van Winckel's introduction was right, or whether Kevin McCabe's views were reasonable ones. The issue was that after a lengthy debate Kevin McCabe had given an assurance to Prince Abdullah and then gone back on it. Prince Abdullah considered that Kevin McCabe had broken his word and that he could not trust him. Prince Abdullah accepted that he was angry about the Deloitte and van Winckel incidents, and then very angry about the way that Kevin McCabe had dealt with Mr Ratcliffe's contract and Mr Bettis's pay.

350. In my judgment, Prince Abdullah was entirely justified in being offended by Kevin McCabe's behaviour, which was underhand and deliberately obstructive, despite the agreement that he accepted had been reached at the "good meeting" at The Corinthia. Kevin McCabe's subjective belief that the requirements of the Club at the time justified his decision misses the point. It is his case in this trial that Prince Abdullah was effectively his partner and the two of them (through their corporate vehicles) owed each other duties of fair dealing, candour and good faith. Yet here Kevin McCabe was quite deliberately operating behind Prince Abdullah's back to try to subvert agreements that they had only just confirmed. He probably did not see it that way, and certainly does not see it that way now, but that was what it amounted to.

351. It was at this time that Mr Giansiracusa started to draft his email of rebuke (based on the Deloitte and van Winckel matters, and previous disagreements). Prince Abdullah, Mr van Winckel and Mr Hawasli all saw the draft of the email and commented on it. But, before it was sent, the incident with Mr Ratcliffe's contract occurred. Mr Giansiracusa said that, even in comparison with the anger about the Deloitte and van Winckel matters, this was on another level in terms of the offence that was caused. At that point, his and Prince Abdullah's attitude to Kevin McCabe changed dramatically. The criticism is that Kevin McCabe went behind people's backs and used Catherine Frost, an HR employee of the Club, to change the terms of Mr Ratcliffe's contract.

352. The indisputable facts about this incident are set out in paras 102-104 above. The dispute is about what exactly Kevin McCabe did and whether he was either acting appropriately, in the best interests of SUFC, in meeting Ms Frost to answer her questions about the terms of the contract, as SUL says, or (as UTB says) was trying without alerting UTB to get Ms Frost to change the terms of the contract and ensure

that the new finance director reported to Mr Birks rather than Mr Bettis and that there was no reporting line to UTB.

353. My findings about that incident are the following:

i) The appointment of a finance director was a sensitive issue for Kevin McCabe because UTB had the right to make the appointment and remove the appointee at will; Kevin McCabe thought that one was unnecessary and that a junior to Mr Birks would be more appropriate. In that way, Kevin McCabe would maintain his control of the Club's finances.

ii) Mr Tutton was loyally looking out for Kevin McCabe's interests in this as in other matters and tipped him off that the contract needed his urgent attention.

iii) Ms Frost had not drafted the letter or contract on the basis that Mr Ratcliffe had to report to UTB, but on the basis that he was to report to the CEO of SUFC and its board. The first point of concern for Mr Tutton and Kevin McCabe was the reporting to Mr Bettis, whom they had previously removed from the payroll and who was (so far as they were concerned) no longer an employee. The second point was the risk that Catherine Frost would amend the contract in accordance with Mr Giansiracusa's request to insert a reporting line to UTB instead of the board of SUFC.

iv) What Mr Tutton and Kevin McCabe wanted to bring about was that Mr Ratcliffe should report to the COO, Mr Birks, who was Kevin McCabe's man (or so they believed), and that there was no substitution of UTB for the board of SUFC. This is the only way to make complete sense of Mr Tutton's observation that "Catherine Frost is now in an awkward position." She did not know that Mr Bettis's pay had been stopped, as there had been no formal process of resignation or dismissal.

v) Kevin McCabe and Mr Tutton then met Catherine Frost and instructed her to change the reporting structure so that Mr Ratcliffe reported to the COO, but not otherwise to change it. They did not instruct Ms Frost to circulate the amended drafts to Mr Giansiracusa and did not intend that she should do so, but rather intended that the contract should be sent to Mr Ratcliffe in its amended form.

vi) Ms Frost did circulate the amended drafts before posting the letter, pointing out that Kevin McCabe had made changes to the contract and letter. Mr Giansiracusa reacted swiftly and before the letter was posted identified the changes made and not made. He wrote to Kevin McCabe, copied to Catherine Frost, pointing out that he had no authority to make changes and should confirm to Ms Frost that she should take instructions only from Prince Abdullah in relation to Mr Ratcliffe.

354. In my judgment, Kevin McCabe was once more acting wrongly and in an underhand way over the Ratcliffe contract, aided and abetted by Mr Tutton. He did so in order to try to achieve control of Club employees, at the expense of UTB's interests. Again, as with Mr Birks in relation to Mr Bettis's pay, Kevin McCabe was willing to make

use of SUFC employees (Ms Frost on this occasion) to achieve his ends, thereby putting them in an invidious position.

355. Kevin McCabe's response to Mr Giansiracusa's email that was copied to Catherine Frost is revealing: "You're a gentleman who certainly lacks grace". It is evident that Kevin McCabe felt humiliated that he had been called out by Mr Giansiracusa in a relatively public way. He challenged Mr Giansiracusa to pick up the telephone rather than look to create disputes by emails and to show his legal skills and pursue an action if he thought that SUL had breached the terms of the ISA. He said in evidence that Mr Giansiracusa's email was offensive because it was written as a lawyer, not as a colleague, and because it was "blown out of all proportion". He claimed that the changes he had made to the contract were insignificant, and that they were "common sense amendments to benefit SUFC". This was in my judgment disingenuous: Kevin McCabe knew exactly what he was doing, even though he denied it from the witness box. It was his email that provoked Mr Giansiracusa's long email of rebuke on 19 November 2017, but it is clear that the relationship between the sides had already broken down at this stage, as a result of the Deloitte and van Winckel issues.

356. Both sides realised by this time that a separation was close. SUL was at exactly this time entering into a non-disclosure agreement with ALK, so that ALK could start due diligence on purchasing SUL's interest. On 20 November 2017, Mr Tutton commented to Kevin McCabe "Looks like we have the dispute you want." This was a comment on an email from Mr Giansiracusa about SUFC's annual report, which required the statement "...our thanks to Stephen Bettis, who serves so ably as Chief Executive Officer" to be inserted. Kevin McCabe explained Mr Tutton's comment as his wanting a reason for him and Prince Abdullah to get together to sort things out, but I do not accept that explanation. There had been plenty of disputes since the last meeting between them at The Corinthia but they were the very reason why Prince Abdullah was no longer willing to talk. Kevin McCabe was looking for the right pretext to justify steps to force a separation of SUL and UTB, once ALK was ready to proceed.

357. In my judgment, UTB was also starting to consider how the parties could separate, but its thinking was less well-advanced than SUL's. UTB was considering how and when it could serve a call option notice to acquire SUL's shares. Prince Abdullah and Mr Giansiracusa knew that they did not have the ready money at that time to buy out SUL and pay for the property assets within a year. So they preferred to wait and had no immediate plans to serve a call option notice. That is why Mr Giansiracusa said on 6 December 2017: "I'm really looking forward to the day we can pull the trigger on the call option" and why he started to look at the property call option machinery for the first time in mid-November.

358. When it came, on 19 November 2017, Mr Giansiracusa's rebuke was uncompromising and, in certain respects, unnecessarily personally unpleasant. However, it reflected the state that relations between the parties had reached by then; it did not damage a good working relationship. Although Kevin McCabe may have been taken aback by the personal attack in the email, I am quite sure, having seen the man that he is, that he would not in any way have been cowed or intimidated by it and that he would not have been deflected from the course on which he was set. This was to exert his control as much as possible, sell his stake in SUFC to ALK and get out of

the continuing drain on his resources that the Club still represented, but without causing damage to the standing of the Club itself.

359. The proof that Kevin McCabe was not in any way deflected from his course is what he wrote in the following days. First, on 20 November 2017 to Prince Abdullah, he insisted that he wished to communicate with the Prince and not with Mr Giansiracusa and explained that SUFC's business lay in Sheffield, England, not Riyadh, Saudi Arabia "where managing people is not best achieved via 'edicts and resolutions' produced as if the recipients are subservient", and that accordingly he and not the Prince's representatives had an affiliation with the Club's personnel. On the same day, he responded to Mr Giansiracusa, making the same observation about the "Sheffield-centric" nature of the business and stating that the need for change was on UTB's side, not on SUL's. On 21 November, Mr Tutton sent Kevin McCabe an email saying "If Alan Pace and chums are up for it we could take HRH out no problem at all. Remember beautiful clause 11 – Call Option…You just need to get agreement with Alan that he stands behind you irrevocably". (Alan Pace and his colleagues had been in Sheffield for meetings with Kevin McCabe at the same time as the Catherine Frost incident.) The following day, 22 November 2017, Mr Tutton wrote again, advising Kevin McCabe that he should look to structure a deal with the full intention of taking out UTB via the call option route. He warned that UTB may not be able to finance the property call options and so SUL should only propose a price that (if UTB served a counternotice) would be large enough to compensate for SUFC remaining a tenant rather than paying for the property assets. He proposed £10 million and that part of the deal with ALK should therefore be a £10 million initial loan to fund the desired buy out of UTB's interest. Mr Tutton expressed the view that Prince Abdullah might be tempted to cash in his losses, take the £10 million and avoid the need to pay that sum to SUL, fund ongoing losses of a Championship club and then pay £40 million or more for the property assets. Mr Tutton may well have been right in his analysis, but Kevin McCabe thought that he could do better than that.

360. Further proof of Kevin McCabe's determination not to be deflected is in his emails to the SUL-appointed directors and separately to Prince Abdullah, both on 24 November 2017. He first told the directors that they must as directors confirm that Mr van Winckel did not have SUL's approval to sit on the technical committee or be employed "in any shape or form – directly or as a consultant – by the Club". As to the other issues raised in Mr Giansiracusa's "wallpaper email" he commented: "As they say 'water off a duck's back'". He awaited their confirmation "as the smooth running of SUFC is of paramount importance" – presumably to give ALK the impression that they were about to buy into a well-run football club.

361. The email to Prince Abdullah repeated that Kevin McCabe did not approve of Deloitte's involvement and that the work "will be at a sensible date to suit SUFC's business and football operations". He repeated that proposals for Mr van Winckel's involvement could not be agreed as the time was not right and there was little or nothing for him to contribute to a well-run committee. He blamed a misunderstanding of cultures for the lack of harmony between the owners and Mr Giansiracusa for damaging the ethos and spirit of the Club. The letter ends: "It rests with yourself and not myself to sort out these issues which like it or not are disrupting a Sheffield Institution who's roots began in 1855". Characteristically, Kevin McCabe was blaming anyone but himself for what had gone wrong. He was being wholly

uncompromising on his determination to control the Club at that time. Interestingly, his email makes no reference at all to dealings with ALK and no further reference was made by SUL to those discussions before the Call Option Notice was served. The email of 24 November 2017 was forwarded to the SUL-appointed directors with the comment "Let's see if Prince Abdullah can man up and see the light!" Without waiting for a response from Prince Abdullah, Kevin McCabe emailed Mr van Winckel on the same day telling him that his involvement was not desired.

362. Kevin McCabe followed up on this with Mr Bettis (in his capacity as a director of SUFC) on 25 November, asking for confirmation that he agreed with the van Winckel proposal. He said that he sensed that "this will bring the dispute with HRH to a head", and that he intended to circulate a note to all those involved in the Club's football management and the technical committee to the effect that Mr van Winckel would not be joining. He added: "Of course HRH will be copied in". Here, as with the removal of Mr Bettis and the amendment to Mr Ratcliffe's contract, Kevin McCabe was intent on providing UTB with a fait accompli.

363. The suggestion – advanced by SUL in this case – that Mr Giansiracusa's email of rebuke (or other steps taken by him before or after that email to call out Kevin McCabe's conduct) did real damage to the relationship of trust and confidence between UTB and SUL, or cowed or intimidated Kevin McCabe and forced him to submit, is quite unrealistic and is wrong. There was at that time no trust and confidence left in the relationship, and SUL was determined to continue as it had previously, acting in its own interests and not collaboratively with UTB, with a view to selling out to ALK at a large profit. How exactly it was going to achieve that was still unclear, though SUL knew that it could rely on clause 11 and did not need to rely on deadlock. However, clause 11 (and clause 10) carried with it uncertainty. Kevin McCabe's email to Prince Abdullah dated 5 December 2017 strongly implied that the two of them needed to meet in order to decide how to separate their interests.

364. To that end, it appears to have been Kevin McCabe's thinking that a serious dispute, or perhaps deadlock on a material issue, was not inconvenient for his purpose of persuading Prince Abdullah to give up his interest in the Club. I find that by seeking to reassert control in an uncompromising manner, by obstructing Prince Abdullah's attempted reforms and being implacable in his approach, Kevin McCabe was hoping to cause Prince Abdullah to think that his continued involvement in the Club was not worth all the heartache that it was bringing him. Informing Prince Abdullah in December 2017 that he and his two sons would again become directors of Blades and SUFC was part of the same approach: to let UTB know that SUL would seek to exert maximum control, both on the board and through the appointed senior executives.

365. Negotiations with ALK were proceeding apace and a new proposal from ALK was received on 29 November 2017, ahead of a meeting with Kevin McCabe the following week. It was for an initial loan of £5 million by 31 January 2018 and options to buy up to 90% of the equity in Blades in tranches, with the first 20% to be by 30 June 2018. SUL reverted to ALK with a proposal that they provide a loan of £10 million with a view to using it to buy out UTB's interest.

366. At about the same time, Mr Giansiracusa received Mr Bettis's email informing him and Prince Abdullah that his salary had been stopped. I accept Mr Giansiracusa's evidence that he and Prince Abdullah were outraged by what had been done. This

was not just because it went contrary to UTB's aims for Mr Bettis's continued employment but because it was done in an irregular way: without informing Mr Bettis or the directors of SUFC of the fact, and again using an innocent employee to do a wrongful act.

367. The argument advanced by SUL that Kevin McCabe had made it clear in his email of 8 November 2017 about the Deloitte mandate that Mr Bettis was no longer the CEO ("I also don't see the need for Steve's involvement other than in his position to approve as a Director of SUFC") is not persuasive. It was calculated to exclude Mr Bettis from implementing the Deloitte arrangements without making explicit to him or to the UTB side that Mr Bettis was no longer an executive of the Club. The fact that this was being concealed for as long as possible is clear from Mr Tutton's email to Mr Giansiracusa dated 21 November 2017. Mr Giansiracusa had suggested wording to insert into the statutory accounts and report about Mr Bettis "who serves so ably as Chief Executive Officer". Instead of replying to the effect that he no longer did serve in that capacity, Mr Tutton replied pointing out that Mr Bettis had accepted in the 26 October 2017 board meeting that he could not properly fulfil the CEO role from Los Angeles and stating that Mr Bettis had requested that he should not be mentioned in the document "other than where there is a statutory duty to do so". Were Kevin McCabe and Mr Tutton being open about the matter, the response would have been quite different. Mr Giansiracusa replied pointing out that he had not seen any formal resignation from Mr Bettis and that he understood he was serving until the end of the year. Mr Tutton did not take the opportunity then or at any other time during November 2017 to disabuse Mr Giansiracusa of his belief; nor did Kevin McCabe.

368. When Mr Giansiracusa and Prince Abdullah found out what had happened to Mr Bettis, UTB realised that the relationship was beyond repair and that a suitable exit would need to be found. Both sides were then, independently, of the mind that there was no future in their carrying on together as "partners". When later in the month Mr Giansiracusa served short notice of a board meeting to be held on 18 December 2017, he realised that SUL would not attend it, but nevertheless circulated the agenda and proposed resolutions for the purpose of putting everything that he considered that Kevin McCabe had done wrong "on the record".

369. I do not accept that UTB or Prince Abdullah or Mr Giansiracusa acted in November 2017 with a view to causing hurt, embarrassment and distress to Kevin McCabe so that the relationship was destroyed and so that he would take steps under clause 11 of the ISA (or otherwise) to get out of Blades and SUFC. SUL submitted that that was the case and that Mr Giansiracusa was the chosen instrument of oppression, but that argument seemed to me to "protest too much", given what SUL was seeking to achieve at the same time.

370. It is undoubtedly true that Prince Abdullah and Mr Giansiracusa were determined to force Kevin McCabe to respect the constitutions of Blades and SUFC and act correctly through their boards and their appointed CEO, to the extent that matters could not be agreed by the owners. If Kevin McCabe consistently opposed that line, which he did, they regarded it as necessary to force him to act in accordance with decisions of the board and its authorised executives, and not according to Kevin McCabe's preference. That did necessitate opposing him and his wishes, directly and in strong terms, but it was not done for the purpose of embarrassing or intimidating

him. It was done to assert UTB's rights under the articles and ISA and by that means to protect UTB's best interests, as Prince Abdullah and Mr Giansiracusa saw them. Although pugilistic language is present in some internal emails on the UTB side during this period (e.g. Prince Abdullah's email of 17 November 2017: "our war against Kevin McCabe should start from here"), the aim was not to bully or intimidate Kevin McCabe but to make him understand that his behaviour was unacceptable and bring him to heel, so far as corporate governance was concerned. As matters deteriorated, which they did with the revelation about Mr Bettis on 30 November 2017, UTB realised that they needed to make plans to end the relationship too. Later, SUL took them by surprise, by making an oral offer on 20 December 2017 and then serving the Call Option Notice on 29 December 2017.

371. The discussion between Kevin McCabe and Mr Giansiracusa on 20 December 2017 followed a more conciliatory email from Mr Giansiracusa on 17 December 2017. The offer made on 20 December 2017 was probably a tactical offer from SUL, though the tactics were different from those suggested by Mr Tutton in an email earlier that day. Kevin McCabe offered to sell SUL's shares for £10 million on the basis that purchase of the property assets would be deferred for 3-6 years. I find that that offer was made in an attempt to test the water and find out the ability of UTB to fund a payment of that size, and also to flag up the problem with having to pay for the property assets. A range of £5 million to £10 million was clearly in consideration by SUL as an offer for UTB's shares. Acquiring UTB's shares was, in my judgment Kevin McCabe's clear preference, since it enabled him to sell to ALK and retain some interest in the Club. Everything depended on a perception of whether UTB would serve a counternotice, and if so up to what price it would be able to do so.

372. In the event, Kevin McCabe chose to make the offer at £5 million. Despite his evidence in court that he expected UTB to be able to organise funds to pay £5 million and pay for the property assets within 12 months, I find that Kevin McCabe hoped and expected that UTB would find itself unable to serve a counternotice, owing to Prince Abdullah's previous financial difficulties and the problem of having to fund the continuing losses of the Club and pay for the property assets within a year. He said in answer to my question that he hoped that UTB would not serve a counternotice. That, I find, was the truth. He therefore must have considered that he could get away with a price as low as £5 million. As it turned out, £5 million was too low a price. Prince Abdullah's reaction was that it "was not a fair offer". UTB determined on 10 January 2018 to serve a counternotice, believing that it had it within its power to defer the property asset purchase by other means.

G. The Disputed Events in 2018.

373. There was, in the end, no dispute about UTB's evidence that it did not decide to serve a counternotice until 10 January 2018 and did not hit upon the device of transferring some of its shares to UTB 2018 until 22 January 2018. That evidence is supported by the evident hurry in which the transfers were effected and the sub-sales of shares to be purchased from SUL put in place. Had UTB decided earlier to transfer its shares, it clearly would have done so earlier, so that there was a greater chance of the transfer being registered before service of a counternotice.

374. After the Counternotice was received, SUL promptly sought to cause SUFC's directors to execute the property call options and Prince Abdullah personally and then

Jones Day on his behalf intervened to seek to prevent that from happening. UTB considered that its assignment and sub-sale schemes were effective to avoid clause 9.1.12, although I have held that they were not. Prince Abdullah's email dated 30 January 2018 said that no action should be taken in response to Shepherd & Wedderburn's letter calling for execution of the property call option notices until Jones Day had written the following day.

375. Jones Day stated that they disagreed that the obligation under clause 9.1.12 of the ISA had been triggered and that there was therefore a dispute between SUL and UTB and that, in light of that, the status quo should be preserved and no action taken until UTB confirmed that the obligation had been triggered or the board of SUFC agreed by a majority to execute in any event. While emphasising that there was a dispute as to the meaning of clause 9.1.12, the letter did not in terms say that the matter would be referred to the court for determination. It was, in substance, a denial of SUL's right upon completion of the share sale to have the SUFC directors execute the property call option notices. SUL claimed that it was a repudiatory breach of contract, among others, and by letter dated 6 February 2018 purported to terminate the ISA and the contract of sale and purchase on account of repudiatory breaches by UTB.

376. Proceedings were in fact started by UTB shortly after the failure by SUL to complete the sale on 6 February 2018. UTB had contended that SUL should complete but without prejudice to any rights that had arisen prior to the date of completion, however SUL declined to do so, for fear that completion might waive such rights as SUL had to set aside or terminate the contract of sale and purchase. It offered different terms of completion but UTB would not agree these.

377. Further disputes between SUL and UTB during 2018 related to the basis on which each of them should contribute to the repayment of the Charwell loan on 30 April 2018 and the funding of the Club's deficit thereafter. It took two applications made to the Court by SUL to achieve loans of £1 million from each owner for the purpose primarily of repaying Charwell.

H. Breaches of Contract

378. SUL argues that UTB was in breach of the ISA and the contract of sale and purchase in various respects. All but one of the alleged breaches depend on the implication of various terms. I have held, in Part D of this judgment, that there is no implied term of good faith, no implied term restricting a partial transfer of shares or encumbering of a party's own shares or diminishing the value of the other party's shares once a call option notice has been served. I have held that it is implicit that UTB and SUL must not wilfully obstruct or hinder the reunification of the property assets pursuant to clause 9.1.12 of the ISA in connection with the operation of clauses 10 or 11.

379. The allegations of breach of contract no longer matter in this case for the claim for damages. Had UTB successfully evaded the obligation under clause 9.1.12, in breach of contract, and not voluntarily agreed in April 2019 to cause SUFC to execute the property call options, there would have been a claim for damages, which prima facie would have been the difference between the price for the property assets payable under the property call options and the value of those assets subject to the leases to SUFC. However, SUL now accepts that, if SUFC does in due course pay the price under the property call options that have been triggered, there is no financial loss

caused by the breaches of contract alleged. But the alleged breaches of contract are nonetheless important because SUL claims to have terminated the ISA and the contract of sale and purchase on 6 February 2018 for repudiatory breach, with the consequence (if correct) that UTB cannot now enforce the contract of sale and purchase of SUL's shares.

380. The main breach of contract relied on in this regard was the breach of an implied term of good faith, but I have held that there is no such implied term. I have similarly rejected SUL's claim that other terms are to be implied, apart from the obligation not wilfully to obstruct or hinder the operation of clause 9.1.12 of the ISA. By transferring 40% of the shares in Blades to UTB 2018 and seeking to have the transfer registered, UTB intended to defeat the operation of clause 9.1.12 but it did not do so. It did not do so because there is a resulting trust of the shares transferred to UTB 2018 and because the nomination of third parties as transferees of the shares bought from SUL did not mean that UTB did not acquire them and was perfectly lawful. The steps taken by UTB prior to Jones Day's letter dated 31 January 2018 were therefore not a breach of the implied term because, in themselves, they did not obstruct or hinder the operation of clause 9.1.12.

381. The other breach of contract on which SUL relies is a repudiatory breach of UTB's obligation under clause 9.1.12 to cause SUFC to execute and serve property call option notices. I have held that performance of that obligation would have been due immediately after completion of the contract of sale and purchase on 6 February 2018, when UTB paid SUL the price under that contract, thereby "acquiring" its shares in Blades. Completion never in fact took place, but before it was due Jones Day wrote to the directors of SUFC telling them that they must not execute property call option notices before UTB agreed or the board of SUFC resolved to do so. In the circumstances, that was an anticipatory breach of contract – since UTB and SUL would have been obliged upon completion on 6 February 2018 to cause their appointed directors to execute the property call option notices. It was also itself a breach of the implied term because it hindered the operation of clause 9.1.12.

382. Non-exercise of the property call options except at the will of UTB (or with the agreement of the majority of an evenly divided board of SUFC) would have deprived SUL of substantially the whole of the benefit then remaining to it under the terms of the ISA, since the joint venture came to an end with the purchase of SUL's shares in Blades and the principal remaining obligation of benefit to SUL was to trigger the property call options. In my judgment, UTB was plainly refusing to perform clause 9.1.12 on completion on 6 February 2018 or at any time other than a time of its choice, thereby hindering the operation of clause 9.1.12, and it was a repudiatory breach of contract entitling SUL to terminate the ISA. Jones Day's letter dated 31 January 2018 alluded to a dispute about the operation of clause 9.1.12 but it did not say that the options should not be exercised until the court had determined the issue; it said that they should not be exercised until UTB (or SUFC's board) decided that they should be exercised. SUL elected to terminate the ISA (and the contract of sale and purchase) by its solicitors' letter dated 6 February 2018, as to which there is no dispute. The effect of that was that SUL lost the benefit of clause 9.1.12 of the ISA and any other obligation of the ISA that remained to be performed and has instead a claim for damages against UTB for any losses caused by the breach.

383. However, it is not the ISA that SUL needs to terminate if it is to avoid having to sell its shares in Blades to UTB for £5 million: it is the contract of sale and purchase that had to be terminated. This contract came into existence only on 26 January 2018, upon service of the Counternotice, which in terms accepted the alternative offer made in the Call Option Notice. Upon service of the Counternotice, subject only to payment of the price of £5 million, UTB was entitled to SUL's shares on 6 February 2018.

384. Since the contract of sale and purchase of SUL's shares in Blades came into existence as a result of an offer made by SUL on 29 December 2017 and an acceptance of that offer by UTB on 26 January 2018, the contract in question is plainly a separate contract from the ISA itself. The same would be true even if UTB had exercised an option to buy the shares: see Sherwood v Tucker [1924] 2 Ch 440 at 444-5, per Pollock MR. Once an option is exercised, a new contract arises. The new contract is a contract of sale and purchase of shares: Francis v Vista del Mar Development Ltd [2019] UKPC 14 at [1], per Lady Arden. The new contract analysis in these option cases applies more strongly where there is a bilateral contract formed by offer and acceptance.

385. That being so, the termination of the ISA on 6 February 2018 will leave the contract of sale and purchase in place. It will discharge the unperformed obligations of the ISA, leaving SUL with a remedy in damages: Photo Production Ltd v Securicor Transport Ltd [1980] A.C. 827, 849, per Lord Diplock. This is restated in clause 20.2 of the ISA, which provides that any termination of the ISA is without prejudice to rights, obligations or liabilities of any party accrued or arisen prior to termination. It does not therefore terminate the contract of sale and purchase.

386. SUL seeks to avoid this outcome in two ways.

387. First, it contends that the obligation under the contract of sale and purchase was conditional on various matters, including payment of the price and execution of documents that are reasonably required by the buyer, as well as identification of the required transferees of the shares. It argues that the right to have the shares transferred had not accrued at the time of termination and so no such obligation could arise. In my judgment that is an incorrect analysis. The contract of sale and purchase is not a conditional contract: payment of the price and execution of documents are matters of completion. UTB was entitled from 26 January 2018 to have the shares transferred to it at completion, on payment of the price. In any event, the rights of UTB were not rights under the terminated ISA: they were rights under the contract of sale and purchase itself.

388. Second, SUL contends that the contract of sale and purchase arising under clause 11 of the ISA "does not operate in a vacuum"; the rights under clause 9.1.12 are an essential part of the clause 11 contract and "are written into the contract of sale and purchase, as a matter of construction", such that the contract cannot stand without the rights under clause 9.1.12 and therefore termination of the ISA necessarily terminates the contract of sale and purchase. This argument of SUL is not one that was fully developed by Mr Downes QC until closing submissions. SUL's pleaded case is that the ISA and/or the contract of sale and purchase were terminated on account of various repudiatory breaches of contract by UTB. Nothing specific was pleaded about the terms of the contract of sale and purchase. I remain unclear whether SUL is

arguing that the implied terms of the ISA are also implied terms of the contract of sale and purchase, or whether it is contending for an implied term of the contract of sale and purchase that SUL and UTB must cause SUFC to exercise the property call options in compliance with clause 9.1.12 of the ISA.

389. Whichever way SUL is putting its case, I consider that the true analysis is that the contract of sale and purchase contains no such implied term. It is unnecessary to imply any such term into the contract that arises under clause 11 of the ISA for the following reasons. First, the obligations already exist under the terms of the ISA, which as I have held include an implied obligation not wilfully to do anything that defeats the operation of clause 9.1.12 when clause 11 rights are being exercised. Second, the obligation under clause 9.1.12 is triggered by completion of the contract of sale and purchase; it is not a term of that contract. The contract of sale and purchase of SUL's shares in Blades is solely concerned with transferring the shares and paying the price that has been set by the clause 11 machinery. Third, there is no lacuna in the operation of the ISA and the contract that requires to be filled. If SUL as seller of its shares wishes to enforce clause 9.1.12 its remedy is plain: it can affirm the ISA and sue to enforce clause 9.1.12 after completion of the sale of its shares, or claim damages for the loss of that right. If on the other hand UTB had succeeded in preventing clause 9.1.12 from being triggered, SUL would have a strong defence in equity to a claim for specific performance of the contract of sale and purchase of its shares. There is therefore no necessary or obvious implied term of the contract of sale and purchase relating to the operation of the ISA.

390. In case I am later held to be wrong in holding that there are no other material terms to be implied into the ISA, I need to make brief findings about what breaches of any such terms are established – and whether they are repudiatory breaches.

391. The principal breach of contract on which SUL relied was breach of an implied obligation of good faith, in relation to the conduct of Mr Giansiracusa, Prince Abdullah and UTB in November and December 2017 and in relation to the attempt to avoid triggering clause 9.1.12. I have held that there was no such implied term, or at least that no such obligation could exist at a time when one party was exercising or was about to exercise its rights to serve a call option notice under clause 11 or a Roulette Notice under clause 10. If there is any such implied obligation, then in my judgment UTB was in breach of that obligation by Mr Giansiracusa's emails in November 2017 and his agenda and draft resolutions of December 2017. These went further than was appropriate and necessary if the relevant context was one of a cooperative venture in which a good personal relationship between Prince Abdullah and Kevin McCabe was of paramount importance and the parties were required to deal fairly with each other. Although UTB may then have been in breach of an implied obligation to act in good faith towards SUL, there was very significant mitigation for its conduct. SUL had itself been in serious breach of the same obligation during the months September to November 2017 and, for the reasons I have already given, UTB was entitled to be offended and angry by Kevin McCabe's conduct. Nevertheless, the ISA was not terminated by UTB and in my judgment Mr Giansiracusa did in some of his language overstep the mark that would be regarded as appropriate, if there were a good faith joint venture between the parties.

392. I do not, however, consider that UTB's actions with regard to Mr Ratcliffe's appointment and Mr Bettis's employment were breaches of the obligation of good

faith. UTB may have exceeded its rights under clause 5.11 in seeking to set the reporting lines that it did, but there was no absence of good faith in the way that UTB conducted itself. Mr Giansiracusa considered that UTB was properly exercising a right conferred on it by the ISA and it is notable that, at the October 2017 board meeting, Mr Tutton acquiesced in what UTB was doing, and subsequently acquiesced in the terms of the appointment of Mr Ratcliffe. A vigorous disagreement about what was best for the Club and what the ISA permitted is not an absence of good faith. Equally, UTB did not act contrary to the requirements of good faith in seeking to retain Mr Bettis as CEO, even though they were aware that Kevin McCabe (but not all the SUL-appointed directors) wished that he would leave. The board did not vote to invite Mr Bettis to resign. In those circumstances his salary was payable and Mr Giansiracusa was right to cause it to be paid. Even if Mr Giansiracusa was strictly in breach of fiduciary duty in advising Mr Bettis that he had a claim against SUFC, his doing so was an attempt to mollify Mr Bettis at a time when he was angry about the way that he had been treated. In the last year, the Club has derived the benefit of that attempt by UTB to maintain good relations with Mr Bettis. I reject the contention that Mr Giansiracusa acted with the intention of causing Mr Bettis to make a claim against SUFC.

393. Turning to January 2018, if I am wrong in concluding that there was no obligation of good faith binding UTB after SUL had served the Option Call Notice, then UTB was in breach of it by seeking to take advantage of SUL's misjudgment of its motives, without first informing UTB that it considered that – by taking various steps prior to serving a counternotice – it could avoid the obligation to trigger the property call options until a time of its choosing. Since UTB was obliged not to obstruct clause 9.1.12 by taking any such steps, it must therefore have been a breach of the obligation of good faith to attempt to do so without at least disclosing to SUL what it intended to do and the basis of its entitlement. However, the obligation of good faith did not require UTB to offer to rescind the Call Option Notice that SUL had served. UTB was in any event obliged not to do anything that would circumvent clause 9.1.12 by reason of the implied term that I have held to exist.

394. The next question is whether any such breach of the implied obligation of good faith was a repudiatory breach of contract. I consider that any breach constituted by Mr Giansiracusa's communications in November/December 2017 was clearly not a repudiatory breach of contract. The reason is that, by that time, any relationship of confidence and trust between the principals of SUL and UTB had been irrevocably damaged by Kevin McCabe's conduct in the previous weeks or months. UTB's breaches of the obligation of good faith were minor in comparison with SUL's breaches. The ISA-governed relationship had already reached its end stage, with both sides starting to look for the right opportunity and circumstances in which to exercise contractual rights to terminate the relationship. Those contractual rights were unaffected by any breach of the obligation of good faith. There was little else of benefit remaining for SUL in the ISA. SUFC remained a substantially loss-making company and neither UTB nor SUL was prepared to continue to fund it without finding a new investor. The remaining benefit of the ISA for SUL was therefore not taken from SUL by UTB's conduct. (SUL may well have affirmed the ISA by exercising its rights under clause 11 on 29 December 2017, with full knowledge of UTB's conduct and its consequences; however, UTB did not plead affirmation and in

closing disclaimed its ability to argue that SUL did in fact know at that time of its legal right to elect to terminate the ISA.)

395. As regards a breach of the obligation of good faith by seeking to avoid triggering clause 9.1.12 without first drawing its intended actions to SUL's attention, this was of no effect on the substantive rights of SUL under the ISA (other than to give rise to a legal dispute that needed to be adjudicated) if the Scheme was ineffective.

396. If the Scheme to avoid triggering clause 9.1.12 succeeded because (contrary to my conclusion) either the transfer of UTB's shares when lodged or registered will be effective to transfer those shares beneficially to UTB 2018, or because UTB will not "acquire" the SUL shares that are transferred to Prince Musa'ad and Mr Giansiracusa, then UTB would have breached the implied term not to obstruct or hinder the operation of clause 9.1.12. That breach would be a repudiatory breach of the implied term in itself because it would deprive SUL of its very important rights under clause 9.1.12 of the ISA. On the basis that UTB was intending to serve or had served a counternotice, these rights were by far the most substantial rights remaining to SUL under the terms of the ISA.

397. However, a repudiatory breach of any implied obligation of the ISA gets SUL no further for the reasons already explained in paras 383ff above: the contract of sale and purchase was a separate contract. There is no pleaded case that the contract of sale and purchase was a "relational" contract or otherwise subject to an implied term of good faith. Nor could any such implied term be obvious or necessary. Further, SUL does not allege that anything that UTB did after the contract of sale and purchase was formed was a breach of an implied obligation of good faith.

398. For the reasons that I have given, no breach of contract for which SUL has contended amounts to a breach of the contract of sale and purchase that came into existence on 26 January 2018. That contract therefore is not terminated. In that regard, SUL has one remaining argument, which I shall address under Part J of this judgment dealing with alleged unfairly prejudicial conduct (see paras 415, 416 below. That is that unfairly prejudicial conduct of UTB, Prince Abdullah and Mr Giansiracusa was a substantial cause of Kevin McCabe's serving the Call Option Notice on 29 December 2017, which led to the contract of sale and purchase, and that relief granted for such conduct should include setting aside the Call Option Notice or the contract of sale and purchase.

I. Conspiracy to Cause Harm to SUL

399. SUL advances an additional claim that it suffered loss caused by UTB, Mr Giansiracusa and Prince Abdullah conspiring together to use unlawful means to harm its interests. At one stage, SUL also relied on a lawful means conspiracy whose predominant motive was to harm SUL's interests, but that alternative claim was abandoned by SUL during the trial.

400. SUL contends that UTB, Mr Giansuracusa and Prince Abdullah acted in combination and unlawfully in two separate respects. First, in waging a war of attrition against Kevin McCabe in November and December 2017, calculated to cause him to give up SUL's interest in Blades by using the exit mechanisms of the ISA or otherwise offering to sell out to UTB. The alleged loss crystallised when SUL served the Call

Option Notice on 29 December 2017, which gave UTB the option to buy out SUL for £5 million. Second, in seeking to conceal until the last minute the Scheme that UTB had conceived to deprive SUL of the benefit of clause 9.1.12 upon completion of the contract of sale and purchase.

401. As far as the first of these is concerned, I have already found that there was no conspiracy in November and December 2017 to cause harm to SUL by making its position as an owner of Blades untenable. Prince Abdullah and Mr Giansiracusa, with the input of others such as Mr van Winckel and Mr Hawasli, worked together to seek to protect UTB's best interests, as they saw it, which necessarily involved curtailing the liberties and influence of Kevin McCabe. They considered that the events relating to the engagement of Deloitte, Mr van Winckel's appointment, Mr Ratcliffe's appointment and Mr Bettis's employment required them to confront Kevin McCabe in a strong way. They agreed how to do that to best effect. But the purpose was to cause Kevin McCabe to realise that his behaviour would not be tolerated and must cease. Their objective, as demonstrated by the Whatsapp messages exchanged before the meeting on 19 November 2017, was to restore proper balance between the two sides in the management of the Club's affairs. I find that there was no intention to cause SUL to give up its involvement in Blades.

402. Although some strong, excessively hurtful, language was used by Mr Giansiracusa in his communications with Kevin and Scott McCabe, there was nothing unlawful in what was done. There was no motive to injure SUL and no intention to cause Kevin McCabe to walk away from the Club. Prince Abdullah and Mr Giansiracusa were angry about Kevin McCabe's conduct, and this anger only increased when they discovered the way that Mr Bettis had been treated. Nevertheless, I find that before the service of the Call Option Notice on 29 December 2017 UTB had made no decision to acquire SUL's interest in Blades or to cause SUL to serve a call option notice. UTB was starting to consider exit routes because it had become apparent that it could no longer work with SUL, unless Kevin McCabe fundamentally changed his *modus operandi*. But UTB had not reached a decision that it should operate clause 10 or 11 of the ISA, or that it should attempt to force SUL to do so. Both parties were looking at various ways of restructuring the ownership of Blades, by selling an interest to another investor, and had been for some considerable time. Unknown to Prince Abdullah and Mr Giansiracusa, SUL was at that time well advanced in discussions with ALK that would involve UTB's shares being acquired by ALK. When Kevin McCabe made an offer on the telephone to Mr Giansuracusa on 20 December 2017, UTB was interested to consider it further and possibly negotiate the offer down, but still had made no decision about what to do.

403. In any event, I find that the various rebukes and criticisms that were directed at Kevin McCabe in November and December 2017 were not a cause of SUL's serving the Call Option Notice. That act was entirely a calculated decision by Kevin McCabe, after careful discussion with Mr Tutton and no doubt his sons over Christmas that year, to take advantage of apparent financial weakness of Prince Abdullah, so that SUL could acquire UTB's shares cheaply and sell on at a substantial profit to ALK. The argument that Kevin McCabe was left with no alternative and that the hurtful treatment he had received caused him to trigger the exit machinery does not stand up to analysis.

404. In the first place, Kevin McCabe, though no doubt stung by the criticism he received, is not the kind of man to be intimidated by cross words. He is a seasoned businessman with the experience, toughness and "good humour" (as he often states in his emails to others) to rise above such matters. Second, his intention was not to sell SUL's shares and get out but to acquire UTB's shares as cheaply as possible. Despite the oral offer to sell SUL's shares for £10 million – which was a means only of testing UTB's means and resolve – and the discussion with Mr Tutton about offering up to that sum to buy out UTB, the offer that SUL made for UTB's shares was at the unrealistically low figure of £5 million: about one-third of Prince Abdullah's investment to that time. Despite Kevin McCabe's claim that he assumed that a wealthy Prince Abdullah would be able to fund the property call options or find another investor, I consider that he calculated that Prince Abdullah would feel unable to take the risk of such a substantial future liability, even if he could raise the £5 million. Kevin McCabe believed that SUL could if necessary afford to pay that sum from Scarborough Group's resources, in the event that no counternotice was served by UTB. Although the hoped-for loan of £10 million from ALK had not yet materialised – Mr Pace had indicated that he required some due diligence to be done before he would take that step – there was still every prospect in late December 2017 that the deal with ALK would proceed.

405. Third, Kevin McCabe does not say in his witness statement that he was so hurt by the attack on him that SUL was left with no choice but to seek to get out of Blades. What he says is that he recognised that it was in the best interests of the Club for the dispute to be resolved on the basis that one or other party should take complete control and "get on with it", and that owing to the breakdown of the relationship with Prince Abdullah it seemed appropriate to operate the machinery in the ISA to resolve matters one way or the other. However, Kevin McCabe had every intention of it being SUL that would buy out UTB, not least because he regarded those acting for UTB as inadequate and unsuitable to run the Club. Although no deal had at that time been struck with ALK, Kevin McCabe was optimistic – as he had been in January 2017 with Sela Sport – and was willing to take the chance that the deal with ALK would shortly be agreed. The relationship with Prince Abdullah had certainly deteriorated in November 2017 but it had been apparent for some time that the ISA would be terminated once a suitable and willing investor was found.

406. For all these reasons, I reject the argument that an unlawful means conspiracy caused SUL loss as a result of the service by SUL of the Call Option Notice.

407. Turning to the second aspect of the unlawful means conspiracy claim, SUL claims that Mr Giansiracusa, Prince Abdullah and UTB conspired together to try to deprive SUL of the benefit of clause 9.1.12 of the ISA, in particular by concealing their intentions until the last minute. The unlawful means invoked for this purpose are the underlying breaches of contract by UTB (breaches of an implied term and the obligation under clause 9.1.12 itself) and fraudulent misrepresentation by Mr Giansiracusa on 25 January 2018, when he implied to Shepherd & Wedderburn that he had no instructions from UTB about service of a counternotice ("I don't have instructions from my client. You'll be notified if and when I do.").

408. As for that email, I find that it was Mr Giansiracusa's intention to keep SUL and its solicitors guessing for as long as possible about UTB's decision to serve a counternotice, although in fact Mr Ratcliffe had already heard from Mr Hawasli that UTB was intending to serve one. The fact that Mr Hawasli had spoken openly about

UTB's intention demonstrates that there was no concerted attempt at secrecy. At about the same time that Mr Giansiracusa's email was sent, Jones Day sent SUL the stock transfer form in favour of UTB 2018. Mr Giansiracusa explained his email as just "brushing off" an inappropriate enquiry from Shepherd & Wedderburn; but there was nothing inappropriate about the enquiry, though Jones Day were entitled to decline to answer it. Mr Giansiracusa went further than that and accepted frankly in the witness box that his wording was unfortunate. Although he did not accept that it was a misrepresentation, I find that it was, since it was clear that UTB had decided to serve the Counternotice and was preparing to do so on the last possible day.

409. However, Mr Giansiracusa's email was not part of a concerted plan to deceive SUL. The Scheme had only been conceived at the last moment and the incorporation of UTB 2018 and the stock transfer were hurriedly done. Mr Giansiracusa himself took the view that he would not tell SUL anything that they were not entitled to know; however, that was attributable to his own mindset as a tough business lawyer, not a shared strategy to deceive SUL. Moreover, the email had no causative effect at all. SUL lost nothing as a result of being uncertain for one further day what UTB would do and the Scheme was ineffective.

410. Further, the loss in respect of which SUL claims damages is the difference between the freehold value of the Stadium and the Academy subject to the property call options and their value without those options. In the events that have happened, the property call options have been exercised, in July 2019, and SUL will not suffer the losses claimed because it will in due course be entitled to be paid the prices specified in those options. SUL did not seek to amend its claim for damages to allege loss caused by a delay in the exercise of the property call options.

411. Although SUL recognises that the substantial losses that are the subject of its damages claim will not be incurred, provided that SUFC does indeed complete the purchase of the property assets, it contends that if that purchase is not completed on time it will have suffered loss. It therefore seeks to have the quantum of any damages payable (whether for breach of contract of conspiracy) adjourned to await the outcome of the exercise of the property call options.

412. In my judgment, that is not an appropriate course to take. It wrongly assumes that SUFC would have performed if the property call options had been exercised in February 2018. The claim for damages was for the difference in value between the property assets with and without the benefit of exercised property call options. That difference will not arise. Moreover, in valuing the properties with the benefit of the property call options, the valuers would necessarily have to take into account the risk of non-completion of the purchase by SUFC, as at the date on which the tortious conduct caused loss, in about late January 2018. Unless the risk of non-completion by SUFC of the purchase of the property assets is greater today or the price lower, there is no loss resulting from delay. In January 2018, SUFC controlled by UTB would have been in substantial difficulty in paying for about £40 million of property assets within a year. Its ability to do so would have depended on UTB finding a new investor. Such an investor would have been buying into a loss-making Championship football club with no certainty of promotion to the Premier League and a liability to pay for the property assets. At the current time, SUFC has the benefit of very substantial revenue that Premier League clubs enjoy and, inevitably, a much higher prospect of attracting further capital investment. It is impossible therefore to

conclude that there is a greater risk of non-completion of the purchase of the property assets. There is no argument that the price will be lower. There is therefore no reason to adjourn assessment of loss to a later date.

413. For the reasons given above, I dismiss the claim for conspiracy to cause loss to SUL by unlawful means. Although UTB, Prince Abdullah and Mr Giansiracusa did combine to try to avoid the exercise of the property call options, they were not conspiring to act unlawfully and their attempt to avoid the contractual obligation in clause 9.1.12 of the ISA was unsuccessful. Further, no loss was caused by any such combination; alternatively, in view of the voluntary exercise by SUFC of the property call options in July 2019, no loss that has been claimed exists.

J. Unfairly Prejudicial Conduct: the Section 994 Petition

414. In its Petition, SUL seeks an order that it be entitled to buy all UTB's shares in Blades, or an order setting aside the Call Option Notice or the contract of sale and purchase, or both. It does so on the basis that UTB, Prince Abdullah and Mr Giansiracusa have conducted the affairs of Blades in a manner that is unfairly prejudicial to SUL's interests as a member of the company, such that the relief claimed is appropriate. During the course of the trial, SUL abandoned its case that the price for its purchase of UTB's shares should be £5 million. It now accepts that the price should be the market value of UTB's holding.

415. The alleged prejudicial conduct in part mirrors the allegations that are the subject of the conspiracy claim, but there are further allegations that are relied upon. SUL accepts that the Call Option Notice or the contract of sale and purchase can only be set aside, by way of relief granted under section 996 of the Companies Act 2006, if unfairly prejudicial conduct caused SUL to serve the Call Option Notice. However, for the same reasons that I have given in Part I above, it was not the case that any unfair or wrongful treatment of Kevin McCabe by or on behalf of UTB caused him to serve the Call Option Notice. The causative link required is wholly absent, so there is no basis on which the Call Option Notice can be set aside.

416. The allegations of unfairly prejudicial conduct and the relief that SUL seeks are therefore of significance only if I decline to grant specific performance of the contract of sale and purchase, leaving SUL as owner of 50% of the shares of Blades. Otherwise, SUL will be selling its shares at a price that it chose, not a price that reflects the market value of those shares diminished by any conduct of the Respondents. I will in any event make factual findings about the allegations of unfairly prejudicial conduct.

417. It is unnecessary for me to consider again the allegations of quasi-partnership and breaches of an implied obligation of good faith, which I have addressed and rejected in earlier parts of this judgment. I have also rejected the argument that UTB and those acting on its behalf were seeking to cause SUL to give up its interest in Blades and SUFC. The remaining allegations on which SUL relies are the following:

i) Attempting to defeat an objective of the ISA, namely the reunification of the property assets with SUFC, so as to create a dispute that made SUL's shares in Blades unmarketable;

ii) Acting in such a tricky way in relation to the attempted avoidance of clause 9.1.12 that SUFC was likely to be brought into disrepute;

iii) Taking advantage of SUL's misunderstanding about the effect of service of the Call Option Notice;

iv) Misappropriation of SUFC funds in seeking to continue the employment of Mr Bettis;

v) Breach of fiduciary duty by Mr Giansiracusa's email to Mr Bettis dated 1 December 2017 informing him that he had a claim against SUFC;

vi) Abuse of power in relation to the appointment of Mr Ratcliffe as CFO in November 2017;

vii) Prince Abdullah's conduct in relation to the Charwell loan, viz. his accepting a bribe.

418. The starting point is to address to what extent these matters amount to management of the company's affairs. A shareholder is not entitled to complain about the way in which another shareholder exercises rights appurtenant to their shares unless it amounts to management of the company's affairs, as distinct from a shareholder's affairs. SUL submits that "management … must obviously include a shareholder exercising its powers qua shareholder" but this is far too broad a proposition. As the example then given by SUL establishes, it is only if the votes or rights of a shareholder are used to determine how the company's affairs are conducted, for example by passing a resolution in general meeting or by removing or appointing a director to the board, that it amounts to management of the company's affairs.

419. Even if a shareholder's actions do amount to managing the company's affairs, another shareholder will not be "entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted" (per Lord Hoffmann in O'Neill v Phillips [1999] 1 WLR 1092 at 1098H). There must not only be material prejudice to the interests of SUL as a shareholder but the prejudice must be unfair, that is to say not justified by the terms that have been agreed or by the conduct of SUL.

(i) Creating a dispute by attempting to avoid clause 9.1.12

420. In relation to the first allegation, the steps taken by UTB in an attempt to avoid triggering clause 9.1.12 of the ISA do arguably relate to management of the affairs of Blades because SUFC had existing rights (under the property call options) and contingent obligations (under clause 9.1.12 of the ISA) in relation to the property assets, of which it was also the lessee. What UTB was seeking to do would directly affect those interests and obligations. Further, it was part of the scheme of the ISA (to which Blades and SUFC were parties) that the property assets would be reunited with SUFC when a shareholder gained super-majority control.

421. However, it is impossible to discern prejudice caused to SUL as a shareholder of Blades by not exercising the property call options in February 2018. In the first place, the effect was that SUL remained a shareholder, when it would otherwise have had to sell its shares in February 2018. If any prejudice was caused to SUL by delaying the exercise of those options, it was caused to SUL as the owner of some of the property assets, which ownership predated the ISA. The interests of SUFC (and therefore of Blades and its shareholders) were for clause 9.1.12 not to be triggered and for it to be able to exercise the property call options at a time that suited it – a right that it had under the property call options themselves. That is so for two principal reasons. First, SUFC had the benefit of leases of the main property assets at concessionary rents (in July 2017 Kevin McCabe was seeking a market rent of £1.65 million p.a. for the Stadium and Academy, for which SUFC was obliged to pay £310,000 p.a.). It was SUFC (and therefore Blades) that benefited from that arrangement and SUL only in its capacity as landlord that was disadvantaged by it. While SUFC remained a loss-making Championship club, it was clearly in SUFC's and Blades' interests for the subsidised rental arrangement to continue, since the rental liabilities were a much lower sum than likely finance costs of paying for the property assets.

422. Second, if the property call options were triggered at a time when SUFC could not afford to pay the purchase prices, it would become insolvent. At the time of the attempts by UTB to avoid triggering clause 9.1.12 (including the letter of Jones Day dated 31 January 2018 that was a repudiatory breach of the ISA), Blades had no immediate prospect of paying around £40 million for the property assets, and the chances of Blades controlled by UTB being able to do so within 12 months were speculative. Even if (which is not the case) there was unfair prejudice to SUL as a shareholder, that prejudice has now been removed by the voluntary exercise of the property call options by SUFC and no further relief is needed or appropriate.

423. SUL attempts to get round this difficulty by characterising the prejudice as the creation of a dispute that made its shares in Blades unmarketable. Since UTB was unaware of SUL's detailed negotiations with ALK until disclosure in these proceedings, it is not credible that UTB created a dispute to stymie those negotiations. UTB's conduct did create a dispute from about 31 January 2018 but by then SUL had offered to sell its shares to UTB for £5 million. If there had been no dispute SUL would have had to complete the sale of its shares to UTB on 6 February 2018 for £5 million. It could not then have sought to market its shares anywhere else. Its ability to sell its shares to ALK or to any other purchaser depended on its being able to set aside (or resist enforcement of) the contract of sale and purchase with UTB. Moreover, SUL was able to agree terms with ALK even though a dispute had arisen. SUL has identified no prejudice that it has suffered as a result of the delay in completion of the contract of sale and purchase and, if that contract is valid and enforceable, it cannot sell its shares elsewhere. If the contract is not enforced, SUL is free to sell its shares to ALK or another person and there is no evidence that the value of the shares has been affected by the dispute with UTB or that ALK has lost interest. There is therefore no prejudice and no relief is justified.

(ii) <u>Alleged tricky conduct of UTB in relation to service of counternotice</u>

424. The second allegation is that SUFC has been or was likely to be brought into disrepute by the tricky conduct of UTB. This allegation therefore also relies on SUL's shares in Blades being worth less or being less marketable as a result of the

conduct in question. The tricky conduct is understood to refer to the attempts by UTB to avoid informing SUL before 26 January 2018 that it was intending to serve a counternotice and to conceal the Scheme. However, nothing that UTB did in terms of concealing its intentions from SUL or misleading SUL amounts to management of the affairs of Blades.

425. The short answer to the remainder of this allegation is that there is no evidence that anything that UTB did that gave rise to the legal dispute has brought SUFC into disrepute so as to affect the value or marketability of SUL's shares. If SUL has to sell its shares to UTB, the price was fixed on 29 December 2017 by SUL's own act. If it is free to sell its shares (or some of them) to ALK then there is nothing to show that SUL's shares are worth less or that ALK reduced its price as a consequence of anything that UTB did. Neither of the share valuers suggested that the current market price is affected by the circumstances in which the dispute arose. Nor is there any evidence that if SUL is able and elects to keep its shares in Blades, those shares are worth less on account of the way in which UTB, Prince Abdullah or Mr Giansiracusa have conducted the affairs of Blades or SUFC. SUL submits that news about the way in which the McCabes have been treated by UTB will be liable to bring SUFC and Blades into disrepute because of adverse fan reaction, adverse media comment and the perception of strife at the Club. This however was mere supposition and assertion: there was no evidence capable of supporting it.

(iii) Attempts to avoid clause 9.1.12 ISA

426. The third allegation is that UTB took advantage of a mistake by SUL about the effect of service of the Call Option Notice. In so far as this differs from the first allegation, it is because it focuses on the element of taking advantage by UTB of SUL's mistake and so alleges a different kind of impropriety. The mistake was a mistake by SUL, as shareholder, as to the motives of the other shareholder, or as to the scope within the ISA to avoid triggering clause 9.1.12. UTB took certain steps as shareholder: it transferred shares to UTB 2018 and agreed to sub-sell shares acquired from SUL, to try to take advantage of that mistake. But this alleged impropriety – as distinct from the alleged breach of contract – has nothing to do with UTB, Prince Abdullah or Mr Giansiracusa's managing Blades' affairs. In so far as this allegation is based on steps that UTB took to avoid clause 9.1.12, the allegation has already been dealt with in the paragraphs above dealing with the first and second allegations.

(iv) Improper use of SUFC monies to pay Mr Bettis

427. The fourth allegation is that UTB, Prince Abdullah and Mr Giansiracusa misappropriated the funds of SUFC by their attempts to keep Mr Bettis employed. There are two components to this allegation. The first is that it was obvious from March 2017 that Mr Bettis could not properly perform the work of CEO of SUFC from Los Angeles and that the attempt by UTB to retain his services wasted money and delayed the appointment of a successor. The second is that Mr Giansiracusa and UTB caused Mr Bettis to be paid for November 2017 at a time when he was no longer working as CEO and had agreed to leave his position.

428. In the light of my findings about these matters, it is impossible for SUL to argue that money was misappropriated on payment of Mr Bettis's wages. At no time did Mr Bettis resign, nor was he sacked or made redundant. He therefore remained employed

as CEO. The opportunity for the board of SUFC to call on Mr Bettis to resign, or terminate his employment, was the October 2017 board meeting when Mr Tutton did not move that either of those things be done and there was in any event no support on the board for his and Kevin McCabe's views. Until then, Mr Bettis was unarguably retained as CEO and the only question was on what date he should be requested to leave.

429. UTB's decision from about May 2017 to retain Mr Bettis in part-time employment was its own judgment. That judgment was backed by all the directors of SUFC, who signed the June 2017 board resolution. Although Kevin McCabe and Mr Tutton (but not Mr Green or Mr Bettis) considered that it was in the best interests of SUFC for Mr Bettis to go, the UTB directors held a different view. The argument that this decision was taken by the UTB-appointed directors for improper reasons – to keep a friendly person in charge of SUFC – was not substantiated at trial. Prince Abdullah and Mr Giansiracusa both recognised the abilities and suitable temperament of Mr Bettis and his value to the Club, even on a part-time basis. In my judgment, they formed their views in the best interests of SUFC and not only in their own narrow interests, and their judgment has been wholly vindicated by the success that Mr Bettis has subsequently enjoyed at the Club with the support of both sides of this dispute. Whether or not Mr Bettis, supported by Mr Birks, was able to do a good enough part-time job while based in Los Angeles was a judgment call on which Kevin McCabe and Prince Abdullah genuinely differed. But the allegation that the UTB directors were acting in bad faith or in breach of their fiduciary duties is not proved.

430. Moreover, there was no prejudice caused to SUL as a shareholder in Blades by Mr Bettis's retention until December 2017. His retention if anything saved SUFC money, compared with the cost of recruiting and remunerating a new CEO at a much higher rate of pay than Mr Bettis was being paid. It was clear at the time that Mr Birks was not ready to do the CEO job at the Club. SUL's shares are (subject to the contract of sale and purchase) now worth substantially more than they were in 2017, part of which is attributable to Mr Bettis's skill in running the Club on a shoestring budget. Removal of Mr Bettis in 2017 might well have meant that he did not return in 2018, which could have caused the Club to be less successfully run during the important 2018-19 season.

431. The contention that Mr Giansiracusa was wrong to pay Mr Bettis his November salary is unsustainable. Mr Bettis remained employed; to do otherwise would have been unlawful. He had not agreed to leave: he had indicated that he would resign if the owners refused to support his staying. In the event, that question was not resolved at the October 2017 board meeting or afterwards, despite Kevin McCabe's unilateral decision to remove him from the payroll. Mr Bettis did then resign in December 2017 when he discovered how he had been treated. UTB's insistence in doing the right thing in terms of Mr Bettis's pay at that time contributed to his willingness to return to the position of CEO when he came back to the United Kingdom in 2018.

(v) <u>Advice to Mr Bettis about his unlawful dismissal</u>

432. The fifth allegation is that Mr Giansiracusa was in breach of the fiduciary duties that he owed Blades (and SUFC) in advising Mr Bettis that he had a claim against SUFC. I consider that there was technically a breach of duty: it could have been harmful to the interests of SUFC (and Blades) for an acknowledgment of the validity of a claim

to have been made in writing by one of its directors. Mr Giansiracusa's email may have been well-intentioned as a whole – with a view to persuading Mr Bettis to stay and so avoid the possibility of a claim – but nevertheless his acknowledgement was incautious and wrong. I do not consider that Mr Giansiracusa could have thought that telling Mr Bettis in writing that he had a valid claim would cause him not to file a claim and so would serve the best interests of the company. If Mr Bettis did not file a claim it had nothing to do with the fact that he was told that he had one. However the short answer to this complaint is that it caused absolutely nothing and SUL was in fact not prejudiced as a shareholder at all. It would therefore be quite wrong to grant any relief on the basis of this minor breach of duty.

(vi) The appointment of Mr Ratcliffe

433. The sixth allegation is abuse of power in relation to the appointment of Mr Ratcliffe as CFO in November 2017. This matter is rather more complex. The appointment of a finance director plainly related to the management of the affairs of Blades and SUL, even though it was UTB that was given the right by clause 5.11 of the ISA to make the appointment. SUL complains that UTB and Mr Giansiracusa acted in excess of authority conferred on UTB by (a) taking control of the appointment of recruitment consultants, The Savannah Group, and requiring their fees to be paid by SUFC; (b) seeking to impose a principal reporting line directly between Mr Ratcliffe and Prince Abdullah, and (c) agreeing a salary in excess of the limits imposed by schedule 4 to the ISA.

434. The first question is the true interpretation of clause 5.11 of the ISA. In my judgment, that clause gives UTB the right on behalf of Blades and SUFC to appoint and agree the terms of appointment of a finance director of Blades and SUFC. It does not expressly give UTB the right to instruct consultants to search for and find suitable candidates, but in my view it is implicit that UTB must be entitled to instruct such consultants, otherwise - contrary to the best interests of the companies - UTB would be hampered in finding the right candidate. The clause does not expressly state that the director is to be remunerated by the companies, but that is obvious. I consider that it is similarly obvious that the fees of the consultants are to be paid by the companies and not by UTB. That is because UTB is acting on behalf of the companies in searching for and appointing their finance director. However, UTB is entitled to have regard to its own preference in selecting the candidate and is not exercising a fiduciary power in making its choice.

435. I consider that remuneration is a matter for UTB to decide, provided that it is acting in the best interests of the companies in doing so (and in determining the other terms of appointment). Although clause 9.1.10 of and schedule 4 to the ISA would otherwise require majority approval of the appointment of any employee earning over £40,000 p.a., it is implicit that UTB does not need to obtain such approval before appointing the finance director, otherwise SUL could frustrate the right conferred by clause 5.11 simply by withholding its approval. It is therefore necessary for UTB to have the right – subject to its fiduciary responsibilities – to approve the remuneration.

436. The right to appoint a finance director does not, however, mean that the director is anything other than the finance director of the companies, and there is no justification for reporting lines and employee's duties that are different from those that would be appropriate were the candidate selected and appointed by the boards of the

companies. It is self-evidently appropriate that the finance director report to the CEO and to the board.

437. In my judgment, therefore, UTB were right in contending that it and not the board of Blades or SUFC had the right to agree remuneration of the finance director and appoint consultants and have them remunerated by Blades or SUFC. In any event, at the October 2017 board meeting SUL agreed to leave it to UTB to decide in good faith at the levels quoted. UTB was wrong in contending that it was entitled to impose a special reporting line to Prince Abdullah.

438. The next question is whether Mr Giansiracusa was acting honestly and mistakenly in seeking to impose that reporting line, or whether this was something that he consciously required in the interests of UTB rather than the interests of the companies. Mr Giansiracusa had provided the reporting lines (at Mr Birks's request) from under a palm tree, while on holiday in Sri Lanka. His explanation was that he saw it in terms of the right to dismiss, and that Mr Ratcliffe would be accountable to UTB in that sense. He also understood that it was the purpose of clause 5.11 to give UTB a direct reporting line, and that that was not inconsistent with directors' fiduciary duties because it was all negotiated in advance in the ISA.

439. Given the view that I formed of Mr Giansiracusa as a witness generally, I am unable to find that he was acting dishonestly on this point. I consider that he was acting in the genuine but mistaken belief that the ISA entitled UTB to have those reporting rights. He was not analysing the issue in a solicitor's office but from a beach holiday where, as he said, he was not inclined to get deeply involved and was using "a kind of shorthand" in the response that he sent to Mr Birks. In his email to Catherine Frost, copied to Mr Tutton, he acknowledged that the reporting lines were unusual but said that it was a contractual right and that good corporate governance was protected by the "dotted line" to the CEO. I therefore find that there was no breach of fiduciary duty in the actions that Mr Giansiracusa took in relation to Mr Ratcliffe's contract.

440. Regardless of this, there was no substantial prejudice caused to SUL as a shareholder by the terms of Mr Ratcliffe's appointment. When asked about them in evidence, Kevin McCabe said that they did not cause him concern and that he had only been concerned to ensure that Mr Ratcliffe reported to Mr Birks, not to a CEO who was no longer in post. There was no evidence at all that any difficulty during Mr Ratcliffe's short time at the Club (before illness caused him to have to resign) was caused by the reporting lines specified by UTB. In those circumstances it would be inappropriate to grant any relief in this regard in any event.

(vii) <u>The alleged bribing of Prince Abdullah</u>

441. The final and most substantial aspect of the unfairly prejudicial conduct on which SUL relies is the matter of the alleged bribe accepted by Prince Abdullah from Dr Rakan. This issue was the most significant factual dispute at the trial and was the focus of several interim applications before trial. The case that SUL has advanced based on bribery has materially changed during the course of the proceedings and even during the trial itself. It is appropriate at the outset to note what the case originally was and what it now is.

442. The pleaded case of SUL in its Petition, filed in May 2018, was that:

i) Prince Abdullah procured an interest-free loan from a company that was owned and controlled by Dr Rakan, in anticipation that Dr Rakan would become an investor in SUFC and the loan would be converted to equity.

ii) The business of Dr Rakan's company, Sela Sport, was such that Prince Abdullah, as a government minister for youth and sport, would be in a position of potential conflict of interest if Dr Rakan bestowed a benefit on him.

iii) Charwell, UTB and SUFC entered into a novation agreement which provided for UTB to assume liability for £1.6 million of the loan.

iv) Contrary to what Mr Tutton was informed by Mr Birks on 20 April 2018, UTB did not repay its share of the loan on the term date and Jones Day subsequently refused to answer questions about whether UTB's debt had been repaid, in order to conceal the fact that it had not been repaid.

v) The pleaded case then proceeds as follows:

> "53. It is to be inferred that the Charwell Loan was a means by which Dr Rakan and Prince Abdullah disguised a payment of around £1.5m from Charwell to UTB (in substance from Dr Rakan to Prince Abdullah). That inference is to be drawn from the following facts:
>
> (a) The statement made by Prince Abdullah in January 2017 to Mr McCabe to the effect that the Charwell Loan would not have to be repaid under any circumstances.
>
> (b) The absence of any documentary evidence showing payments of £100,000 or £1.5m passing from UTB to Charwell in repayment of its obligation arising from the Novation on the due date coupled with the refusal by Jones Day to disclose the same to the Petitioner's solicitors.
>
> (c) The false claim made by Mr Giansiracusa to Mr Birks to the effect that the full £1.6m had, as at 20th April 2018, been repaid.
>
> 54. In the premises it is to be inferred that the Charwell Loan amounted to a benefit provided by Dr Rakan to Prince Abdullah in circumstances where Prince Abdullah's interests as a shareholder in the Company and UTB conflicted with his duties to the Saudi Government as Minister for Youth and Sports. In these circumstances the payment amounted to a bribe.
>
> 55. Further or alternatively whilst the precise arrangements and understandings between Prince Abdullah and Dr Rakan regarding the Charwell Loan are unclear, they are at best suspicious and at worst redolent of corruption such that they are liable to bring SUFC and the Company into disrepute.

> 56. These actions were therefore a breach of Prince Abdullah's duty as a director of the Company either because they were a bribe and/or because they were liable to bring SUFC and the Company into disrepute."

443. Fairly analysed, the allegation made was not that Dr Rakan had provided financial accommodation, in the form of an interest-free loan to Blades, that benefited Blades' cash flow and therefore benefited Prince Abdullah as a shareholder. What is alleged is that, either from the outset or from the time of the novation agreement, or subsequently, Dr Rakan and Prince Abdullah agreed that the Charwell loan or part of it would not have to be repaid; that UTB did not repay about £1.5 million and that this was a means of disguising a gift of money to Prince Abdullah. From the outset, therefore, a very serious allegation of bribery was made against Prince Abdullah, which was said to be a breach of fiduciary duty by the Prince and something liable to bring SUFC into disrepute.

444. From the outset, the inference of bribery was made from rather slender factual foundations, namely: a comment allegedly made by Prince Abdullah to Kevin McCabe before the terms of any loan had been agreed; the absence of proof of repayment; a failure by Jones Day to comment; and an unspecified false claim said to have been made by Mr Giansiracusa relating to repayment of the novated part of the loan. Nowhere is any connection between Dr Rakan and Charwell identified. It later became clear from Mr Tutton's witness statement that it was what he must have told SUL's solicitors about a telephone conversation with Ms Kafena, shortly after the Charwell loan was made, that led SUL to believe that Charwell was owned by Dr Rakan.

445. Two months after the issue of the Petition, UTB did repay to Charwell the remaining unpaid £1.5 million of the novated loan. Although prior to trial the suggestion was made by SUL that this repayment was only made in order to provide UTB with a defence to the allegation of bribery and would not otherwise have been made, no amendment was made at that stage to the allegations of bribery.

446. SUL applied without notice for an evidence preservation order against UTB, relying on its original allegations of bribery. It was heard by a Deputy Judge on 26 July 2018. It is clear from the transcript of that hearing that the Deputy Judge sought and was given on behalf of SUL an assurance that it was not the original loan that was alleged to be the bribe but the novation agreement, which it was suggested was a sham to disguise a gift to UTB. That was consistent with the pleaded case, in that the novation agreement and the non-repayment of £1.5 million by UTB is relied upon.

447. Following disclosure and witness statements, SUL sought and was granted permission to amend the Petition to state that Charwell was a company SUL believed was owned and controlled by Dr Rakan. SUL clearly had some doubt about the alleged connection between Charwell and Dr Rakan, even though Mr Tutton's witness statement unequivocally stated that he had spoken to Charwell's solicitors, who had told him that Dr Rakan was the ultimate beneficial owner of Charwell. SUL then issued and pursued specific disclosure and non-party disclosure applications, including one against Charwell's solicitors, to try to find out who was the beneficial owner of that company.

448. Evidence in the form of disclosed confidential documents and a witness statement from Ms Kafena, a partner at those solicitors, clearly demonstrated that Dr Rakan was not connected with Charwell. But still SUL did not amend or abandon its allegations of bribery and it opened the trial on the basis that the documents suggested that Dr Rakan or Sela Sport was the controller or owner of Charwell. The matter was pursued relentlessly in cross-examination of Prince Abdullah, Mr Giansiracusa and Ms Kafena.

449. SUL's case in written closing submissions was this:

i) Dr Rakan provided a financial or other advantage to Prince Abdullah regardless of whether he was the source of the monies that were lent to Blades.

ii) Dr Rakan used his influence to arrange a financial advantage provided by Charwell and had a connection to the advantage because his company, Sela Sport, was a potential investor/funder.

iii) There is a presumption of corruption and fraud, and Prince Abdullah has failed to prove that there was no connection between the Charwell Loan and his position as a minister in the Saudi Government.

iv) Alternatively, the Charwell Loan was sufficiently suspicious to give rise to the appearance of corruption.

SUL therefore now seeks to contend that it was the facilitation of the original loan that was presumed to be a bribe to Prince Abdullah, or that reeked of corruption, and places no reliance on the novation agreement. In that regard, it is important to remember that Prince Abdullah was not a director of Blades or SUL at the time of the Charwell loan or at the date of the novation agreement, nor was he a Saudi minister at the date of the novation agreement. He was the ultimate beneficial owner of a 50% shareholding in Blades. Prince Abdullah only became a director of Blades again on 4 August 2017. At the times of the Charwell loan and the novation agreement, therefore, Prince Abdullah cannot have been acting in breach of a fiduciary duty.

450. There is of course - despite the appearance likely to have been given to anyone watching in court - no issue as such in this trial about whether Dr Rakan bribed Prince Abdullah. What is in issue is whether the affairs of Blades were conducted by UTB, Prince Abdullah or Mr Giansiracusa in a manner unfairly prejudicial to SUL's interests as a shareholder of Blades.

451. SUL confirmed in oral closing submissions that the main case being advanced in relation to bribery was a "procurement case", namely that Dr Rakan procured the Charwell loan by another, and that that procurement in the context of a possible conflict of interest and duty gave rise to a presumption of bribery. SUL contends that Prince Abdullah brought Blades into disrepute by accepting such a bribe. However, Prince Abdullah was no more than an indirect part owner of Blades at the time. No case was ever pleaded or advanced that, as an owner of UTB, Prince Abdullah (or UTB) owed Blades any kind of fiduciary duty. SUL did submit there is a heavy burden on a director of a company to ensure that his company is not exposed to any risk of prejudice by being connected with allegations of bribery or the appearance of corruption.

452. Faced with the difficulty arising from Prince Abdullah's distance from managing the affairs of Blades at the relevant times and the fact that he was not a director of Blades, SUL then sought to argue a new case, for the first time, on day 18 of the trial. This was that the unfairly prejudicial conduct was either that Prince Abdullah did not, on becoming a director of Blades, make disclosure to the Saudi authorities that he (through UTB) had benefited from the Charwell loan and then make repayment of the loan, or alternatively that he accepted the appointment as a director of Blades and SUFC when he could not distance himself from the smell of corruption. SUL complains that by accepting the appointment and not making disclosure in Saudi Arabia, Prince Abdullah brought that problem into SUFC.

453. No case was ever pleaded based on wrongful acceptance by Prince Abdullah of an appointment as director on 4 August 2017 or on failure by him to disclose to the Saudi government on or after that date that Dr Rakan had assisted in procuring a loan to Blades from a potential investor and to repay the loan. The primary factual case based on supposition and Mr Tutton's evidence has fallen away, though SUL did have a pleaded alternative case that the arrangements between Prince Abdullah and Dr Rakan were somewhere between suspicious and redolent of corruption and as such were liable to bring SUFC and Blades into disrepute. I shall refer to that alternative case for convenience as its "dubious dealings" case. That case is still pursued and is based on the making of the Charwell loan and the novation agreement.

454. Section 996(1) of the Companies Act 2006 states:

> "If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of."

Accordingly, the Court cannot grant relief in respect of matters that are not the subject of complaint in the Petition. The jurisdiction to grant relief is purely statutory.

455. The Court has always taken a relatively strict approach to the scope of allegations in unfair prejudice petitions. In Re Lundie Brothers [1965] 1 WLR 1051, in a passage subsequently cited with approval by Dillon LJ in Re Tecnion Investments Ltd [1985] BCLC 434, Plowman J stated:

> "It seems to me that it would be wrong for the court to travel outside the allegations in the petition, particularly in a case of this sort where the petition is based on the proposition that the respondents to it have been guilty of some oppression or lack of probity."

In Re Coroin Ltd [2013] 2 BCLC 583, David Richards J said:

> "Many issues were explored in evidence and submissions have been made on them, but the parties' cases are defined by their pleadings. This is of particular importance to proceedings under s994 of the 2006 Act. The breadth of the jurisdiction means that the petition plays, in my judgment, a vital role in defining the basis of the petitioner's case. This is not a question of taking technical pleading points. The petition must be read sensibly.

> But it does mean that the grounds on which the petitioner says the affairs of the company have been conducted in an unfairly prejudicial manner should be fairly set out in the petition. Only in this way will the respondents be able properly to meet the case and the court to be able to keep the proceedings within manageable bounds…"

456. In my judgment, the Court should not consider granting SUL relief on the basis of the new case that it now advances, namely that Prince Abdullah was in breach of fiduciary duty owed to Blades either by accepting appointment as a director in August 2017 or by not making disclosure of the loan in Saudi Arabia and repaying it at that time. That case is wholly different in character from the pleaded case, which alleged the wrongful acceptance of a disguised gift of money.

457. The new case on bribery also raises an important question of law that has never been identified in the pleaded case, namely whether Prince Abdullah's acceptance of assistance from Dr Rakan to procure from a potential investor in Blades an interest-free loan is something that is unlawful under Saudi law, or something that as a Saudi minister Prince Abdullah should have disclosed. If there was no impropriety under Saudi law in such circumstances then there was nothing for Prince Abdullah to disclose to the Saudi government and no reason why he should have caused Blades and UTB to repay the Charwell loan in August 2017. There was in fact evidence from Prince Abdullah himself that the King of Saudi Arabia was aware of the Prince's commercial activities when he appointed him and agreed that he should be entitled to continue those activities. Whether anything more in terms of disclosure was required is unclear because there has been no evidence about the position in Saudi Arabia, despite the point about lack of such evidence being raised in UTB's Points of Defence to the Petition and by UTB's solicitors on two occasions during the course of the proceedings.

458. The response of Mr Downes QC to this point was that SUL did not need to prove Saudi law because the focus of the case was on the failure of Prince Abdullah to promote the interests of the Company and that the proper law of the alleged bribe and the allegation that Blades had been brought into disrepute was English law. Further, he submitted that any question of foreign law that arises, whether pleaded or not, gives rise to a presumption that foreign law is the same as English law.

459. I accept that the proper law of the bribe that was alleged in the Petition (a disguised gift of £1.5 million in the United Kingdom) and the proper law of the allegations of breach of fiduciary duty is English law, but otherwise I reject Mr Downes's argument. If, by way of change from its pleaded case, SUL was to pursue a case that Prince Abdullah was in breach of his duty as a director of Blades in August 2017 by failing to make disclosure then of the Charwell loan arrangements to the Saudi authorities and failing to repay the loan, SUL needed to obtain permission to plead it. It needed to allege in its pleading that taking the benefit of Dr Rakan's assistance in procuring in Saudi Arabia a loan from a potential investor to Blades was a breach of the Prince's duties as a minister, either regardless of disclosure or unless it was disclosed, and that that breach of duty in Saudi Arabia was such as to bring Blades into disrepute. That would have given rise to an issue of Saudi law, in response to which UTB was entitled to plead that Saudi law applied and the content of Saudi law, and then to seek to adduce evidence of the law. The pleading of the facts and allegation that relate to

an issue of foreign law gives both parties the opportunity to consider the applicable law and adduce evidence of it if different from English law. If no issue that involves foreign law is raised, or if though raised no evidence is adduced, the Court will generally apply English law or presume that the applicable foreign law is the same as English law in regard to the issue in question. The same presumption does not apply if, in closing submissions, a new allegation potentially involving foreign law is made without the other party having the chance to plead that foreign law applies and to put in evidence about it.

460. In those circumstances, it would be wrong to allow SUL to pursue its new case on what amounted to a bribe and what Prince Abdullah had to do in terms of disclosure in order to comply with his duty as a director in August 2017.

461. SUL is nevertheless entitled to pursue its dubious dealings case that, regardless of the precise arrangements between Dr Rakan and Prince Abdullah, the fact of their dealings was at best suspicious and at worst redolent of corruption and as such liable to bring SUFC or Blades into disrepute. However, it is now abundantly clear that (as SUL's changed primary case recognises) the Charwell loan and the novation agreement were not a disguised gift at all. Further, at those times, Prince Abdullah was an indirect co-owner not a director. SUL is therefore limited to the contention that Prince Abdullah's having dealings with Dr Rakan intended to benefit Blades, in circumstances of his being a Saudi minister and a beneficial co-owner of Blades, amounted to wrongful conduct of Blades's affairs that unfairly prejudiced SUL's interests as a shareholder.

462. It is necessary now to make findings of fact about what happened, so that the dubious dealings allegation of SUL can be viewed in its correct light. I set out my findings in paras 463-477 below.

463. Prince Abdullah was in contact with Dr Rakan, whom he knew as the husband of the daughter of the best friend of his mother and from certain historic business affairs, but more recently from his governmental dealings with Sela Sport, Dr Rakan's company. These were not business dealings in the sense of commercial, profit-orientated business where money changed hands (which Sela Sport did have with the Saudi Football Federation, an independent body), but arrangements made between Sela Sport and the Saudi government itself. Examples given by Prince Abdullah were liaising to arrange the presence of members of the Saudi Royal Family at cup finals; discussing the possibility of establishing a Gulf States international league event; regulation of the arrangements between Saudi football clubs and banks; and arranging sponsorship of the Saudi national team.

464. Contact between Prince Abdullah and Dr Rakan in relation to Project Delta started in about October 2016, at which time both Kevin McCabe and Prince Abdullah were desperately keen to find a new investor for the Club. It is an inference that I draw that Prince Abdullah approached Dr Rakan, as a man who was heavily engaged in the sports industry and football in particular, to see whether he or Sela Sport would invest in Blades or whether he knew someone would do so. Sela Sport had previously been involved in organising investment in a prominent soccer team in North America. Disclosure by UTB about these early meetings and about Prince Abdullah's contact with Dr Rakan was undoubtedly deficient and so the full picture does not emerge. Further, Prince Abdullah claimed to have almost no recollection of meetings with Dr

Rakan about Project Delta, except the meeting on 9 January 2017 in Dubai. For whatever reason – and the reason may have nothing to do with this case – it was clear to me that the Prince was sensitive about disclosing his full dealings with Dr Rakan.

465. Dr Rakan was interested in the proposal, as was another sports and media company called BeIN. Prince Abdullah had meetings with them in London in mid-November 2016. It is likely that by that time a group of potential investors had been contacted by Dr Rakan, including Saleh bin Laden and possibly a Mr Al-Amoudi from Jeddah. A non-disclosure agreement was sent by Mr Howard to the interested parties on 27 November 2016. These included Mr Alsaady of Nuovo Capital, who acted only on behalf of Mr bin Laden, not on behalf of Sela Sport or Dr Rakan.

466. It is clear that Sela Sport was fronting the possible investment (and was at this stage still interested in taking a stake itself) and that it might create a fund or special purpose vehicle to that end, if there were multiple investors. It was convenient to others, including Mr bin Laden and Prince Abdullah, that these investors could remain hidden behind Sela Sport, and deal with the matter through Dr Rakan, at least initially. That is why the non-disclosure agreement was signed by Mr Alsaady on behalf of Nuovo Capital, which was (incorrectly) described by Mr Howard as an affiliate and representative of Sela Sport.

467. Prince Abdullah accepted that Dr Rakan owed him favours, though there was no evidence that Prince Abdullah had improperly favoured Dr Rakan previously. It is clear that Dr Rakan was consciously assisting Prince Abdullah to find investors. The only investor (other than Sela Sport itself) to remain interested by the end of 2016 was Mr bin Laden. Prince Abdullah travelled with Dr Rakan to meet him in Jeddah on 30 December 2016. The fact that the Prince travelled to him, rather than the other way round, is revealing as regards both the status and wealth of Mr bin Laden and the need that the Prince had at that time to find favour. Prince Abdullah did his best to sell the investment opportunity and Mr bin Laden was positive about it, such that Prince Abdullah returned to Riyadh believing that the investment would happen. Prince Abdullah made it clear to Mr bin Laden that he was not selling but retaining UTB's shares in Blades. A loan of £3 million was probably not discussed with Mr bin Laden at that stage, but it is possible that an advance payment on account of the eventual investment was mentioned and very likely that a £3 million contribution to 2016/17 losses was required, as a term of the substantive deal.

468. In meetings in Dubai on 9 January 2017, the proposed investment of Mr bin Laden was discussed with the McCabes. At that time, Dr Rakan was still considering taking a stake himself, through Sela Sport, but it was known that the main investor would be Mr bin Laden. I reject the attempt made by the McCabes in evidence to suggest that the bin Laden name was only mentioned in passing, as being of no particular significance, but I do accept that it was not clear at that stage that Mr bin Laden would be the only investor and that it was still contemplated that Sela Sport would set up some kind of investment vehicle or fund for investors.

469. At those meetings with Dr Rakan in Dubai an advance (that could become a loan in the event that the investment did not proceed) was discussed and three tranches of payment in January, February and March were suggested. It was discussed and agreed in principle that there could be an option to capitalise the £3 million in any event, even if the loan did not proceed, but it was probably not made clear in

discussion with Dr Rakan whose option that should be. The loan and option arrangements had not previously been discussed with Mr bin Laden and no indication was given at that meeting about who would be making the loan, though it would have been understood that the loan would be made by the investor since the loan would be treated as part of the purchase price in the event that the investment proceeded. The true identity of the lender was not revealed to the McCabes at that stage.

470. Prince Abdullah and the McCabes all believed from the discussion that Blades would have the option to capitalise the loan of £3 million if the investment did not proceed. Mr Tutton was told so by Scott McCabe immediately after the meeting and Prince Abdullah told Mr Giansiracusa so in a Whatsapp message at about the same time. (Prince Abdullah's attempt in oral evidence to characterise that as a mistake was not persuasive.) That explains why Kevin McCabe left Dubai with the understanding (which had been shared with Prince Abdullah in the final meeting) that whatever happened the loan would not have to be repaid (because Blades could choose to capitalise the loan if there were no further investment). The McCabes were, understandably, delighted with the way that the meetings had gone and already regarded the investment as very likely to proceed. They also realised that the £3 million loan would mean that they had no further need at all to fund SUFC (assuming that the investment proceeded). The £3 million was therefore very eagerly awaited by Kevin McCabe.

471. When Mr Alsaady later sent a version of the loan agreement, it was clear that Mr bin Laden had not accepted that Blades should have the option to capitalise the £3 million advance payment. Mr Alsaady's draft stipulated that the lender should have the option. The only important thing for Kevin McCabe was to obtain the loan ("Let's have them in our cage"), which would (as he saw it) turn out in any event to be an advance payment and non-returnable, since the larger investment was going to proceed if the £3 million was paid. Kevin McCabe and his sons were equally unconcerned by the likely provenance of the loan or the circumstances in which it had been arranged. They knew and understood well that it was as a result of Prince Abdullah's authority and influence with Dr Rakan that likely investors had been found in Saudi Arabia and the advance of £3 million was being paid, but these matters were of no concern to them. Indeed, Kevin McCabe wanted Prince Abdullah to do exactly that. What mattered was that money was being advanced by a likely investor in the Club, that would enable SUL to end its subsidy of SUFC and enable, Kevin McCabe to hand on the baton and the Scarborough Group to sell the property assets back to the Club. Mr Tutton sounded a brief note of caution about the risk of being seen to take finance from the bin Laden family, but his concern was swept aside by Kevin McCabe. I find that the McCabes were so keen for the money to be paid by a potential investor that they would have brushed aside almost any concern about the circumstances in which the money was being raised, including whether it was proper for Prince Abdullah to assist in the way that he had.

472. The loan turned out to be made by Charwell, but no steps were taken to identify the beneficial owner of Charwell before or after the loan was made. Mr Tutton only obtained afterwards from Charwell's solicitors documents that verified the identity and status of Charwell as an offshore limited company. Given what the McCabes had been told in Dubai, there was no proper basis on which SUL could assume that the loan was made by Sela Sport, although Sela Sport continued to be named as the lead

investor while the due diligence process was carried on. Charwell was a company indirectly owned by the bin Laden family. The loan agreement itself was negotiated between Charwell's solicitors and SUL on behalf of Blades. It was SUL that agreed that the loan would be made to Blades and agreed the terms of the loan agreement. UTB was not involved.

473. The loan agreement was no more than that. The loan was interest-free for a little over a year and unsecured, but there was nothing in it that amounted to a gift to Blades. The reason why the loan was interest-free and unsecured was that it was also, at the option of Charwell, a first instalment of a substantial capital investment in Blades in return for a shareholding. The interest-free loan gave Charwell the status of a preferred investor and the opportunity to carry out due diligence and make an investment decision. In those circumstances, there is nothing surprising about the terms of the loan agreement.

474. When the loan agreement was signed, Kevin McCabe and Mr Tutton were ecstatic ("turning cartwheels"). The £3 million was paid on time, thereby financing SUFC's deficit for the remainder of the season. Had the investment proceeded, that would have been the end of the drain on Scarborough Group resources and a source of future funding for the Club, but unfortunately it did not proceed. It became evident by the end of April 2017 that whoever the investors were they were getting cold feet. As a matter of convenience, the name of Sela Sport had continued to be used in connection with Project Delta, but I find that Dr Rakan had ceased to have any interest in being a co-investor by no later (and possibly earlier) than April 2017. Further, although in February 2017 Dr Rakan was still considering the possibility of investing, the £3 million loan was not funded in any way by him or by Sela Sport.

475. By June 2017 Project Delta was dead. That left Blades having to deal with a loan that could not remain as such on the balance sheet if the Club was to comply with the Salary Cost Management Protocol. At that stage, Mr Alsaady was reluctantly persuaded by Mr Tutton to take to Mr bin Laden a proposal to novate part of the Charwell loan to UTB. The purpose of that was to capitalise the excess borrowing, to comply with the Protocol, and at the same time to equalise the capital contributions of SUL and UTB to Blades, resulting in the issue of £4 million of new shares to each of them. However, the main impetus was to avoid if possible (and then terminate urgently) the embargo on transfer activity that had been placed on the Club as a result of the Charwell loan.

476. With Charwell's agreement, the novation agreement was belatedly made. Charwell insisted on Prince Abdullah standing as guarantor for UTB's £1.6 million part of the debt. Blades remained liable under the original loan agreement for £1.4 million (the continued existence of this debt was warranted by Mr Tutton, who signed on behalf of Blades). Both sums were to be repaid by 30 April 2018.

477. The novation agreement was exactly what it appeared to be. It was not a disguised gift, nor was it understood that Charwell would not enforce the novated loan. The evidence is clear that this was an arm's length transaction. When UTB did not repay its part of the loan on time, this was not by agreement with Charwell but because Prince Abdullah needed time to release the necessary funds. I accept Prince Abdullah's explanation that, although he had £5 million in Jones Day's client account waiting for the delayed completion of the contract of sale and purchase of SUL's

shares in Blades, it was not sufficiently clear until about June 2018 that those funds would not be required in the short term and so could be used to repay Charwell. In the event, UTB had to pay something over the £1.5 million then outstanding (£100,000 having been prepaid in March 2018 as a sign of goodwill) in order to resolve a dispute about interest and the exchange rate used to calculate the dollar equivalent of £1.5 million. There was no question of UTB being treated favourably, or as a special case, by Charwell.

478. In view of those findings of fact, SUL's case on dubious dealings amounts to this: that at a time when he was a government minister Prince Abdullah used his influence to persuade Dr Rakan to help him source an arm's length investor in Blades – possibly a purchaser of SUL's shares in Blades – from which investment (if it was made) UTB would benefit as a shareholder of Blades. The loan of £3 million only arose at a late stage, as part of the discussions between Dr Rakan, Prince Abdullah and the McCabes in Dubai on 9 January 2017. Prince Abdullah was in reality acting (with the express or at least tacit agreement of SUL) to seek to sell some or all of SUL's shares in Blades and some of the property assets, for the benefit of SUL, Blades and UTB. The loan that was agreed was not a free-standing loan on favourable terms: it was an advance on account of a hoped-for investment in Blades that would be treated as a short-term, interest-free loan if the investment did not proceed. The financial benefit that Charwell gave Blades, in the form of a £3 million advance, was to induce Blades and SUL to treat favourably with Charwell for the sale of a substantial interest in the Club.

479. The benefit that Prince Abdullah (as an indirect shareholder in Blades) received from Dr Rakan or from Charwell is therefore not one that by its nature calls out for an explanation or investigation. If one is looking for conduct that is redolent of corruption there must be something that puts Prince Abdullah in a real (as opposed to fanciful) position of potential conflict between interest and duty: see Novoship (UK) Ltd v Mikhaylyuk [2012] EWHC 3586 (Comm), per Christopher Clarke J at [106]. The benefit that Dr Rakan conferred was putting Prince Abdullah in touch with potential investors in Blades. I agree with Mr Gledhill QC that that is of a wholly different order of magnitude than the pleaded allegation that Dr Rakan secretly paid Prince Abdullah £1.5 million.

480. The dealings between Dr Rakan and Prince Abdullah were not, in my judgment, such as to give rise to a real risk of conflict of interest and duty or to any perception of impropriety: Dr Rakan was helping Prince Abdullah to find a potential arm's length investor. Even if they were, there is no evidence of prejudice to SUL as a shareholder arising from that perception, though SUL made sustained allegations of prejudice that could arise from the Club being associated with financial impropriety. As far as the evidence is concerned, SUL offered to buy the shares of UTB on 29 December 2017 for £5 million with full knowledge of all the circumstances of the Charwell loan (and the real possibility that Charwell was associated with Mr bin Laden), and was happy to acquire full control of Blades, or sell its shares to UTB if a counternotice was served. The figure of £5 million had nothing to do with the true market value of a 50% holding in Blades. If SUL does now sell its shares to UTB that will be either at the price it chose when it served its Call Option Notice or at a price determined on the basis of valuation evidence that it and UTB called at trial. This evidence made no deduction or adjustment of any kind for a diminution in the value

of shares in Blades owing to the circumstances in which Prince Abdullah made use of Dr Rakan to find potential investors in Saudi Arabia.

481. There is, in short, no evidence of any financial or other prejudice arising from the fact that Prince Abdullah by agreement with Kevin McCabe used Dr Rakan to find a potential investor in Blades who advanced £3 million as a loan. SUL cannot create a possibility of prejudice by simply asserting (as it did) that the Club could lose support from its bankers, sponsors and fans, or face regulatory difficulties with the Football League, if it was known that Prince Abdullah had wrongly abused his relationship with a Saudi businessman to obtain advantage for SUFC without making full disclosure to the Saudi government. This was, in substance, what SUL's new case on bribery amounts to. The case based on dubious dealings is, necessarily, something less than that and is based on the circumstances leading to the making of the Charwell loan.

482. The only demonstrated potential prejudice to the Club that has arisen from this trial is as a result of the press coverage of the revelation that Blades had borrowed money from the bin Laden family. It was as a result of that that Santander, SUFC's bankers, asked questions about the Charwell loan, including whether due diligence had been done on the ownership of Charwell and whether the loan had been repaid. Santander did not ask whether Prince Abdullah had abused his position of authority to source an investor or whether he had disclosed his relationship with Dr Rakan and the benefit of the introductions to the Saudi authorities. I am confident that SUL's "no stone left unturned" approach to these issues would have placed any such evidence of actual prejudice before me, if there was any.

483. Further, the attempts by Prince Abdullah to find a new investor were made in good faith – with the backing of SUL – in order to benefit the Club. It must be remembered that in autumn 2016, when Project Delta started, the Club was likely to make losses of up to £8 million in the 2016/17 football season and neither shareholder was willing or able to fund such a deficit on a continuing basis. When Prince Abdullah was no longer able to contribute further money after November 2016, the Club was on several occasions on the verge of insolvency and only rescued by the ability of the Scarborough Group to provide small sums at the very last minute. Had the loan of £3 million not been provided, SUFC would either have become insolvent in February 2017 or SUL would have been forced (because Prince Abdullah was unable) to find that extra money and subscribe for more shares, contrary to its intention of passing on the baton to a responsible new owner. The attempts to find a new investor were therefore not only made in good faith but as much if not more for SUL's benefit than for UTB's benefit.

484. Even if there were some prejudice to the interests of SUL as a shareholder for which Prince Abdullah bears responsibility, I would have no hesitation on the facts of this case in concluding that any such prejudice is not unfair to SUL. The reason for that is that Prince Abdullah was acting in good faith, in the best interests of Blades and SUFC, with the encouragement of Kevin McCabe on behalf of SUL, to seek an investor who could buy SUL's shares and the property assets. SUL through the McCabes was fully aware of the circumstances in which Dr Rakan was involved and was able to put Blades in contact with potential investors. As was clear from the evidence, both oral and documentary, SUL expected and wished for Prince Abdullah to use his authority and contacts in Saudi Arabia to assist Blades in that way. As one

example only, on 11 January 2017, after the meetings in Dubai, Kevin McCabe emailed Mr Howard:

> "I better understand the influence HRH has to 'force' a possible transaction involving Sela Sports and their prospective investors … all very friendly and the association with HRH excellent – to 'make it happen' rests with him using his influence and his position of authority"

Prince Abdullah did so in accordance with Kevin McCabe's wishes for the benefit of SUL and UTB.

485. Mr Downes's answer to that conclusion was that SUL had no idea that Prince Abdullah had not regularised the dealings with Dr Rakan by making full disclosure to the Saudi government. But the truth is that the McCabes had no concern with any such matter. They did not ask themselves at any stage whether what was being done was scrupulously proper and did not assume that it was. This is demonstrated by Kevin McCabe's dismissal of Mr Tutton's concern about the Club being at risk of association with dirty money. They were desperate to find a new benefactor for the Club, who could get them off the financial hook for the future, and were only interested in a rich and willing investor coming forward somehow. I find that they would have acted no differently had Prince Abdullah told them in Dubai that he had not disclosed his dealings with Dr Rakan to the Saudi government. In any event, the argument about disclosure only raises again, in a different guise, the same unresolved question of what (if any) disclosure was required under Saudi law.

486. I therefore conclude that the allegedly dubious dealings between Prince Abdullah and Dr Rakan were not unfairly prejudicial to SUL. SUL knowingly supported them, no prejudice was caused by them and, on the contrary, SUL benefited from them. Had they resulted in a full investment by Charwell or others, SUL would have benefited much more substantially, but the investment unfortunately for them did not happen.

487. There is, accordingly, no conduct by Prince Abdullah, UTB or Mr Giansiracusa that can be said to be unfairly prejudicial to Blades such that the Court should grant relief to SUL.

K. Specific Performance

488. In view of the conclusions that I reached, there is no substance in SUL's argument that service of SUL's Call Option Notice was caused, wholly or in part, by unfairly prejudicial conduct of UTB, Prince Abdullah or Mr Giansiracusa. Service of the Call Option Notice was the result of Kevin McCabe's and his sons' and Mr Tutton's careful assessment of the way in which SUL and other Scarborough Group companies could benefit most from bringing the ISA to an end, in order to sell a majority stake in Blades to ALK.

489. Although SUL could have waited until it had received the benefit of a loan or advance from ALK, Kevin McCabe evidently considered that the time was right immediately after Christmas 2017 to exercise the option. Kevin McCabe had, in my judgment, learnt enough from his conversation with Mr Giansiracusa on 20 December 2017 to persuade him that Prince Abdullah was unlikely to be able to pay for the shares and

property assets within the year that clause 9.1.12 of the ISA required. He therefore judged that an offer for UTB's shares much lower than the £10 million mentioned to Mr Giansiracusa would have a good chance of success, given that UTB had to pay the price for the shares, fund the continuing deficit and then find in the region of £40 million within a year if it were to serve a counternotice. I find that Kevin McCabe had calculated that UTB would feel unable to make any such commitment and so would be unable to serve a counternotice, leaving SUL able to acquire UTB's shares cheaply for £5 million.

490. Kevin McCabe accordingly took the risk that UTB would serve a counternotice, but he undoubtedly believed that if it did so SUL would be paid £5 million for its shares and the Scarborough Group would be entitled to receive another £40 million or so within a year for the property assets. UTB considered that it could serve a counternotice and avoid having to pay for the property assets until it was willing to do so. UTB was wrong in its assessment, for the reasons that I have given. As things have turned out, if specific performance of the contract of sale and purchase is granted, SUL will receive £5 million for its shares and the Scarborough Group now has the benefit of contracts with SUFC under the property call options to sell the property assets. SUL will therefore be - after a delay of a little over a year and a half - in the position in which it should have been in February 2018.

491. In two respects SUL is in a better position. First, in February 2018, SUL and other Scarborough Group companies would have had the benefit of a contract with SUFC that was then a loss-making Championship football club, unable without the support of a new investor to afford to complete the contract. Now, SUFC is a profitable Premier League football club and very likely to be able to afford to buy the property assets. Second, the price payable for the property assets depends on their values as at the date of exercise of the property options. According to SUL's property valuation expert, the values of the main property assets increased between December 2017 and February 2019. It is inherently likely that the property assets have further increased in value as a result of being associated with a Premier League football club, as from April 2019. A higher price will therefore be payable to SUL and other Scarborough Group companies as a result of exercise of the property call options in July 2019 rather than in February 2018.

492. Nevertheless, SUL contends that the Court should exercise its discretion to refuse specific performance of the contract of sale and purchase of SUL's shares in Blades. It also submits that the Court should not award UTB damages in lieu of specific performance because UTB has not claimed damages in lieu of specific performance. I have no hesitation in rejecting the last submission. The Court has jurisdiction to award damages in lieu of specific performance where damages are not expressly claimed, just as it can award damages in lieu of injunctive relief. If the court cannot do so then it is hard to imagine circumstances in which it would be equitable to exercise a discretion to refuse specific performance and leave the claimant with no remedy. The consequence of that, in this case, would be to create a remedy for SUL's mistake about UTB's motives that is otherwise unavailable to SUL as a matter of law.

493. If damages were an adequate remedy for the loss of SUL's shares in Blades the Court might leave UTB to a remedy in damages. However, I consider that damages would not be an adequate remedy for the loss of complete control of Blades and SUFC, particularly as it would leave UTB and SUL deadlocked as 50/50 shareholders of

Blades and provide no effective resolution of their dispute. In any event, damages in lieu would be almost as burdensome to SUL as the loss of the shares, since the starting point for quantifying the value of the contract of sale and purchase would be the difference between the value of the shares to a purchaser in the position of UTB and the £5 million to be paid for them. Since the Club is now a Premier League football club worth in the region of £100 million, that could leave SUL paying up to £45 million in damages. UTB's submissions do not grapple with the implication and quantum of damages in lieu of specific performance except by arguing that damages in lieu should not be awarded.

494. The grounds on which SUL contends that the Court should refuse specific performance are: that damages are an adequate remedy; that UTB unfairly took advantage of a mistake made by SUL and so does not come to court with clean hands; and that specific performance would cause great hardship to SUL because of the change in circumstances since January 2018, namely that the Club (and so the shares in Blades) are now worth very substantially more than they were worth in December 2017 when SUL served the Call Option Notice and took the risk of being bought out for £5 million.

495. In my judgment damages are not an adequate remedy for UTB for the reasons to which I have alluded. Moreover, in clause 20.1 of the ISA, the parties expressly agreed that damages are not an adequate remedy for breach of obligations under the ISA. While not determinative, that agreement reflects the importance of performance according to the terms of the ISA, which includes the call option provisions of clause 11. Shares in a limited company are a form of property and many limited companies are unique in the same way that a parcel of real property is unique. The shares in Blades carry with them control of SUFC, a company that runs a famous football club, ownership of which confers all kinds of non-financial benefits that people such as Kevin McCabe and Prince Abdullah find attractive and rewarding irrespective of financial gain or loss. An award of damages would not be adequate compensation to UTB for loss of these benefits, especially as it would leave UTB deadlocked with SUL in a non-functioning relationship as joint owners, without any form of shareholder agreement for the future.

496. SUL made a mistake about the motives of UTB and UTB tried to take advantage of that mistake but in the event it has failed to do so. Had I concluded that UTB succeeded in avoiding clause 9.1.12 of the ISA in breach of contract, so that it was entitled to buy the shares in Blades of SUL but not obliged to trigger the property call options, I would have refused specific performance except on terms that the property call options were exercised. I would have done so on the basis that the court would otherwise confer on UTB a benefit obtained by a breach of the ISA that it was never intended that it would have, to the great disadvantage of SUL. However, apart from the fact that SUFC has exercised the property call options, my decision that UTB was unsuccessful in avoiding clause 9.1.12 means that, on completion of the contract of sale and purchase, UTB would have been bound to cause SUFC to exercise the property call options. In fact, the property call options were exercised in July 2019 and SUL is therefore in the same position (apart from about 18 months' delay – which as pointed out above is not wholly disadvantageous to it) as it would have been in if UTB had not attempted to avoid clause 9.1.12. SUL will therefore not be disadvantaged in consequence of any mistake that it made or UTB's attempt to take

advantage of any such mistake. There is therefore no reason in this case to refuse specific performance on grounds of prejudice caused by SUL's mistake.

497. As for hardship and change of circumstances, SUL is wrong to contend that there has been a fundamental change in the subject matter of the contract of sale and purchase during the period of delay in its completion. It is also wrong to contend that UTB will obtain a windfall or something more than the performance due to it. There has been no change in subject matter and there is no undeserved windfall. SUL served the Call Option Notice putting a value of £5 million on 50% of the shares of Blades. It did so in the knowledge that Blades had a short-term objective of achieving Premier League status for the Club and a reasonably good chance of achieving that objective. The fact that the Club then did so, at the end of the following season, is no material change in circumstances. What changed is the value of the shares as a result of promotion being acheived, but SUL knew that the price for the shares was fixed by the terms of the Call Option Notice that it served and knew that the Club might be promoted.

498. SUL is not able to – and does not – contend that the change in the value of Blades shares was attributable to anything that it rather than UTB did during the period of delay in completion. Both SUL and UTB injected a further £1 million each into Blades in April 2018, to enable it to repay the Charwell loan, and this was done on the basis that the eventual "loser" in the litigation would have its contribution treated as a loan to Blades. There was no evidence of any further investment by either owner subsequently to April 2018. SUL does not contend that it rather than UTB was responsible for the success of the Club in achieving promotion. Rather, it appears that the success was down to the considerable skill of the Club's independent management and executives.

499. In those circumstances, the change in the value of Blades' shares since February 2018 is not the result of any work or investment of SUL, which would make it unjust to enforce the contract of sale and purchase without taking that work or investment into account. SUL was always prepared to take the risk of having to sell half the shares in a football club that could (and in the view of Kevin McCabe should and deserved to) be promoted to the Premier League. It was a calculated risk. The consolation, if the risk eventuated, was that SUFC would have to buy the property assets. That is what will now happen. In that sense, SUL has obtained that which it was prepared to accept when it served the Call Option Notice. It cannot in my judgment be heard to say that circumstances have changed because the subject matter of the contract is now more valuable. The position would have been the same in reverse if UTB had not served a counternotice but had disputed the validity of the Call Option Notice on different grounds, resulting in litigation and a delay in completion. UTB could not in such circumstances expect to resist specific performance of the contract to sell its shares for £5 million on the ground of an increase in the value of the shares in the meantime.

500. Patel v Ali [1984] Ch 283, on which SUL relies, was a wholly different case in which a vendor's personal health and circumstances had so declined during a four-year delay that enforcing the contract of sale and purchase of her house would have created great personal hardship for her. Had Mrs Ali sought to resist specific performance on the ground that her house had significantly increased in value during the four years, I have no doubt that the argument would have been swiftly rejected.

501. SUL seek to contend that UTB will obtain a windfall and that specific performance will therefore operate harshly and oppressively to SUL, but this is merely another way of formulating the same argument. UTB would only obtain a windfall if the increase in the value of the shares was the result of something that SUL rather than UTB had done during the period of delay, or possibly something caused by the delay itself. Unless UTB would promptly have sold its shares in Blades to a third party for a low price, reflecting Championship status, UTB will obtain the same benefit today as if the contract had been completed in February 2018 and the Club's management and executives had achieved promotion in 2019. SUL has not argued or sought to prove that UTB would have sold the shares in 2018 to anyone that it did not control (UTB 2018 will hold its shares on resulting trust for UTB and is otherwise controlled by Prince Abdullah and UTB has the option to take back from Prince Musa'ad and Mr Giansiracusa the shares that were to be transferred by SUL to them). SUL does assert that UTB will obtain a windfall because it will now seek to sell the Club to a third party at a large profit, but in my judgment even if that is true it is an irrelevance: whether UTB intends to keep its shares or sell them is a matter for it and, regardless of its choice, it will have an asset of the same value.

502. Accordingly, for the above reasons, I reject the argument that any change in circumstances makes it oppressive to SUL to enforce the contract for sale and purchase of its shares in Blades for £5 million. The true position here is that SUL will get, as a result of the delay, more than it was prepared to accept when it served the Call Option Notice: a better prospect of the property call options being completed by SUFC on time for a higher price. There is nothing inequitable about enforcing the contract simply because SUL misjudged the risk of UTB serving a counternotice and the shares increasing in value. There is no relevant change of circumstances that makes enforcement oppressive or unduly harsh.

503. As for the doctrine of clean hands, it is true that UTB comes to court seeking equitable relief in circumstances in which it has acted in repudiatory breach of the ISA by stating that it would not execute the property option notices on completion of the contract of sale and purchase. Further, it has admitted that it was aware that SUL must have specified a price of £5 million believing that the property call options would be triggered and that it attempted to take advantage of that mistake. These circumstances call for a careful consideration of whether a court of equity should decline to grant UTB the equitable remedy that it seeks.

504. UTB's attempt to evade clause 9.1.12 was unsuccessful. SUL has not in fact been prejudiced by what UTB did. SUL has to sell its shares in Blades for £5 million because of the terms of clause 11 of the ISA and the price that it chose to specify in the Call Option Notice. This was a low price and SUL hoped that UTB would feel compelled to accept the low price. As it was put in submissions, SUL was "playing hard ball" and UTB was entitled to seek to make the terms of the ISA work in its favour, without regard for SUL's interests, so far as it lawfully could. It was fully entitled to serve a counternotice and take advantage of the low offer. It was mistaken in thinking that it could acquire SUL's shares and not trigger clause 9.1.12.

505. I have accepted Mr Giansiracusa's and Prince Abdullah's evidence that UTB only decided on 10 January 2018 to serve a counternotice. That was at a time when the only "avoidance" device that it had in mind was nominating transferees of SUL's shares other than UTB. For reasons already given that would not have meant that

UTB did not "acquire" SUL's shares; nevertheless UTB was entitled to sub-sell the shares and expressly permitted by the ISA to direct SUL to transfer the shares to others. It is not therefore the case that UTB only served a counternotice because it had devised the Scheme and would otherwise not have served a counternotice. SUL did not plead or seek to establish that UTB would not have served a counternotice if it had believed that it must comply with clause 9.1.12.

506. A claimant for specific performance of a contract is not disqualified from equitable relief merely because it has done wrong to the defendant. It must be something wrong that relates to the contract that the claimant seeks to enforce, such that it would be against conscience for the court to grant the particular relief sought. Although UTB sought to avoid an obligation owed under the ISA, nothing that it did wrong affected the formation or terms of the contract of sale and purchase of Blades shares. SUL freely chose to serve the Call Option Notice and UTB was entitled to serve a counternotice for any reason, giving it the right to purchase SUL's shares in Blades. The Scheme did not affect the service of the Counternotice, save perhaps the exact timing of it, but that was irrelevant to the formation of the contract of sale and purchase. Although UTB then wrongly refused to execute the property call option notices until it chose to do so, that was a breach of contract whose effect on SUL was, as it turns out, only temporary.

507. By ordering specific performance of the contract of sale and purchase, the Court will not be conferring any advantage on UTB that it has wrongfully acquired, except as regards the timing of the purchase of the property assets. It is true that delay in having to pay for the property assets has benefited UTB in the sense that UTB will probably not now have to sell an interest to another investor or borrow large sums of money in order to cause SUFC to comply with its obligations. On the other hand, the price that SUFC will have to pay has probably increased as a result of the delay. In that way, the delay in sale and purchase of the property assets has benefited both UTB and SUL for different reasons.

508. The right that UTB seeks to enforce arises directly from service of the Counternotice. UTB resolved on 10 January 2018 to serve a counternotice. That was not dependent on the Scheme because Mr Giansiracusa did not think of that until 22 January 2018. It is not the case therefore that the decision was taken and the Counternotice was served only because UTB intended to act in breach of the ISA. As at 10 January 2018, UTB intended to act pursuant to the express terms of the ISA by requiring transfer of some of SUL's shares to persons other than UTB. The only breaches of contract occurred on 31 January 2018. It is therefore not the case that the rights that UTB seeks to enforce depend on a breach of contract, an intention to breach a contract or on any other wrong. The only breaches of contract followed the accrual of UTB's rights under the contract of sale and purchase.

509. By granting specific performance, the Court will be placing both parties in the position that SUL had bound itself to accept when it served the Call Option Notice and knowingly took the risk that UTB might serve a counternotice. The only difference is the delay. In my judgment, the "unclean hands" of UTB arising from its breach of the ISA on 31 January 2018 therefore do not infect its equitable claim to enforce the contract of sale and purchase. The grant of specific performance does more complete justice to the substantive rights of the parties than refusing it would do. Refusing specific performance would leave both parties in a very difficult

position with Blades and SUFC deadlocked without the benefit of the ISA; with an obligation on SUFC to buy the property assets by July 2020, and with a liability of SUL to compensate UTB for the value of the 50% of Blades shares that UTB will not receive. This would, in my judgment, be highly likely to lead to further disputes and litigation, to the inevitable harm of others interested in the Club. It is therefore not unconscionable to grant the relief that UTB seeks.

510. For these reasons, I will not refuse UTB specific performance of the contract of sale and purchase on account of its anticipatory breach of the ISA and its attempt to obtain an advantage of buying SUL's shares without triggering the property call options.

511. In closing, Mr Downes QC submitted that of the possible and available outcomes in this case only two are fair outcomes: allowing SUL to buy the shares in Blades owned by UTB or UTB 2018 at full value, and ordering a re-run of the clause 11 option notice procedure but with UTB forced to serve the option notice. He recognised that although leaving each party with a 50% holding might be said to be fair it was nevertheless an unsatisfactory outcome. Both the outcomes preferred by Mr Downes depend on SUL establishing unfairly prejudicial conduct of UTB, Prince Abdullah and/or Mr Giansiracusa, which merit the grant of relief of that nature, but for the reasons that I have given no such conduct meriting relief of any kind has been established.

512. SUL's characterising as unfair the outcome of one side acquiring the other's shareholding for £5 million is in substance the same argument of change in circumstances or windfall that I have already addressed. SUL sought the advantage of acquiring (and took the risk of having to sell) a 50% holding in Blades for what might turn out to be much less than its true value at a later date, but this was inherent in the clause 11 procedure that allowed both parties to seek to balance that advantage and risk as they saw fit. There is nothing inherently unfair in enforcing the contract of sale and purchase that arose from the terms of the Call Option Notice and Counternotice, once it is established that neither was served as a result of unlawful conduct.

513. Mr Downes also sought to persuade me that it would be damaging to the interests of the Club to allow UTB to obtain full control at the expense of SUL, on the basis that Kevin McCabe is much valued by the staff, executives and manager of the Club as well as by the supporters, whereas Prince Abdullah and the UTB-appointed directors are relatively unknown and might be disliked as having been the instruments of Kevin McCabe's removal. The basis for this argument was one character witness, Peter Beeby, and the evidence of Mr Bettis. Mr Beeby is a supporter who has known Kevin McCabe for upwards of 20 years. He spoke in glowing terms of the benefits that Kevin McCabe has brought to the Club and the regard in which he is held. Mr Bettis said, in one-word answers to many leading questions, what a force for good Kevin McCabe had been and how his removal might be unsettling. However, Mr Beeby had nothing adverse to say about Prince Abdullah's involvement in the Club or about UTB, and it was clear that Mr Bettis has an equal regard for the management qualities that UTB brings to Blades and SUFC and that he is on equally good terms with Prince Abdullah and Mr Giansiracusa. I have already concluded that, despite the conduct of both of the disputing owners, the Club has been successful recently because of the strength of the independent management and executives of the Club.

514. In any event, mere speculation about what impact certain outcomes or this judgment as a whole may have on those associated with the Club cannot be a proper basis for granting or withholding relief that is otherwise appropriate. This judgment and my decision are based on the merits of the underlying dispute between the two owners of the Club.

L. Postscript: Valuation Evidence

515. The parties prepared and served evidence from expert valuers on the value of the property assets that were subject to the property call options and on the value of the shares of Blades at three different times: about the time that the Call Option Notice was served, in March 2019, shortly before the start of the trial in April 2019, and in June 2019. In the event, after SUFC agreed to exercise the property call options after the start of the trial, it was agreed that it was unnecessary to call the property valuers on the basis that resolution of any disagreement in their evidence had become irrelevant to the issues to be decided at trial. The reports prepared by the property valuers were admitted as written evidence but in the event neither side needed to rely on that evidence in their closing submissions.

516. I heard oral evidence from the two share valuation experts, Mr Nicholas Good FCA, a partner in KPMG LLP, who was called on behalf of SUL, and Mr Douglas Harmer ACA, a former KPMG employee and now a director of Oakwell Capital Ltd, who was called on behalf of the UTB parties. The evidence of these expert witnesses would have been material had I awarded SUL the relief that it claimed in its Petition, namely an order that SUL buy the shares of UTB in Blades at their current value, or similar relief. However, I have held that the contract of sale and purchase of SUL's shares in Blades should be enforced and that no relief should be granted on account of unfairly prejudicial conduct alleged by SUL. In those circumstances, the valuation evidence was only of peripheral relevance to my conclusions.

517. In case it later becomes material, I express briefly below my conclusions on the valuation evidence, in so far as it remained a matter of dispute.

518. Mr Harmer in his reports had valued Blades and 50% of the shares in Blades at late December 2017, March 2019 and – in a supplementary report – June 2019. The significance of the latter date is of course that by then (but not in March 2019) SUFC had secured promotion to the Premier League. Mr Good similarly addressed the values in late December 2017 and March 2019 in his original report and valued at June 2019 in a supplementary report.

519. Mr Harmer valued Blades at between £21 million and £25 million in 2017 and Mr Good at between £35 million and £40 million. Mr Harmer valued in March 2019 at £24 million to £29 million and Mr Good at £30 million to £35 million. The current value of Blades with the Club promoted to the Premier League was put in the range of £100 million to £120 million by Mr Harmer and between £88 million and £104 million by Mr Good. Each of the valuers considered that a 50% holding of Blades shares would attract a significant discount from pro rata value, on a sale to a third party, on account of the absence of control over the company.

520. Mr Harmer and Mr Good were quite different as valuers. Mr Good was an orthodox professional valuer, who had only limited experience of working with football clubs

and no particular expertise in the football world, but who relied on colleagues for specialist knowledge. His valuations were rigorous and careful and he impressed me as a highly competent and professional man, appropriately cautious and reasoned in his approach, and aware of the limtits to his own knowledge and of the difficulties of valuing a football club. Mr Harmer, on the other hand, was deeply immersed and actively involved in the world of transactions in football clubs and their shares, but was not otherwise an expert in forensic accountancy. His report was thin on reasoning and he was unimpressive as a professional valuer, failing to address and answer properly most of the questions that were put to him. In the final analysis he relied on his gut feel for the right value, based on his experience of the sector and the market.

521. I was more impressed with the valuations of Mr Good, in particular with his approach to valuing the risk that a newly-promoted club could be relegated within one or two seasons, but I considered that one aspect of his approach was unpersuasive in that regard. This was his partial reliance on betting odds in forming a judgment on the appropriate discount to the value of a well-established Premier League club of the size of SUFC. I consider that a discount of 50%, based on the historic evidence of the fortunes of newly-promoted Premier League clubs, is much more reliable than the bookmakers odds of SUFC specifically being relegated within 2 seasons. Accordingly, I would incline towards the top of Mr Good's range of £88 million to £104 million, rather than the bottom of it (which resulted from the bookmakers' odds being converted into a discount).

522. Mr Harmer's reasoning, apparently based on a table of multiples of revenue that he considered appropriate to a loss-making business, ultimately did not influence his opinion that the current value of Blades was in the range of £100 million to £120 million. Rather, the multiple that he considered appropriate was derived form his gut feeling that applying the median multiple from his table produced too high a value for the Club, rather than the value being derived from the appropriately selected multiple. I do however have some regard for Mr Harmer's considerable experience of what is an unusual market. In my judgment his gut feel is of some persuasive value, given his experience, though the range of values that he gives is a broad one.

523. Mr Harmer expressed the opinion, which I accept, that in the real world a transaction for Blades shares would not have happened in March 2019, because the difference in value between a Championship club and a Premier League club is very great and any seller and buyer would want to know whether or not the Club achieved the promotion in April 2019 that in March it was on course but not certain to achieve. I also accept his opinion that in reality a one-off payment would not be made for a newly-promoted club but that the consideration would be structured so that further tranches became payable if the club survived one, two or more years in the Premier League. Nevertheless, the issues that the valuers were asked to address were the market value of Blades and holdings in Blades on particular dates, which requires one to assess the cash consideration that would be paid in full on the completion date of the transaction.

524. Having heard both valuers, my conclusion is that the most likely market value of Blades in June 2019 was £104 million, a figure at the top of Mr Good's range of values but still within Mr Harmer's range.

525. Mr Downes QC on behalf of SUL, having successfully undermined in cross-examination the methodology contained in Mr Harmer's reports, then sought to persuade him that the best evidence of the value of Blades in June 2019 was not his overall gut feel for value but an amount based on the figures for which two other Premier League clubs (with which Mr Harmer is currently involved) are being offered on the market and on the non-binding terms agreed on 1 April 2019 between SUL and ALK for the sale of a majority stake in Blades. Mr Downes also sought to abandon reliance on SUL's own expert, Mr Good, on the basis that he did not have sufficient knowledge of actual deals being discussed in the market, of which Mr Harmer was aware.

526. I found these attempts to try to justify the highest possible figure on any available basis unpersuasive. Mr Harmer's knowledge of the dealings involving the two other Premier League clubs would have been taken into account in the range of values that he expressed in his supplementary report, since the relevant facts were known to him at the time. Further, these were values at which no deal had taken place and, in the case of one of them, no interest had been expressed. ALK's terms were not binding, involved a number of "kickers" (staged payments) depending on how long the Club remained in the Premier League, and included very substantial sums paid upfront for the property assets, including assets not owned by SUFC or Blades.

527. If it became material to consider the value of Blades in December 2017 or March 2019, I would accept the opinion of Mr Good as to the appropriate range of values, namely £35 million to £40 million in December 2017 and £30 million to £35 million in March 2019 and would determine a value in the middle of each range. Although it appears odd that the value of Blades - at a time when the Club was close to securing promotion - is lower than the value at a time when promotion was merely speculative, the reason, as Mr Good explained, is that SUFC owned one very valuable player at the earlier time, who was sold at the end of the 2017/18 season for in the region of £12 million in total. With a loss-making Championship club, the value of the club is essentially based on the value of its players and any property assets that it owns. In my judgment, Mr Harmer significantly undervalued Blades in March 2019 at a time when promotion was almost within its grasp because he entirely disregarded that prospect in his valuation approach.

528. The valuers appear to agree that 50% of the shares in Blades would be worth on the open market only about one-third of the net asset value of Blades. The discount arises because a 50% holding does not carry with it any control over the company's affairs. The special value attributable to a possible purchase by the other existing shareholder would be disregarded on a valuation on a market value basis, though in reality in many circumstances an existing shareholder would be likely to pay more than the market value.

M. Summary of Conclusions

529. Blades is not a quasi-partnership and the terms of the ISA are not subject to an implied term that each of the shareholders is to deal with the other in good faith. In any event, no such implied term applies once one of the shareholders is about to serve or has served a Call Option Notice under clause 11 or a Roulette Notice under clause 10 of the ISA.

530. There is a term to be implied in the ISA that UTB must not wilfully obstruct or hinder the operation of clause 9.1.12 of the ISA in connection with the exercise of rights under clause 10 or clause 11 to purchase the shares of SUL.

531. The contract of sale and purchase of SUL's shares in Blades that arose on 26 January 2018 cannot be set aside on the ground of any mistake made by SUL in serving the Call Option Notice on 29 December 2017.

532. UTB was not in breach of the ISA prior to service of its counternotice dated 26 January 2018 and did not conspire with Prince Abdullah and/or Mr Giansiracusa to use unlawful means to cause harm to SUL.

533. UTB's attempt to avoid the operation of clause 9.1.12 was unsuccessful. It will "acquire" the shares of SUL in Blades within the meaning of clause 9.1.12 on completion of the contract of sale and purchase of SUL's shareholding and would have been obliged to cause SUFC to execute property call option notices had the contract of sale and purchase completed on time.

534. UTB was in repudiatory breach of the ISA by refusing on 31 January 2018 to execute property call option notices and the ISA was terminated by SUL on 6 February 2018.

535. No loss that is the subject of any claim by SUL has been caused by UTB's repudiatory breach of the ISA because UTB agreed in April 2019 to cause SUFC to exercise the property call options in April 2019 and SUFC did so in July 2019.

536. Save for a minor respect in which no harm was caused and no relief is appropriate, none of Prince Abdullah, Mr Giansiracusa and UTB have conducted the affairs of Blades in a manner unfairly prejudicial to the interests of SUL as a shareholder in Blades.

537. The contract of sale and purchase of SUL's shares in Blades was unaffected by termination of the ISA and should be specifically enforced, since damages are not an adequate remedy for UTB, with the consequence that SUL must complete the sale of its shares in Blades to UTB for £5 million. As a consequence of the exercise of the property call options, SUFC must acquire the property assets pursuant to the property call options by July 2020.

538. The additional claim for damages for breach of contract and for conspiracy to cause harm to SUL is dismissed.