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ROYAL COURT
(Samedi Division)

31 May 2023

Before: **Commissioner A R Binnington sitting with Jurats Christensen and Entwistle**

Between	**HSRE CL HoldCo Ltd**	**Representor**
And	**1. Crosslane Property Group Limited**	**Respondents**
	2. Crosslane Student Developments UK Ltd	
	3. HSRE Crosslane GP Ltd	
	4. Alter Domus Secretarial Services Ltd	

Advocate R Gardner for the Representor
Advocate C Sorensen for the First and Second Respondents
Advocate A Kistler for the Fourth Respondent

JUDGMENT

COMMISSIONER:

1. On 10 March 2023 the Representor was granted leave to serve a Representation on the Respondents and they were convened for a substantive hearing of the Representation on 27 March 2023.

2. The Representation sought i) declarations that various steps taken to bring about a transfer of shares in the Third Respondent ("GPCo") from the First Respondent ("Crosslane") to the Representor ("HSRE") have been effective, and ii) an order requiring the Fourth Respondent ("Alter Domus") to update HSRE Crosslane GP's register of shareholders to reflect that fact. At the hearing on 27 March HSRE, requested the court, in light of what they suggested was the urgency of the situation, to make an interim order by way of rectification of the share register of GPCo pursuant to Article 47(1) of the Companies (Jersey) Law 1991 ("the 1991 Law") in order to recognise the transfer

of shares from Crosslane to HSRE. HSRE offered undertakings to the court to reverse any such transfer in the event that final relief were to be refused.

3. At the conclusion of the hearing, we declined to grant the interim relief sought and this judgment sets out our reasons for reaching that decision.

Evidence

4. The Representor, for whom Advocate Gardner appeared, submitted two affidavits sworn by Mr Ben Chittick ("Mr Chittick"), the Managing Director, Head of Asset Management for Harrison Street Real Estate Capital LLC and its subsidiaries and a director of GPCo, and two affidavits sworn by Mr Michael Gradidge, counsel in Bedell Cristin Jersey Partnership, the Representor's lawyers. The First and Second Respondents, for whom Advocate Sorensen appeared, submitted an affidavit sworn by Ms Emma Nawaz, the Managing Partner of Blackstone Solicitors who act for the Second and Third Respondents. The Third Respondent was joined for the purposes of being bound by any decision that the Court might make. The Fourth Respondent, for whom Advocate Kistler appeared, maintained a neutral stance and submitted an affidavit sworn by Ms Claire Cabot, a director of Alter Domus (Jersey) Limited and a director of GPCo.

Background

5. HSRE was described as a subsidiary of Harrison Street Real Estate Capital LLC, an asset management firm which invests in real estate projects. Following circulation of a draft judgment, the court was informed by the Fourth Respondent that a more accurate description of the position is that HSRE is a subsidiary of funds that have appointed Harrison Street Real Estate Capital LLC as investment manager.

6. The dispute arises out of a joint venture between HSRE and Crosslane set up to develop a number of PBSA projects across the United Kingdom. The essence of the joint venture was that HSRE would finance the projects and Crosslane would be responsible for building and developing them. HSRE and Crosslane operated their joint venture through two separate Jersey limited partnerships, namely the HSRE Crosslane JV I Limited Partnership ("JV Partnership I") and the HSRE Crosslane JV II Limited Partnership ("JV Partnership II"). These limited partnerships were referred to collectively as the "JV Partnerships".

7. On 23 November 2017, HSRE and Crosslane incorporated GPCo as a Jersey limited company to act as general partner of JV Partnerships I and II. As general partner, GPCo operated the JV

Partnerships, was responsible for managing their underlying investments (which included contracting with third parties) and had unlimited liability for the JV Partnerships' debts. The relationship between HSRE, Crosslane and GPCo was governed by three separate agreements all executed on 13 December 2018, namely:

(a) a shareholder agreement ("the SHA") governing HSRE and Crosslane's exercise of powers over GPCo;

(b) a limited partnership agreement relating to JV Partnership I (the "LPA"); and

(c) a limited partnership agreement relating to JV Partnership II.

8. In broad outline, the effect of those agreements was that:

(a) Although management of the JV Partnerships was vested in GPCo and GPCo was responsible for contracting with third parties, GPCo was not itself entitled to any of the JV Partnerships' profits. HSRE and Crosslane's shareholdings in GPCo (90% and 10% respectively) were therefore only relevant to their control over the JV Partnerships' management.

(b) GPCo's management was governed by the SHA, which provided that HSRE and Crosslane may each appoint two directors to GPCo's board. The SHA specified a number of categories of decisions which could only be taken by unanimity, save in case of an emergency. Further, GPCo's board was only quorate to take decisions if the meeting took place in Jersey and at least two directors were in attendance (of which one must have been appointed by each of HSRE and Crosslane).

(c) As for the arrangements' economics, HSRE as a limited partner was entitled to 90% of the profits of JV partnership I and Crosslane was entitled to the residual 10%. For JV Partnership II the respective proportions were 92% and 8% to HSRE and Crosslane respectively.

9. As at the date of the hearing JV Partnership I had developed four separate PBSA projects in Coventry, Leeds, Portsmouth and Swansea. JV Partnership II had developed two projects, one in Cardiff and one in Coventry.

10. As the JV Partnerships' main financial backer, HSRE was exposed to the risk that the projects' costs would overrun their original budgets. HSRE was not, however, well placed to exercise a cost control function because Crosslane was the party responsible for building and developing the sites. In order to align the partners' incentives, HSRE and Crosslane entered into a series of cost overrun guarantees for each PBSA development (the "Costs Overrun Guarantee Agreements"). In broad terms these agreements imposed agreed budgets on each PBSA Development and provided that, if the project's costs exceeded those budgets, any excess would be refunded by Crosslane. The effect of these agreements was to transfer most of the risk of cost overruns onto Crosslane.

11. HSRE and Crosslane began working together in 2018. As at the date of the hearing the projects' outcomes had been mixed. Whilst JV Partnership I had received net proceeds of around £36 million from the sale of two projects (in Coventry and Leeds) another project (in Swansea) remained unsold, albeit profitable, and a project in Portsmouth had, Advocate Gardner told us, been found to have construction defects.

12. The JV Partnerships had also apparently been plagued by cost overruns. Notably, the four projects within JV Partnership I were said to have exceeded their budgets by £5,000,000. This meant that Crosslane were alleged to have become liable to pay around £5,000,000 under the terms of the Costs Overrun Guarantee Agreements. This liability was restructured when HSRE, Crosslane, GPCo and JV Partnership I (along with a number of JV Partnership I's subsidiaries) executed a settlement agreement on 2 June 2021 (the "Settlement Agreement").

13. The Settlement Agreement provided that Crosslane's liabilities under the Costs Overrun Guarantee Agreements would be satisfied by payment to JV Partnership I of a sum of £2,619,000 (the "Settlement Sum"). As Crosslane was unable or unwilling to pay that sum in cash to JV Partnership I, it was allegedly agreed (pursuant to clauses 4.1 and 4.2 of the Settlement Agreement) that JV Partnership I could set off the Settlement Sum against any future distributions payable by JV Partnership I to Crosslane. The precise operation of clauses 4.1 and 4.2 was disputed by Crosslane.

14. HSRE alleged that as a result of the matters to which we have referred:

    (a) JV Partnership I currently held approximately £35 million of cash following the sale of the Coventry and Leeds projects. After accounting for unpaid costs and working capital, some £33.5 million was, in principle, available for distribution. Under the terms of the LPA, Crosslane was entitled to 10% (or £3.3 million) of that cash.

(b) Under the terms of the Settlement Agreement, JV Partnership I was, however, entitled to set off £2.6 million (being the Settlement Sum) against any distribution to Crosslane. Crosslane would therefore receive a sum of (at most) £925,000 when JV Partnership I distributed the £33.5 million of cash that it currently held.

(c) However, as will be explained below, HSRE considered that approximately £10 million of the approximately £33.5 million should be used to fund remedial works to JV Partnership I's project in Portsmouth. If that was correct, then the amount available for distribution would be approximately £23.5 million (being £33.5 million less £10 million). Crosslane's 10% share of this would be approximately £2.3 million. As this was less than the £2.6 million Settlement Sum, it followed that Crosslane would not be entitled to any distribution at all.

15. Crosslane had, however, demanded (most recently on 6 January 2023) that JV Partnership I distribute the £3.5 million without set-off. When HSRE asked Crosslane to explain its position, Crosslane had argued that, on the true construction of the Settlement Agreement, Crosslane was entitled to withdraw its proportion of the sales proceeds until 75% or more of the proceeds were paid out. It was alleged by HSRE that Crosslane had more recently also argued that the terms of the antecedent LPA took precedence over the Settlement Agreement. Crosslane had therefore pressed JV Partnership I to distribute its pro rata share of the £35 million.

16. HSRE did not regard these positions as representing Crosslane's genuinely held views. HSRE stated that Crosslane had provided HSRE with a "Draft Preliminary Advice" from its English counsel in which advice (over which Crosslane had waived privilege) counsel had expressed the opinion that HSRE's position (as expressed above) was *"more convincing"*.

17. HSRE therefore accepted that, at least in theory, a dispute existed between HSRE and Crosslane as to whether JV Partnership I was entitled to set off the Settlement Sum against any cash distributed to Crosslane. It was against that background that a new dispute between HSRE and Crosslane had emerged.

The Portsmouth Property

18. JV Partnership I's project in Portsmouth was a block of student accommodation (the "Portsmouth Property"). The Portsmouth Property had been completed. As with their other projects, HSRE and Crosslane had intended to sell the Portsmouth Property once it was developed. JV Partnership I had apparently engaged in negotiations to sell the Portsmouth Property throughout 2022.

19. It was, however, alleged by HSRE that it had become apparent that the Portsmouth Property suffered from what they described as serious construction defects. Defective work around the property's facade had allegedly resulted in substantial water ingress. This had caused problems, which they alleged included black mould developing, which made it necessary to rehouse (and compensate) some of the Portsmouth Property's student residents. Although they accepted that the full extent of the physical damage to the Portsmouth Property was not yet known, they alleged that it was clearly substantial and was also expected to worsen over time.

20. Unfortunately, the main contractor who carried out the window installation had entered into an insolvency process and was thus unlikely to be able to rectify the alleged defects and the sub-contractors would be unlikely to carry out the works themselves, requiring JV Partnership I to complete the rectification works to crystallise any alleged claim in damages.

21. According to HSRE, the defective work on the facade had also made it impossible to sell or refinance the Portsmouth Property until remedial works had been carried out. They alleged that JV Partnership I's main lender had indicated that JV Partnership I would breach its loan covenants unless remedial works were carried out promptly. The loan was cross-collateralised against another JV Partnership I property and accordingly if remedial works were not carried out the lender could potentially enforce against that other property. Given these circumstances, HSRE had formed the view that remedial works should commence immediately. HSRE had identified a contractor to perform the works and estimated that the cost would be approximately £10 million.

22. HSRE's position was that the works would have to be commenced immediately as the Portsmouth local authority had a highway project in the vicinity which was due to start in October 2023. The local authority's works were scheduled to take around a year to complete and it was alleged by HSRE that the local authority had indicated that if the remedial works to the Portsmouth Property were not started by 31 March 2023, then they would not be allowed to start until after the highway works had finished, i.e. not before October 2024. This would result in the remedial works being delayed until late 2025 at the earliest. So concerned were HSRE that they signed effectively on behalf of GPCo a letter of intent with a building firm on 24 February 2023 in order that the firm could place an order for scaffolding to enable the work to commence by 31 March 2023.

The 16 February 2023 board meeting

23. Paragraph 8.4 of the SHA between HSRE and Crosslane provided that certain categories of decisions (so-called *"major decisions"*) could only be authorised through a unanimous resolution of GPCo's board, save in cases of emergency. HSRE had asked Crosslane to approve the remedial works by passing a resolution of GPCo's board. Crosslane had allegedly not only refused to

authorise the remedial works, but had taken what HSRE described as *"extraordinary"* steps to prevent HSRE and GPCo from commencing them using the emergency powers contained in the SHA.

24. On 16 February 2023 a board meeting of GPCo was held in Jersey. Crosslane was represented by two directors, namely Mr Michael Sharples (acting as alternative to David Smith, a Crosslane director) and Mr Greg Symberlist (a Jersey resident professional director appointed by Crosslane). HSRE was represented by two directors, namely Mr Paul Bashir (Harrison Street Europe's CEO), who attended as alternate to Mr Ben Chittick (HSRE's appointed director), and Miss Claire Cabot (a Jersey resident professional director appointed by HSRE).

25. The purpose of the board meeting was to discuss i) whether to distribute the cash proceeds from the sale of the Coventry and Leeds projects and ii) whether to fund the remedial works at the Portsmouth Property.

26. The events of that meeting were described, in summary, in an affidavit sworn by Mr Chittick as follows:

    (a) Mr Sharples (of Crosslane) refused to approve the Portsmouth remedial works. This meant that GPCo's board could not pass the unanimous board resolution to authorise the works, as required by clause 8.4 of the SHA.

    (b) In response, Mr Bashir (of HSRE) proposed that the works be approved under clause 8.4.4 of the SHA, which allowed GPCo to authorise expenditure where necessary to protect the partnership's assets from imminent physical damage or imminent diminution in value.

    (c) Realising that GPCo would approve the Portsmouth works notwithstanding Crosslane's objections, Mr Sharples left the room and instructed Mr Symberlist to join him outside.

    (d) Mr Symberlist returned to the meeting a few minutes later. He informed the meeting that i) he had told Mr Sharples that he considered the situation at Portsmouth to be an emergency and intended to vote in favour of the remedial works, and ii) following this, Mr Sharples (acting on behalf of Crosslane) had dismissed him as a director of GPCo with immediate effect.

    (e) Under clause 5.2 of the SHA, GPCo's board was only quorate if at least two directors attended a meeting, one of whom must have been appointed by each of HSRE and Crosslane. By

leaving the room and dismissing Mr Symberlist, Mr Sharples therefore rendered GPCo's board inquorate and incapable of making any decisions at all. The meeting was therefore adjourned soon after.

(f) The next day (17 February 2023), Mr David Smith (the English director appointed by Crosslane) resigned as a director of GPCo and in the same email stated his wish to appoint Michael Sharples as his replacement. However, HSRE considered that as far as it was aware, Crosslane had not formally appointed any replacement director and so may therefore have had no directors on the board of GPCo, although it was understood that it was the intention for Mr Sharples to replace Mr Smith. Mr Symberlist had not been replaced. Mr Chittick explained in his affidavit that this meant that GPCo could not take any emergency decisions about the Portsmouth Property or indeed, anything else.

27. Ms Nawaz, in her affidavit, stated that Mr Sharples had *"signed once more as director of GPCo to represent Crosslane"* and that a Jersey resident had agreed to become a director on behalf of Crosslane but was abroad until 12 April 2023.

Crosslane's solvency

28. HSRE's position was that Crosslane's reasons for opposing the Portsmouth remedial works had not been made clear and that they could not therefore be sure why Crosslane had taken the approach that it had. It was suggested that Crosslane had solvency issues that made it unable or unwilling to finance its share of the remedial works. Alternatively, it was suggested that Crosslane hoped to make its approval for the Portsmouth works conditional on the distribution of the £3.5 million (less expenses and working capital) without set-off. HSRE argued that Crosslane's stance in opposing the works was driven by its own self-interest rather than what was necessary and in the best interests of JV Partnership I.

29. In relation to Crosslane's solvency position, Mr Chittick explained that following the board meeting of 16 February 2023, HSRE had carried out insolvency searches and learnt that HMRC had presented a winding-up petition in England against Crosslane on 25 January 2023. HSRE learnt that Pinsent Masons LLP (an English law firm) presented a separate winding-up petition against Crosslane Student Developments UK Limited ("CSDUL") on 14 February 2023. HSRE's view was that the presentation of the two winding-up petitions constituted Events of Default under the terms of the SHA and LPA.

30. Ms Nawaz addressed Crosslane's financial position in her affidavit and suggested that Crosslane had sufficient assets, that its liabilities were not a concern and that *"Crosslane will be more than capable of settling those debts that exist currently and fall due in the future accounting for work set to be secured so long as its trading opportunities remain as they are currently"*.

31. Ms Nawaz made reference in her affidavit to a further dispute between the parties, which was whether HSRE had served a Buy/Sell Notice on Crosslane in respect of its shares in GPCo. Although it was suggested that the present application was an attempt by HSRE to acquire Crosslane's shares in GPCo for nil value and thus circumvent the Buy/Sell Notice procedure, HSRE pointed out that the alleged notice was contained in correspondence labelled *"without prejudice"* and as a result this was not a matter that was canvassed before us in greater detail.

The share transfer notice

32. Under Clause 20.1.1.1 of the LPA *"a bona fide petition for a winding-up order presented against (Crosslane) (other than a frivolous or vexatious petition which is discharged within seven days after its presentation)"* is an Event of Default and is also a *"Crosslane Triggering Event"* for the purposes of clause 17.2 of the SHA.

33. Clause 17.2 of the SHA, provides that *"In addition to the remedies HSRE may exercise as set out in clause 20 of the Limited Partnership Agreement, upon the occurrence of an Event of Default in relation to Crosslane ("Crosslane Triggering Event") and within 180 days after the applicable period for cure has lapsed (if any), HSRE may (at its option) also require Crosslane to transfer all its shares in GPCo for nil consideration to HSRE and the provisions of clause 16.3.3 shall apply to such transfer"*.

34. Clause 16.3.3 provided that:

> ***"If the Transferor after becoming bound to transfer the Shares fails to do so, the General Partner may appoint a person (acting as agent for the transferor) to execute a Transfer Agreement in respect of the transfer of the Shares for and on behalf of the Transferor and shall hold the price on trust for the Transferor. After the books of GPCo have been updated to reflect the relevant transfer, the validity of the transaction shall not be questioned by any person".***

35. Accordingly, HSRE served a Notice of Event of Default on Crosslane on 17 February 2023, together with a Transfer Agreement for Crosslane to execute. The Crosslane Event of Default Notice

prompted an email to be sent by Crosslane's English solicitors, Blackstone, to HSRE's solicitors on 17 February 2023 which suggested that Crosslane "*may have contractual and equitable rights of estoppel to prevent the share transfer for nil consideration*" and requested that no action to transfer Crosslane's shares or to remove funds from the JV Partnership I bank account be taken for fourteen days. Three days later Blackstone sent an email threatening to issue an injunction against HSRE to prevent the transfer of shares pursuant to clause 17.2 of the SHA and any dissipation of the £35 million received following the sale of the Coventry and Leeds projects. In the event, no injunction proceedings were commenced by Crosslane in Jersey or any other jurisdiction.

36. Following the sending of the formal notice to Crosslane on 17 February 2023 requiring it to execute the Transfer Agreement Crosslane refused to execute the agreement. On 3 March 2023, Mr Chittick appointed himself as Crosslane's agent to execute a transfer agreement on Crosslane's behalf. The transfer agreement was executed later that day. Also on 3 March 2023, HSRE then wrote to Alter Domus, the company responsible for maintaining GPCo's register of shareholders, asking it to update GPCo's books accordingly. On 6 March 2023 Carey Olsen replied on behalf of Alter Domus, indicating its concern that because Mr Chittick's appointment as Crosslane's agent had not been approved by a resolution of GPCo's board, Alter Domus could not give effect to the transfer agreement and update the register of members of the GPCo as it was not satisfied as to the authority of Mr Chittick to have signed it. HSRE then took the view that it would be necessary for it to apply for a court order requiring Alter Domus to update GPCo's register of shareholders.

Crosslane's position in relation to the remedial works

37. We had before us an affidavit sworn by Emma Nawaz, managing partner of Blackstone Solicitors Limited, the legal representatives in England for Crosslane. She exhibited to that affidavit several items of correspondence and reports from which it was apparent that Crosslane's position was that any issues with the Portsmouth Property were of a relatively minor nature and did not justify the obtaining of interim relief on the basis that there was an *"emergency*". Crosslane's response to the various matters that had been raised by HSRE was that there was no emergency as:

    (i) A stand-alone issue relating to detached cladding issues had been resolved by the final quarter of 2022.

    (ii) Water ingress (albeit with no structural concerns) was also identified by September 2022 but there had been no incident since November 2022.

    (iii) There was no internal black mould present in the Portsmouth Property.

(iv) All fire concerns relating to the Portsmouth Property were firmly refuted by Mr Chittick himself in an e-mail that he sent to the Portsmouth City Council on 13 March 2023.

38. Ms Nawaz stated that *"…there is no immediate risk to the integrity of the building at all. Matters are purely financially, and control driven by HSRE albeit the application has been brought under the veneer of risk/death to individuals. Crosslane simply object to the timings proposed for the remedial works proposed by HSRE due to i) costs generally, ii) contractor claims, iii) student claims and iv) reputational damage... the basis for HSRE's application for interim/final relief and the approach adopted by HSRE as a consequence is disproportionate and entirely without justification".*

39. Ms Nawaz went on to say that Crosslane accepted that work to the windows and surrounding cladding needed to be done but wished to deal with matters as cost effectively as possible. In relation to the allegation that there was a very real threat that the principal lender could call in the loan as a result of the purported failure to keep the Portsmouth Property in a good state of repair, she suggested that this was *"woefully exaggerated"*. She noted that whilst the lender had, in a letter dated 21 February 2023, raised some questions it had openly invited refinancing as an option and, if not feasible, had stated that they were open to considering *"alternative strategies of repayment within the term"*.

Principles applicable to the grant of mandatory injunctions

40. The application before us is for an interim mandatory injunction. The court is not being asked simply to preserve the status quo but is being asked to direct the administrators of GPCo to make a change in the register of shareholders, in order to reflect a purported transfer of shares by Crosslane to HSRE.

41. We were referred by Advocate Sorensen to Gee on Commercial Injunctions (7th ed.), Chapter 2 Section 6 in which the author noted that:

> ***"The distinction between an interim negative injunction and an interim mandatory injunction turns on whether the injunction can be complied with by the defendant doing nothing... Mandatory injunctions are in their nature liable to be more intrusive, result in greater risk in contempt proceedings, result in greater waste of time and money if they are "wrong" and have to be undone, and are more likely to affect the status quo... It is these practical matters which create a greater reluctance for the court to interfere by interim mandatory order. But each case depends on its own circumstances. The court should take whichever***

course seems likely to cause the least irremediable prejudice to one party or the other. The principles stated in the cases reflect these considerations. In summary:

(1) the general principle is to take the course which involves the least risk of injustice if it turns out to be "wrong":

(2) the court should keep in mind that ordering a positive step to be taken may involve an increased risk of injustice for the defendant if the decision turns out to be "wrong";

(3) it is legitimate to consider whether the court does feel a "high degree of assurance" that the claimant will succeed at trial. This is because the greater the degree of assurance, the less risk of injustice if the injunction is granted;

(4) even where the court does not feel this high level of assurance there are still exceptional cases in which it is correct to grant an interim mandatory injunction because that course involves the least risk of injustice.

Thus on an application for an interim mandatory injunction the court does pay attention to the relative strength of the apparent merits in exercising its discretion, and in this respect American Cyanamid principles do not apply."

42. The Royal Court has in several cases confirmed that the American Cyanamid principles apply in Jersey (see Alpha Print v Alphagraphics [1989] JLR 152). They are summarised in the White Book as follows:

"According to the American Cyanamid Co case, when an application is made for an interlocutory injunction, in the exercise of the court's discretion an initial question falls for consideration. That is:

(1) Is there a serious question to be tried? If the answer to that question is yes, then two further related questions arise; they are:

(2) Would damages be an adequate remedy for a party injured by the court's grant of, or its failure to grant, an injunction?

(3) If not, where does the balance of convenience lie?"

43. The Privy Council held in National Commercial Bank Jamaica v. Olint Corp [2009] UKPC 16 at 19, for both mandatory and prohibitory injunctions that *"the underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other".*

Articles of Association of GPCo

44. Mr Chittick is a director of GPCo. Article 17 of GPCo's Articles Association, entitled *"Powers of Directors"* provided as follows:

> ***"(1) The business of the Company shall be managed by the Directors. A meeting of the Directors at which a quorum is present may exercise all powers and discretions exercisable by the Directors.***
>
> ***(2) The Directors may, by power of attorney, mandate, authority given by resolution of the directors or otherwise, appoint:***
>
> ***(a) any person to be the agent of the Company for such purposes and on such terms and conditions as they determine, with or without authority for the agent to delegate all or any of his powers; and***
>
> ***(b) any person to be the attorney or authorised signatory of the Company and on such terms and conditions as they determine,***
>
> ***PROVIDED THAT any power, discretion or authorities shall not exceed those vested in or exercisable by the Directors under these Articles. Such person does not need to be a Director or member of the Company."***

The Court's Power to rectify

45. Article 47 of the Companies (Jersey) Law 1991 ("the 1991 Law"), so far as is relevant, provides as follows:

> ***"(1) If –***

(a) the name of a person, the number of shares held, the class of shares held, or the amount paid up on the shares, or the class of members to which the person belongs is, without sufficient reason, entered in or omitted from a company's register of members; or

(b) there is a failure or unnecessary delay in entering on the register the fact of a person having ceased to be a member, the person aggrieved, or a member of the company, or the company, may apply to the court for rectification of the register.

(2) The court may refuse the application or may order rectification of the register and payment by the company of any damages sustained by a party aggrieved.

(3) On an application under paragraph (1) the court may decide any question necessary or expedient to be decided with respect to the rectification of the register."

46. Advocate Gardner referred us to In the Matter of the Representation of Thayer Group Limited [2006] JCR 1258 which it appears was the first occasion upon which the Royal Court had to consider its statutory ability to order rectification of a share register. The court held that Article 47 of the 1991 Law was clearly based upon similar provisions in the various English Companies Acts and accordingly English judicial decisions were of assistance. The court then extracted three principles for the purposes of that case, two of which were relevant in the current context:

(a) the jurisdiction to rectify the register of a company is to be widely construed;

(b) the court has a discretion as to whether or not to grant rectification even where satisfied that there are grounds for making such an order.

47. These principles were subsequently affirmed by the Royal Court in In the matter of Level One Holding (Jersey) Limited [2007] JRC 106. We have found the Level One decision to be of assistance.

48. The circumstances in that case were that the court was asked to declare that two purported transfers of shares in a Jersey company, Level One Holding (Jersey) Limited ("Level One") were void and to order consequential rectification of its register of members pursuant to Article 47 of the 1991 Law.

49. Level One had two shareholders, each of the two shares in the company being registered in the respective name of two nominee companies of a Jersey trust and company administration business. Each of the nominee shareholders had executed a declaration of trust in favour of another Jersey company which was accordingly the sole beneficial owner of Level One.

50. In relation to one of the purported transfers the share transfer form was executed by two individuals who at the time believed themselves to be directors of the relevant nominee company. There were other directors of the nominee company but no meeting of the board was convened to consider the transfer, the only discussion being between the two individuals who signed the transfer form. Immediately thereafter the two individuals purported to hold a board meeting of Level One for the purpose of approving and registering the share transfer. Although they were both directors of Level One, there were two other directors. No notice of the board meeting was given to the other directors. The meeting resolved to approve the share transfers from the nominee companies to the beneficial owner and the register of members was duly completed to reflect this. It later came to light that one of the individuals was not in fact a director of the nominee company.

51. It subsequently transpired that a transfer of shares in Level One would trigger a charge to real estate transfer tax in Germany. Accordingly, the various transfers were not subsequently ratified by the boards of any of the companies.

52. The court noted that the first issue was whether the two individuals had actual authority to transfer the shares in Level One to the beneficial owner. The articles of association of the nominee companies contained a standard provision whereby the power to manage the business of the company was vested in the board of directors as a whole. The court noted that under such an article an individual director or sub-group of the directors has actual authority to act on behalf of the company only where such authority has been delegated to them (see Mitchell and Hobbs (UK) Limited v Mill [1996] 2 BCLC 102). No board meeting was held by either of the nominee companies specifically to authorise the execution of the share transfer. Nevertheless, there was in each case a standing resolution by the board permitting any two directors to transfer shares and take certain other actions. This constituted a delegation under the articles of association. It followed that if two directors of the nominee company had signed the share transfer in this case, they would have had actual authority to do so even in the absence of a specific board resolution concerning the shares. However, in the case of one of the nominee companies the form of transfer was not signed by two directors because one of the signatories was not a director of the nominee company. The transfer was therefore only signed by one director and it followed that there was no actual authority to execute the share transfer form on this occasion.

53. There are of course material differences between the circumstances in the Level One case and those in the present. In Level One the transfer of shares was purportedly effected and the name of the new shareholder entered on the register. The court, having concluded that the transfer of shares was void, was asked, at a final hearing rather than on an interim basis, to order rectification of the register accordingly. In the present case the court is being asked to rectify the register, as an interim measure, by replacing the name of the original shareholder with that of a new shareholder, on the assumption, albeit at an interlocutory stage, that Mr Chittick had actual authority to execute the share transfer form.

54. Advocate Sorensen referred us to a decision of the Privy Council, on appeal from the Court of Appeal of the British Virgin Islands in Nilon Limited and anor v Royal Westminster Investments SA and ors [2015] UKPC 2. One of the primary questions which were the subject of arguments before the Privy Council was whether a claimant could bring proceedings for rectification of the share register of a company when the reason for rectification was an untried allegation that a defendant had agreed to allot shares in the company to the claimant. Delivering the judgment of the Board Lord Collins stated, at paragraph 37 that:

> ***"There are two points which emerge from the cases. The first is that from the earliest days of the legislation, the courts have made it clear that the summary nature of the jurisdiction makes it an unsuitable vehicle if there is a substantial factual question in dispute: e.g. re Russian (Vyksounsky) Iron Works Company, Stewart's case (1866) LR 1 Ch App 574, 585-586….(para.38). The second point is that Re Holcrest appears to be alone in deciding that it is sufficient for the applicant to have a prospective right against the company, and not an immediate right, to be entered on, or removed from, the register."***

55. Lord Collins went on to say, at paragraph 51 that:

> ***"In the view of the Board, proceedings for rectification can only be brought where the applicant has a right to registration by virtue of a valid transfer of legal title, and not merely a prospective claim against the company dependent on the conversion of an equitable right to a legal title, by an order for specific performance of a contract. It follows that re Holcrest Limited was wrong as a matter of principle, however sensible it might have been as a matter of case management."***

56. The exercise of the court's power under Article 47 of the 1991 Law to rectify a share register is a two-stage process. Firstly, the court has to be satisfied either that the name of a person is, without sufficient reason, entered in or omitted from a company's register of members, or that there is a

failure or unnecessary delay in entering on the register the fact of a person having ceased to be a member. If the court is satisfied that these circumstances exist, it nevertheless has a discretion whether or not to order rectification. The fact that an order of the court is required in order to correct errors on the register emphasises the importance attached to the accuracy of a company's register of members given that it is a public document identifying the registered owners of the company.

57. This point was emphasised by the Privy Council in Nilon(supra) where, at paragraph 39, Lord Collins stated:

> ***"There is no doubt that the legislation is primarily concerned with legal title. In re London, Hamburgh and Continental Exchange Bank, Ward and Henry's case (1867) LR 2 Ch App 431 Lord Cairns stated what might be thought to be the obvious when he said (440) that the object of the section was to secure a list or register which would show who were the shareholders entitled to the profits, and liable to contribute to the debts, of the company. The legislation both in the BVI and in Great Britain is concerned with rectification of the register of members, and membership concerns legal title: Enviroco Ltd. v. Farstad Supply A/S [2011] UKSC 16 at paras 37-38 where Lord Collins said:***
>
> ***"37. The starting point is that the definition of "member" in what is now section 112 of the 2006 Act... reflects a fundamental principle of United Kingdom company law, namely that, except where express provision is made to the contrary, the person on the register of the members is the member to the exclusion of any other person, unless and until the register is rectified : In re Sussex Brick Co [1904] 1 Ch 598 (retrospective rectification of register did not invalidate notices).***
>
> ***38. Ever since the Companies Clauses Consolidation Act 1845 (8 & 9 Vict. c 16) and the Companies Act 1862 (25 & 26 Vict. c 89)) its membership has been determined by entry on the register of members. The companies legislation proceeds on that basis and would be unworkable if that were not so..."""***

58. In NilonLord Collins indicated that the great majority of cases concerning the power of the courts to order rectification involve a situation where a transfer has been executed but not registered, and the applicant seeks to be put on the register. The next largest category is cases (many of which are old cases concerning holders of partly paid shares seeking to avoid being contributories) where the applicant is already on the register but wishes to be removed, e.g. because the registration was effected as a result of misrepresentation or was effected without authority or was illegal because exchange control permission was not obtained or bonus shares were improperly issued. He went on to say that *"the overwhelming majority of the cases turn on legal title".*

59. If we were to accept that the winding-up petitions constituted Crosslane Triggering Events for the purposes of Clause 17.2 of the SHA (a matter that is disputed by Crosslane) then HSRE would have been entitled to require Crosslane to transfer to HSRE all its shares in the GPCo for nil consideration. If Crosslane failed to do so then GPCo would have been entitled to appoint a person (acting as agent for Crosslane) to execute a Transfer Agreement in respect of the transfer of the Shares for and on behalf of Crosslane.

60. Whilst we accept that the matter has not been subject to full argument at a final hearing and accordingly any view that we express is a preliminary view, the decision as to whether to appoint an agent and if so, who that agent should be is one for the board of GPCo to take. The decision could be taken by an individual director were the board to have delegated the decision, either for the specific case or generally, to an individual director pursuant to Article 17(2) of GPCo's Articles of Association but at this stage we have seen no evidence that this was done. No board meeting of GPCo was convened and instead Mr.Chittick proceeded to appoint himself as Crosslane's agent and execute the Transfer Agreement. We have some sympathy for the predicament that Mr Chittick found himself in, given that the board was at the time unable to function following the meeting of 16 February 2023 and he wished to ensure that GPCo authorised the commencement of the remedial works to the Portsmouth Property without further delay. However, there would appear to be nothing in the SHA or the Company's articles that would enable him to act as he did.

61. Before we could consider granting an interim mandatory injunction requiring Alter Domus to update the share register of GPCo we would have to determine an issue that is part of the Representor's final relief, namely whether the share transfer form in relation to Crosslane's shares in GPCo was validly executed and that as a result HSRE had legal title to the shares. At this preliminary stage the evidence suggests that it was not, but determination of that issue must await the hearing of the substantive issue. In the circumstances of the present case, we do not regard it as appropriate for the court to grant an interlocutory mandatory injunction given that if it were to do so it would in effect be exercising its powers under Article 47 of the 1991 Law to rectify the share register of GPCo without having first determined whether the share transfer was valid.

62. In the circumstances it is not necessary for us to answer the questions set out in the American Cyanamid case given that the application essentially falls at the first hurdle. However, had we done so we would have considered that the balance of convenience lay in favour of refusing the relief sought given that we are some considerable way from feeling a *"high degree of assurance*", as the case law suggests is required when granting an interlocutory mandatory injunction, that the Representor will succeed at trial in respect of its alleged entitlement to rectification.

63. For the reasons set out in this judgment, at the conclusion of the hearing on 27 March 2023, we were not prepared to grant the interim relief sought by the Representor.