SUPREME COURT OF QUEENSLAND

CITATION:	*Mazzoni Plant Hire Pty Ltd v HBU Holdings Pty Ltd & Ors* [2014] QSC 228
PARTIES:	**MAZZONI PLANT HIRE PTY LTD** ACN 113 079 208 (applicant) **v** **HBU HOLDINGS PTY LTD** ACN 130 494 012 (first respondent) **SHANE IAN MUNDEY** (second respondent) **AURORA LEISURE NO 1 PTY LTD** ACN 130 494 996 (third respondent)
FILE NO/S:	BS 10868 of 2013
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	17 September 2014
DELIVERED AT:	Brisbane
HEARING DATE:	30 May 2014
JUDGE:	Philip McMurdo J
ORDER:	**1. The originating application is dismissed;** **2. It is declared that there is a contract between the applicant and the first respondent for the transfer of the shares held by the first respondent in the third respondent, according to the transfer notice given by the first respondent dated 1 February 2013.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where both the applicant and first/second respondent own a 50% shareholding in the third respondent – where the third respondent was established to

purchase and develop land at Mackay – where a dispute arose as to the financing of the project – whether this dispute was a "continuing unresolved dispute in relation to the management of the company" to trigger the deadlock provisions of the shareholders agreement – whether the first/second respondent served a valid transfer notice on the applicant – whether the applicant is deemed to have accepted the transfer notice – whether the first/second respondent's shareholding in the third respondent should be transferred to the applicant according to the transfer notice.

Corporations Act 2001 (Cth), s 461(1)(k)

COUNSEL: M J Liddy for the applicant

The second respondent appeared on his own behalf

SOLICITORS: Colville Johnstone Lawyers for the applicant

[1] This is a dispute between the shareholders of the third respondent, which I will call the company. The applicant, which is controlled by Mr Darren Mazzoni, owns half of the shares. The first respondent, which is controlled by the second respondent, Mr Mundey, owns the other half.

[2] The applicant applies to have the company wound up. It filed and originating application seeking relief under Part 2F.1 or alternatively, s 461(1) of the *Corporations Act* 2001 (Cth). As its case was ultimately presented, a more relevant ground would seem to be that under s 461(1)(k), namely that it is just and equitable that the company be wound up.

[3] Mr Mundey and his company ("HBU") oppose the winding up upon only one basis. They argue that by the terms of a written agreement between the shareholders of the company and in the events which have happened, the applicant is obliged to purchase HBU's shares. The respondents are without legal representation and the terms of their pleaded counterclaim are not entirely clear. But at the hearing it was apparent that the issue for determination is whether, as they contend, the applicant is obliged to purchase their shares.

The Shareholders Agreement

[4] The agreement is in writing and dated 7 July 2011. The parties are the applicant (described as "MPH"), HBU and the company. It recites that the company was established to purchase and develop certain land at Mackay, that the applicant and HBU hold or are entitled to hold the issued capital in equal shares and that the shareholders wish to "regulate their rights inter se in relation to the activities of the Company for the proposed development of and sale of the Land …".

[5] The agreement requires the concurrence of the shareholders in all respects in the conduct of the company's affairs. By clause 3.2, a quorum for a meeting of shareholders or directors is one representative of each shareholder. No shares can be issued without the approval of those shareholders. At any meeting of shareholders, a matter can be resolved only by unanimous decision.

[6] Clause 4 provides for the funding of the company's acquisition and development of this land. It is necessary to set out clause 4 in its entirety:

> "4.1 MPH will advance funds to the company for acquisition costs, finance costs, from the date of this Agreement until the Acquisition Date to enable the Company to satisfy (if possible) the contract Conditions.
>
> 4.2 Funds advanced by MPH to the company for acquisition, finance costs and will be treated as a loan to the company.
>
> 4.3 Once the property has been settled, the Shareholders will seek independent finance to cover the Project Costs ('the Finance Facility').
>
> 4.4
>
> 4.4.1 The Company and the Shareholders will do all things and sign all documents required to obtain the Finance Facility;
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> 4.4.2 If guarantees are required from the Shareholders or their directors the Shareholders will provide those guarantees and/or cause their directors to do the same, provided that the aggregate liability of each Shareholder and that Shareholder's directors will be limited to that Shareholder's Proportion (as specified in Recital A) of the total liability under the Finance Facility. Unless otherwise agreed by the Shareholders, nothing in this Agreement requires the parties to give guarantees from the Shareholders trusts.
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> 4.4.3 Each Shareholder cross indemnifies the other and its directors for any liability they suffer under the Finance Facility in excess of their Proportion.
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> 4.5 MPH will, on or before the Acquisition Date, advance to the Company Equity Funding to enable the Company to purchase the Land.
>
> 4.6 The Finance Facility will be applied towards Project Costs as follows:-
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> 4.6.1 Firstly, in accordance with the Equity Funding Proportions, in repayment of amounts advanced to the Company by the Shareholders.
>
> 4.6.2 Secondly, in payment of amounts incurred to persons other than the Company or the Shareholders;
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> 4.7. The shareholders will advance the Company, in accordance with the Equity Funding Proportions, any additional funding over and above the Finance Facility required to complete the Project."

[7] The term "Project Costs" is defined to include "Acquisition Costs" and "Project Expenses". The term "Acquisition Costs" is defined to include all costs associated with the acquisition of the land, including the purchase price. The term "Project Expenses" is defined to include all expenses and other outgoings required to complete the "Project", being "the acquisition, procuring finance … and development of the Land as determined by the Board and the marketing and sale of the Land … on terms to be agreed between the Shareholders".

[8] Clause 8 provides that in the event that a shareholder wishes to dispose of its shareholding, it is to first offer its shares to the other shareholder for the consideration of the value of those shares. If that offer is not accepted, the shares can be offered for sale to a third party at no less than the price at which they were offered to the existing shareholder.

[9] By clause 9 it is agreed that all funds contributed to the Project by shareholders would be treated as interest free loans. It further provides that the shareholders will not do anything which might jeopardise the "continued enjoyment of the Project assets" and that they will be just and faithful to each other in all transactions relating to the project. It further provides that neither shareholder, without the approval of the other, will encumber the assets of the project.

[10] Clause 11 defines certain events as constituting a default for which it provides for the remedies of the non-defaulting shareholder. In particular, the non-defaulting shareholder may elect to purchase the other's shares.

[11] Clause 13 provides that the agreement is to terminate upon the earlier of the completion of the Project or upon either party ceasing to be a shareholder.

[12] Clause 12, upon which the respondents rely, is headed "Deadlock Provisions". It relevantly provides:

> "12.1 Notwithstanding clause 3, in the event of continuing unresolved dispute in relation to the management of the Company of such magnitude that any of MPH and HBU ('the Offering Shareholder') is of the opinion that the continuation of the orderly management of the Company is no longer practicable then the offering Shareholder will have the right to offer for sale the Shares held by it in accordance with this Clause.
>
> 12.2 The Offering Shareholder wishing to transfer or to procure the transfer of its interests referred to in Clause 12.1 will serve a notice ('the Transfer Notice') on the other members of the Company ('the Recipient') offering for sale all of the Offering Shareholder's shares in the Company ('the Sale Interests') and stating the offer price for the sale of the Sale Interests on terms that the sale is unconditional and without the benefit of any representations or warranties or undertakings other than a warranty as to unencumbered title.
>
> 12.3 The Recipient may within 30 days after receipt of the Transfer Notice serve a notice ("Counter Notice") on the Offering Shareholder requiring the Offering Shareholder to acquire all the Recipient's shares at the same price per share and otherwise on the same terms and conditions as contained in the Transfer Notice.
>
> 12.4 In the event that the Recipient does not serve a Counter Notice within 30 days of the receipt of the Transfer Notice then the Recipient will be deemed to have accepted the offer contained in the Transfer Notice.
>
> 12.5 The Recipient of the Counter Notice will on receipt of the Counter Notice be deemed to have accepted the offer contained in the Counter Notice."

[13] Clause 15.5 provides for the ways in which "notices and other communications between the parties" may be given or made. It provides that they may be sent by certified post, by hand delivery or by facsimile transmission. It does not provide that a notice may be emailed. The respondents' case is that HBU sent an effective Transfer Notice under clause 12.2, by attaching it to an email. Although the applicant's case originally challenged the efficacy of this service of the notice, the point was abandoned in argument.[1]

The issues

[14] The respondents say that on or about 1 February 2013, HBU gave an effective transfer notice, offering the sale of its shares to the applicant at a price of $388,000. No "Counter Notice" was given by the applicant. If the HBU notice was effective, there has been a deemed acceptance of its offer and the applicant is obliged to purchase HBU's shares at that price.

[15] Two issues were argued by the applicant as to the efficacy of HBU's notice. The first is whether, in terms of clause 12.1, there was a "continuing unresolved dispute, in relation to the management of the Company of such magnitude that … HBU … [was] of the opinion that the continuation of the orderly management of Company [was] no longer practicable …". The applicant says that there was then no such dispute. The second issue is as to the form of the notice. The applicant says that it is not a notice which offered the shares to the applicant, the notice not being expressly addressed to it.

[16] The first of those issues requires a discussion of the course of the dealings between the two shareholders, particularly in late 2012.

[17] The company was incorporated in 2008 when Mr Mundey became its sole director. Mr Mazzoni was appointed as a director in July 2011 when the applicant acquired its shares. This followed some discussions between Mr Mazzoni and Mr Mundey about the prospective development of the land at Mackay by subdividing it into residential allotments.

[18] The land was then owned by another company controlled by Mr Mundey, Greenpoint Developments Pty Ltd. But Mr Mazzoni and Mr Mundey agreed that it should be owned and developed by the company. As they agreed, the applicant advanced $545,000 to the company to enable it to purchase the land. The applicant also made further advances for the payment of rates and duty on that transaction. In all, its initial advances totalled $566,326.40.

[19] Consequently, the company became the owner of the land and a debtor of the applicant for the amounts which it had advanced. It had no other significant assets or liabilities. Mr Mundey's evidence is that he then told Mr Mazzoni that he had already "put approximately $240,000 into the Project". But he was not a creditor of the company. As the shareholders agreement records, the parties proposed to obtain funding from a third party.

[20] Mr Mazzoni says that at this time Mr Mundey promised that he would pay to the applicant an amount of $280,000, being about half of the amount which it had advanced to the company. Mr Mundey disputes this and says that the agreement as

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1 Transcript 1-78 l. 25.

to the repayment of the applicant's advance to the company was that which is recorded in the Shareholders Agreement. I have set out clause 4 above, from which it is clear that the parties did not agree as Mr Mazzoni suggests. Their agreement was that the company would obtain finance from an independent financier to meet the Project Costs, which included the costs associated with acquiring the land as well as its development costs. That finance was to be sought as soon as the company's purchase of the land had settled.[2] The shareholders were to advance to the company only any funding over and above the external finance as was required to "complete the Project".[3]

[21] The development of the land has not progressed very far. The applicant has made some further advances to the company for the payment of valuers and for outstanding rates. By the end of August 2013, the applicant had advanced a total of $592,354.

[22] The land was valued in October 2012 at $675,000. Another valuation, obtained in July 2013, was in the same amount.

[23] In October 2012 Mr Mundey was trying to obtain some finance for the project. An entity called Holden Capital (apparently a finance broker) wrote to the directors of the company on 17 October 2012, offering certain finance to be secured by a first mortgage on the company's land. The lender was to be a company called Kelly Projects Pty Limited. It offered finance in an amount of $450,000. In addition to the first mortgage, the loan was to be secured by a charge over the company's assets and a "Personal Guarantee for Debt and Interest from the Director and Shareholders of the Borrowing entity, Mr Shane Mundey". The loan was to be repaid six months from the initial drawdown. It was to be conditional upon, amongst other things, a valuation for mortgage purposes of the land in an amount of at least $742,500. On the same day as the letter was sent, it was countersigned by Mr Mundey purportedly on behalf of the company. Mr Mundey said that he did so only after showing the letter to Mr Mazzoni and obtaining his approval. Mr Mazzoni disputes that evidence.

[24] The financier prepared loan documents for execution and these were reviewed by a solicitor, Mr Kinneally. There was a meeting at his office on 2 November 2012 to discuss the documents. Mr Mazzoni attended and says that Mr Mundey attended also. Mr Mundey says that he was out of town and participated by telephone. That difference is immaterial.

[25] At this meeting, it was clear that the loan documents were unsatisfactory from the company's perspective, because they provided that this finance was to be linked to a loan to one of Mr Mundey's companies, called Moreton Bay Developments No 5 Pty Ltd. The documents would have made the company's land available as security for that advance as well as for the loan to the company. This was unsatisfactory to Mr Mazzoni. His objection was accepted by Mr Mundey, whose evidence is that the documents, at least in that respect, had not been prepared according to the letter of offer of finance which Mr Mundey had countersigned. The letter of offer is exhibited to Mr Mundey's affidavit. It did not plainly provide that the company's land would be security for another loan. But there is a possible reference to that link where, against the subject "security", it refers to two mortgages, each with

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2 Clause 4.3

3 Clause 4.7

provision which would allow the lender "to have the option to request that full proceeds be directed to reducing both mortgages if he elects". That part of the letter was not explored with Mr Mundey in his evidence. What is more important is that Mr Mundey accepted this particular objection which Mr Mazzoni made to the documents which were discussed on 2 November 2012.

[26] Mr Mundey says that Mr Mazzoni made a further objection, which was that the documents provided for a guarantee to be signed by him. But again if this objection was made, it was accepted by Mr Mundey.

[27] At the conclusion of 2 November meeting, Mr Kinneally said that Mr Mazzoni should obtain his own legal advice in relation to this finance proposal. Mr Mazzoni then instructed Colville Johnstone Lawyers to act and they wrote to Mr Kinneally's firm advising that the proposal for finance, as reflected in the documents which had been discussed, was not in the best interests of the company.

[28] The next meeting was on 20 November 2012 and was held at the address in Capalaba which Mr Mundey used as an office. This meeting was convened by Mr Mundey. Present were Mr Mazzoni and his wife Natalie Mazzoni, Mr Mazzoni's brother Gavin and his wife, and Mr Mundey. Mr Mazzoni says that a Mr Ashley from PricewaterhouseCoopers, who was retained by Mr Mundey, participated by telephone.

[29] There are different accounts of this meeting given by the two witnesses in this case, namely Mr Mazzoni and Mr Mundey. According to Mr Mazzoni, the only matters which were discussed related to ways of assisting Mr Mundey's own financial predicament, by using the company as a means to obtain finance for another development of Mr Mundey. According to Mr Mundey, the meeting of 20 November 2012 involved first a discussion of finance for the company's development, about which the parties agreed that if the lender was willing to proceed without the terms to which Mr Mazzoni had objected, then this offer of finance would be accepted. Mr Mundey said that the discussion then turned to the circumstance that he was doing all of the work towards the project and was not receiving a salary, at which point he said words to the effect that there should either be the sale of HBU's shares to the applicant or the land should then be sold. But Mr Mazzoni, according to Mr Mundey, then said words to the effect that he wished to depart from the Project, to which Mr Mundey said that he would send an email "with a plan to exit the Project for Darren".

[30] Mr Mundey's evidence in that respect is supported by a series of emails between Mr Mundey and Natalie Mazzoni, each dated 21 November 2012. Mr Mundey's practice was to send emails to Mr Mazzoni by addressing them to her email address. In the first of them, Mr Mundey put a proposal whereby the applicant would transfer its shares to HBU, Mr Mazzoni would resign as a director and the applicant would become a secured creditor for its debt which would begin to earn interest. The applicant was to take a second mortgage over the land under this proposal. Mr Mundey there wrote that he believed that his proposal "will put you in a better position to ensure the return of capital with a good return" as well as allowing Mr Mundey to fix his "current issues …". The reply to Mr Mundey sought clarification in several respects. It enquired as to what Mr Mazzoni would "get for transferring 60 shares to HBU Holdings" It also asked why only a second mortgage was proposed when the land was then unencumbered.

[31] Mr Mundey's evidence was that at the conclusion of the meeting of 20 November, Mr Mazzoni's brother said to him words to the effect that if Mr Mazzoni lost a cent in the Project, he and Mr Mazzoni would "come around and break your legs".[4] Mr Mazzoni's evidence was simply that he had no knowledge of any threat made by his brother to Mr Mundey.[5] There seems to be no compelling reason to reject this evidence of Mr Mundey. The occurrence is one of the matters which Mr Mundey, by his affidavit, identified as the circumstances from which he says he concluded that there was such a deterioration in the relationship between the shareholders that the orderly management of the project was no longer practical.[6] The applicant did not explain why there was no evidence for Mr Mazzoni's brother if this evidence from Mr Mundey was disputed.

[32] On 23 November 2012, Colville Johnstone wrote to Mr Kinneally's firm as the solicitors for HBU. The latter recorded the terms of the loan documents which had recently been considered. It repeated the contention, made by Colville Johnstone in their letter of 14 November 2012, that it was not in the best interests of the company to accept a loan according to those documents. The letter went on to say that it appeared that Mr Mundey was unable to procure the requisite finance according to the Shareholders Agreement. In that circumstance, Colville Johnstone wrote, the applicant was prepared to not immediately demand repayment of its advances if Mr Mundey was agreeable to the applicant's debt becoming secured by a first mortgage and accruing interest at 12 per cent per annum.

[33] On 28 November 2012, Colville Johnstone again wrote to Mr Kinneally's firm, advising that they had received direct correspondence from Mr Mundey requesting a meeting. On the following day, Mr Kinneally replied that his firm did not hold instructions to act for the company.

[34] On 3 December 2012 there was a meeting attended by Mr and Mrs Mazzoni, Mr Taylor of Colville Johnstone, Mr Mundey and Mr Ashley. Mr Mazzoni said that there were discussions about financing the Project and that there were also discussions about a possible further advance by the applicant to the company but for the ultimate benefit of HBU.

[35] Mr Mundey's evidence was that he put forward for discussion proposed loans of $250,000 and $450,000 from the external financier. In his affidavit, Mr Mundey says that at the meeting of 3 December 2012, he was proposing that the company apply for loans from the financier which had proposed finance in the letter of offer which he had countersigned. That financier was described as "Torrac" in these paragraphs of Mr Mundey's affidavit:

> "69. I said words to the effect that I was putting forward for discussion that Aurora apply for:
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> (a) a $250,000 loan from Torrac in line with the letter of offer (i.e. not personal guarantee from Darren and no cross-collateralisation);
>
> (b) a $450,000 loan from Torrac in line with the letter of offer (i.e. not personal guarantee from Darren and no cross-collateralisation);
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> 70. Mr Taylor said words to the effect that Darren (and MPH):

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4 Mr Mundey's affidavit, paragraph 61.

5 Second affidavit of Mr Mazzoni, paragraph 34(b).

6 Affidavit of Mr Mundey, paragraph 76.

(a) did not want to proceed with Torrac for any amount even if the loan agreements were changed to be in line with the letter of offer;
(b) did not want to change the shareholders agreement;
(c) was considering advancing more monies as a loan for MPH to HBU for the purposes of expense in the Aurora project to be secured against HBU's assets and shares;
(d) was considering MPH 'exiting' the project;
(e) was considering buying HBU out for approximately $40,000."

[36] Mr Mundey's evidence was that if Mr Mazzoni did not wish to accept the finance which had been offered then the Project would have to be "changed" and that he remained dissatisfied with the present arrangement under which he (Mr Mundey) was working for no remuneration. He says that he also told the meeting that he would not sell his interest for $40,000. Mr Mundey says that the meeting ended upon the basis that Mr Mazzoni wanted to consider "the various options on the table" and that a letter would be sent to Mr Mundey shortly.

[37] Paragraph 69 of Mr Mundey's affidavit was not explored in cross-examination. It is unclear whether Mr Mundey was meaning to say that he proposed that two loans be sought or that these were alternative proposals for but one loan. Mr Mazzoni's affidavit in reply to Mr Mundey's affidavit did not specifically answer paragraphs 69 and 70. In this affidavit in reply, Mr Mazzoni said of the meeting of 3 December that the discussion concerned Mr Mundey's financial predicament and his need for funds.[7] He said that the conversations at this meeting "do not relate to the management of Aurora or the activities of Aurora".[8] He said that at no time did he, Mr Mazzoni, "refuse to entertain any loan for the purposes of advancing the activities of Aurora for the proposed development.[9]

[38] However, Mr Mazzoni's evidence in that respect is inconsistent with the letter from his solicitors to Mr Ashley of 12 December 2012 which began as follows:

> "We refer to our meeting with you and your client, Shane Mundey on 3 December 2012 at which our clients Darren and Natalie Mazzoni were present.
>
> We confirm that our clients have rejected your client's proposal for [the company] to apply for a loan of $250,000 with a first mortgage being provided to the third party Lender and our clients being provided with a second mortgage over the Mackay property."

This supports Mr Mundey's evidence that he was told at the meeting that Mr Mazzoni "did not want to proceed with Torrac for any amount even if the loan agreements were changed to be in line with the letter of offer …". Having regard to this letter of 12 December, I am persuaded to accept Mr Mundey's evidence that he was told at the meeting of 3 December that Mr Mazzoni did not wish to proceed with finance from Torrac for any amount. It is clear enough from that letter that by 12 December, Mr Mazzoni's aim was to have the applicant be the financier of the

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7 Paragraph 30 of that affidavit.
8 Paragraph 34(d) of the affidavit.
9 Paragraph 34(e).

development and upon the terms which were set out in that letter, rather than borrow from an external financier. This would have required a variation of the shareholders agreement and in particular the provisions of cl 4 by which the shareholders were to seek independent finance to cover the project costs which included the acquisition costs, which the applicant had advanced to the company.

[39] No further documents from a third party financier were submitted by Mr Mundey to Mr Mazzoni. That is understandable given the letter of 12 December 2012 and what had been said at the 3 December meeting.

[40] On 21 December 2012, Colville Johnstone again wrote to Mr Ashley, this time putting a proposal that the applicant would buy HBU's shares in the company for an amount of $46,170.95, which was said to be 50 per cent of the company's net assets (the land being worth $675,000 less the liability to the applicant of $582,658.09). That offer was said to be open for acceptance for a period of 30 days.

[41] On 25 January 2013, Colville Johnstone wrote to Mr Ashley asking whether it was worthwhile seeking instructions for the applicant to renew that offer. The letter concluded with a statement that if there was no reply by 30 January 2013, Colville Johnstone would presume that the respondents had "no interest in settling the matter on the terms outlined in our client's offer".

[42] Mr Mundey's evidence is that this series of events and correspondence caused him to believe that his relationship with Mr Mazzoni had deteriorated to such an extent that it was impossible for the two shareholders to perform their agreement and to "conduct the development". He believed that there was, in the terms of cl 12.1, a continued unresolved dispute in relation to the management of the company of a magnitude that the continuation of the orderly management was no longer practical. Accordingly, he says, he served a notice pursuant to cl 12.2 dated 1 February 2013.

[43] The notice was in these terms:

> "
> Transfer Notice
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> HBU Holdings Pty Ltd … hereby offers for sale the shares held by it in [the company] in accordance with clause 12 of the shareholders agreement between HBU, [the applicant] at an offer price of $388,000 inclusive for all shares held by HBU and in accordance with the terms set out in clause 12 of the shareholders agreement."

[44] It was argued for the applicant that this was not a notice in terms which corresponded with cl 12. It was submitted that it was not addressed to any person and therefore could not be effective. However, it unambiguously stated that it was given according to cl 12, it was an offer for the sale of HBU's shares and it was headed "Transfer Notice". In my view, it was unambiguously an offer purportedly made under cl 12. The question is whether circumstances had arisen which entitled HBU to put such an offer. That is a question to be assessed having regard to what occurred up to 1 February 2013. But for completeness I will refer to what occurred after then, at least because the applicant says that this could indicate whether, by 1 February, there was a dispute of the nature and extent which could have engaged cl 12.

[45] On 4 February 2013, Colville Johnstone wrote to Mr Ashley, Mr Mundey and Mr Kinneally, disputing that the transfer notice was effective. They said that the

applicant was unaware of a continuing unresolved dispute "when the only meeting between the parties was to ascertain if your client's financial difficulties could be resolved with our clients' assistance". It contended that the notice was "void' and inquired as to the basis of the calculation of the price which was stated within it. There was no reply to that letter.

[46] On 12 February 2013, Colville Johnstone wrote to Mr Ashley, Mr Mundey and Mr Kinneally again requiring an explanation for the calculation of the offer price. They said that Mr Mundey's "financial issues" were delaying the project in circumstances where the applicant had advanced money to the company which should have been repaid in full by then. They wrote that it was appropriate that the company immediately provide a mortgage to the applicant for its advance "whilst your shareholder client determines whether or not it intends to sell its share in the Company". It stated that if Mr Mundey was not agreeable then a meeting of directors would be convened. There was no response to that letter.

[47] On 25 February 2013, there was a meeting of directors convened by Mr Mazzoni. Present were Mr and Mrs Mazzoni, their lawyers and Mr and Mrs Mundey. Mr Mundey asked that the others leave and the meeting continued with only the two directors present. Mr Mazzoni proposed motions to the effect that the applicant would become a secured creditor which Mr Mundey opposed.

[48] On 1 March 2013, the applicant had Colville Johnstone send a transfer notice of its own, purportedly pursuant to cl 12.2 of the shareholders agreement. It referred to the meeting of 27 February and the fact that no resolutions had been passed. It asserted that it had become apparent that "no resolution of the issues tabled at the meeting would be passed … at future meetings" so that "there is now a continuing unresolved dispute in relation to the management of the company of such magnitude that [the applicant] is of the opinion that the continuation of the orderly management of the Company is no longer practicable". It offered to sell all of the applicant's shares in the company to HBU at a price of $46,170.95 but on conditions that the company simultaneously repay to the applicant the moneys owing to it together with some other moneys such as legal fees. A transfer notice could not be made as a conditional offer: cl 12.2 required that an offer within such a notice was to be unconditional. The applicant does not now argue that this was a valid notice. And if HBU's notice was valid, then there was no power to issue this notice.

[49] On or about 1 March 2013, Mr Mundey sought to call a general meeting of the company to be held on 4 March (curiously "for the purpose of conducting a directors meeting"). There was no agenda with that notice. Colville Johnstone replied to Mr Mundey on the same day, asserting that there was a deadlock and that Mr Mazzoni was not prepared to attend the meeting.

[50] The applicant, through Colville Johnstone, continued to call for the purchase of its shares pursuant to its Transfer Notice.

Was HBU's notice effective?

[51] For the applicant it is submitted that there was no unresolved dispute in relation to the management of the company as at 1 February 2013. Mr Mundey had agreed that the documents offered by the external financier were unsatisfactory, at least

because they would have made the company's land security for the debt of some other entity associated with Mr Mundey.

[52] It is apparently conceded by the applicant that there was discord between the parties as to the company's future. That could hardly be disputed having regard to the correspondence which I have summarised. But the applicant's argument appears to be that this was not a dispute in relation to the management of the company. It is argued that it was a dispute as to the terms on which the agreement between the shareholders might be varied. In my view, there was a dispute of each kind.

[53] It is evident that from at least late December 2012, there was an unresolved dispute in relation to the management of the company, namely a dispute as to whether the company should pursue any finance from an external financier. The applicant's side had made it clear that it would not participate in the company's doing so, both at the meeting of 3 December and in the letter of 12 December from the applicant's solicitors. The respondents' side had not agreed. And Mr Mundey had not agreed to the company's pursuit of the development on the terms demanded by that letter of 12 December 2012. That was a dispute in relation to the management of the company: how, if at all, it was to finance the project.

[54] The respondents have demonstrated that there was a continuing unresolved dispute in relation to the management of the company as at 1 February 2013 and of a magnitude that HBU (by Mr Mundey) was of the opinion that the continuation of the orderly management of the company was no longer practicable. By 1 February the parties had not met for nearly two months. There was an apparent impasse as to how the project would be financed. the applicant's objection was not limited to the particular financier with which Mr Mundey had been dealing.

[55] It follows that the transfer notice given by HBU was effective. There was no argument for the applicant that by some means it later lost that effect so that it did not become the subject of a deemed acceptance pursuant to cl 12.4. Nor was there any argument that the transfer notice should not be given effect for some reason such as an alleged bad faith on the part of the respondents or HBU not being ready, willing and able to comply with the several possible requirements of cl 12 in consequence of the giving of the transfer notice.

[56] As I have mentioned, HBU's counterclaim is not entirely clear in the relief which it seeks. Paragraph 51 is a claim for damages but in the amount of $388,000, making it seem to be more a claim for the price payable resulting from the deemed acceptance of HBU's offer. Paragraph 53 of the counterclaim seeks an order for "the court to terminate [the shareholders agreement] in accordance with cl 13 after the plaintiff has complied with the transfer of shares and payment to the first defendant". The effect of that paragraph of the counterclaim is to seek specific performance of the agreement for sale resulting from cl 12.

[57] Paragraph 54 of the counterclaim seeks an order for the winding up of the company "should the court not determine this agreement". As I read that paragraph, it is a claim to have the company wound up in the event that the court did not determine that there was a concluded agreement pursuant to cl 12. That is consistent with the way in which the case was presented by Mr Mundey.

Relief

[58] The only relief sought by the applicant ultimately was for the winding up of the company and it was effectively conceded that this should not occur if the first respondent made out its case for a concluded agreement under cl 12. Therefore the originating application should be dismissed. It will be declared that there is a contract between the applicant and the first respondent for the transfer of the shares held by the first respondent in the third respondent, according to the transfer notice given by the first respondent dated 1 February 2013. I will hear the parties as to any further orders.