



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 14  
CA130/21 and CA131/21

Lord President  
Lord Woolman  
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the reclaiming motions

in the causes of

BV10 LIMITED

Pursuers and Respondents

against

ALLANVALE LAND INVESTMENTS LIMITED and OTHERS

and against

ALLANVALE LAND (LINLITHGOW) LIMITED and ANOTHER

Defenders and Reclaimers

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**Pursuers and Respondents: MacColl KC; Morton Fraser LLP**  
**Defenders and Reclaimers: RG Anderson; Murnin McCluskey, Glasgow**

21 March 2023

**Introduction**

[1] BV10 maintain that three stock transfer forms, which were executed in terms of loan facility agreements require the reclaimers to register them (BV10) as members (shareholders) in the Allanvale Land group of companies. The reclaimers argue that the transfer of the

shares was intended only to be in security for loans which have now been repaid. The commercial judge held that the agreements supported BV10's position. He ordered the reclaimers to rectify the AL companies' registers to reflect the STFs. The principal question is whether he was correct to do so. New arguments were presented during the reclaiming process, including one relating to the powers of directors, given by the AL companies' articles of association, to refuse to register a person as a member.

### **The Agreements and the Stock Transfer Forms**

[2] In 2019 and 2020, two groups of companies, the BV group and the Allanvale Land group, entered into a series of agreements in terms of which BV8 and BV9 would make loan facilities available to Allanvale Land Investments, Allanvale Land (Auchincruive) and Allanvale Land (Linlithgow). These three AL companies are the reclaimers along with members of the Kirkwood family, who control them.

[3] Each facility agreement contained "conditions precedent" which required the reclaimers to provide stock transfer forms. They transferred shares in the debtor AL companies to BV10, which was entitled to the issue of share certificates in its name. The AL group duly provided the STFs to the BV group.

[4] In respect of the first, December 2019 agreement between BV8 and Allanvale Homes (Adamton), the STF was to transfer 50% of the share capital in AL Investments to BV10. It was to be signed by the "Guarantor", who was defined as James Vincent Kirkwood. It purported to transfer 250 shares in AL Investments, "out of the name(s) aforesaid", which was not James Vincent but Alasdair Kirkwood, to BV10. This agreement also stipulated that there was to be a shareholders' agreement between the guarantor and BV10 in relation to AL

Investments. In turn the shareholders' agreement was executed. It described AL Investments as a company with 500 shares, 50% of which were held by James Vincent Kirkwood and 50% by BV10.

[5] The second, March 2020 agreement, between BV8 and AL (Auchincruive), required an STF of 100% of AL (Auchincruive)'s share capital, to be signed by "the Guarantor" (again defined as James Vincent Kirkwood) to AL Investments and an onward transfer by the guarantor of 50% of AL Investments' own share capital to BV10. On 19 March 2020, an STF transferred 100 shares in AL (Auchincruive), which were held by James Vincent Kirkwood, to AL Investments. On the same date, Alasdair Kirkwood's executor signed an STF of 250 shares in AL Investments, to BV10. The signatures on the two documents appear identical.

[6] In the third, December 2020 agreement, between BV9 and AL (Linlithgow), the STF, to be signed by the guarantor (again James Vincent Kirkwood), was to transfer 50% of the share capital of the borrower (AL (Linlithgow)) to BV10. An STF of 50 shares in AL (Linlithgow) to BV10 was signed by James Vincent Kirkwood on "22/18/2020" (*sic*; 22 December 2020).

[7] With some minor variations, each agreement defined (a) "security" as meaning a mortgage, charge, pledge, lien or other security interest, and (b) "security documents" as meaning the floating charge, the standard security, and each guarantee that had been entered into, along with any other documents creating a security or guarantee in favour of the lenders (BV8 and BV9).

[8] The agreements defined a default by reference to a number of events including where the debtor AL company ceased to be wholly owned by James Vincent Kirkwood. The

agreements expressly did not create any third party rights. They also contained an “entire agreement” clause.

[9] The STFs were delivered to BV10. None of the share certificates was issued. The loan facilities were nevertheless drawn-down.

### **The reclaimers’ articles of association**

[10] The articles of association for AL Investments provide that the directors may “in their absolute discretion and without assigning any reason ... decline to register the transfer of a share” (Art 12.1). The first sentence of regulation 24 in Table A is not to apply. That sentence requires a company to provide a share certificate to its shareholders.

[11] AL (Linlithgow)’s and AL (Auchincruive)’s articles are based on the Model Articles. They provide that the directors may refuse to register the transfer. If they do so, a notice giving reasons for the refusal must be given as soon as practicable and, in any event, within two months.

### **The commercial judge**

[12] The parties pled their cases in the simplified manner which correctly characterised commercial actions. BV10 averred that they had been provided with the STFs and were entitled to be entered as members of the AL companies. Despite repeatedly requesting that this be done, however, the reclaimers had refused to comply.

[13] The reclaimers tabled a number of defences, some of which were no longer live. They maintained that the provision of the STFs was solely for the “security and reassurance” of the lenders. They had been intended to last only during the subsistence of the loans.

BV10 had not requested implementation of the STFs until after the loans had been, or were about to be, repaid. AL denied BV10's statement that they had repeatedly asked to be entered into the registers of members.

[14] The commercial judge noted that BV10 were suing on the basis of the STFs and not the loan facilities agreements. He held that there was nothing in the agreements which supported the reclaimers' position. They did not state that the share transfers were to be in security for the loans, or could somehow be reversed once the loans were repaid. The agreements dealt in detail with the security which was to be provided, but there was no mention of the STFs in that context. The first, March 2019 agreement set out a long-term arrangement in the form of a joint venture between BV10 and James Vincent Kirkwood, as shareholders in AL Investments. There was nothing which brought the joint venture to an end once the loans were repaid. The reclaimers' position was incompatible with the terms of the joint venture, and with the entirety clause. BV10 were entitled to rectification of the registers of members accordingly.

[15] The conditions precedent in the first, 2019 and second, March 2020 agreements, which had required the provision of an STF executed by James Vincent Kirkwood, must have been in error. Alasdair Kirkwood had executed the relative STFs. The shareholders' agreement provided for James, not Alasdair, Kirkwood, to carry on the business of AL Investments jointly with BV10.

## **Submissions**

### ***Reclaimers***

[16] BV10 were seeking to turn a debt transaction into an equity transaction after the

event. A lender who did not insist upon a condition precedent prior to advancing funds was deemed to have waived that condition (*Bank of Ireland v AMCD (Property Holdings)* [2001] 2 All ER (Comm) 894, at para [16]). BV8 and BV9 had not sought to implement any of the STFs while the loans were outstanding. The proposition, that a lender could seek compliance with conditions precedent after repayment of a loan, was a remarkable one.

[17] BV10's position did not reflect the agreements and led to an uncommercial result. It was inconsistent with their position that a default would occur if the AL debtor ceased to be owned by James Vincent Kirkwood. If the lender sought registration of the STFs, a default would occur. Fundamentally, BV10 were not a party to the facility agreements. Each agreement provided that no third party rights arose.

[18] The reclaimers' case was not bound to fail at proof. BV10 had made no averments about the presentation, or rejection, of any of the STFs in accordance with the companies' articles of association or the Companies Act 2006. The reclaimers had averred that no requests to formalise the transfer had been made.

[19] Following upon an amendment, which was made after the first instance decision, the reclaimers advanced a new argument. Shares in a private company could only be transferred in accordance with the company's articles of association (2006 Act, s 544). The judge held that BV10 were suing upon the STFs. In contrast to English law, a deposit of a share certificate did not create a right in security in Scots law. Security over shares in a Scottish company could only be taken by registration of the transfer (*Enviroco v Farstad Supply* [2011] 1 WLR 921). The articles gave the directors of the AL group of companies a discretion to refuse a transfer. There were limited controls on a director's discretion to refuse to register (*Stewart v James Keiller & Sons* (1902) 4 F 657 at 678 - 679; *Re Smith and*

*Fawcett* [1942] Ch 304 at 308). BV10 had no freestanding right to registration as a member by virtue of the STFs (*Lyle & Scott v Scott's Trs* 1959 SC (HL) 64 at 84).

[20] The commercial judge erred in relying upon the shareholders' agreement. The AL companies were not parties to that agreement. BV10 were not shareholders until registration of a transfer. The agreement could provide no more than context. The judge had erred in correcting the conditions precedent in the agreements to read Alasdair, instead of James, Kirkwood. Such an approach was not permissible under the orthodox rules of contractual construction.

### **BV10**

[21] The reclaiming motion arose because the Kirkwood family and the AL companies sought to avoid having to transfer the shares. They were part of the loan transactions and not security for the loans. The loan facility agreements imposed no restriction on the period during which the shares were to be owned by BV10. The STFs were not "Security Documents" in terms of the agreements. The reclaimers' averments regarding the transfers being only in security did not reflect the terms of any of the agreements. There was no averment of any collateral agreement. The new argument founding upon the default provisions was without merit. The transfer of the shares to BV10 was envisaged by the relative agreement. The lending BV company had consented to the transfers; no default would take place when they occurred.

[22] The commercial judge was entitled to dismiss the case without hearing evidence. The criticism of BV10's pleadings was ill-founded. BV10 had made averments regarding the reclaimers' refusal to amend the registers of members. No substantive response to that was made by the reclaimers.

[23] The argument that directors of companies had an absolute right to refuse to alter the register had not been advanced before the commercial judge. In any event it was misconceived. The right was qualified in the sense that it had to be exercised fairly and reasonably, and not capriciously or corruptly (*Stewart v James Keiller & Sons* at 678-9; *Super-Max Offshore Holdings v Malhotra* [2017] EWHC 3246 (Comm)). In any event, James Kirkwood was the controlling mind of the AL companies. He had entered into the agreements through them. He was not now entitled to avoid implementation of the STFs. No averment had been made that the directors had determined that the registration ought to be refused, far less that they had done so prior to the expiry of the two month time limit (2006 Act, s 771(1)). The reclaimers' argument that the shareholders' agreement did not provide BV10 with a free-standing right to registration was without merit. The judge had not proceeded on the basis of such an analysis. In the context of the present dispute, and for the reasons he gave, the judge was correct to construe the reference to James Vincent Kirkwood in the conditions precedent as an error.

### **Decision**

[24] Central to an understanding of the principal issue is a simple fact. BV10 are suing on the basis of the stock transfer forms, not upon the loan facilities agreements. It follows that no question of third party rights arises. There is no indication in any contractual document that the provision of the STFs was intended only to be a form of security for repayment of the loans. The agreements dealt with what security was to be provided in detail and said nothing to place any limitation on the proposed share transfers. The creation of a joint venture company between BV10 and James Vincent Kirkwood, in respect of the



first, 2019 agreement, runs contrary to the reclaimers' contention. There was no provision bringing this venture to a close once the loan was repaid. There was no agreement that BV8 and BV9 would not intimate the STFs to BV10 or that they would be cancelled or returned to the reclaimers once the loans had been repaid. No background circumstances were averred, by way of context, which point to the STFs being intended only as security. If commercial common sense were to be applied to the terms of the loan facilities agreements, the obvious purpose of the STFs was to give BV10 a stake in, and hence a measure of supervision and control over, the companies to whom the loans were being made.

[25] The fact that BV10 did not request the share certificates until near the expiry of the loans is not significant. They had possession of the STFs, so there was no need to obtain the certificates in advance of drawdown. It was incumbent upon the directors of AL (Linlithgow) and AL (Auchincruive) to complete and have ready for delivery share certificates in respect of these two companies within two months of the transfer being lodged with the company (Companies Act 2006, s 776(1)(a)). No share certificate required to be issued by AL Investments in terms of that company's articles of association.

[26] There are two final points. First, the reference to James Vincent Kirkwood as the grantor of the STF referred to in the first, 2019 agreement must have been a clerical error. He could hardly have transferred his own shareholding in AL Investments and then participated, as a 50:50 member, in the joint venture with BV10. This point is of no moment given that an STF was executed, albeit by Alasdair Kirkwood. Given that the relevant share transfers were agreed in terms of the facilities agreements themselves, that which resulted in James Vincent Kirkwood ceasing to own the entire capital of one of the companies cannot

logically amount to a default; that is an occurrence in breach of the agreements, since that cessation would have happened in line with the agreements.

[27] The reclaimers' belated new argument about the discretion of directors to refuse to register new members falls to be rejected. Where, as here, articles of association give the directors such power, it must be exercised "as soon as practicable and in any event within two months after the date on which the transfer is lodged" (Companies Act 2006, s 771(1)). Unless the articles provide otherwise, reasons must be given. Whether reasons require to be given or not, a decision to refuse must be made *bona fide* in the interests of the company. The refusal would have to be fair and reasonable, rather than capricious or corrupt (*Stewart v James Keiller & Sons* (1902) 4F 657, Lord Trayner at 678-9). The reclaimers maintain that there are no averments by BV10 which deal with the lodging of the STFs. In fact BV10 do aver that they have repeatedly requested that the reclaimers register them as members. In any event, this action is a clear request that this be done. There are no counter averments that the reclaimers: have considered the matter of registration; exercised any power to refuse to register BV10 as members; did so as soon as practicable; or had a *bona fide* reason, in the interests of the company, for refusing to register BV10. It is difficult to see what good reason there could be, when the STFs have been executed by those now refusing to give effect to them.

### **Conclusion**

[28] In short, there is no substance in the reclaimers' central contention that the STFs were only a security, or an attempt to create one. In these circumstances, the shares must be held as transferred. BV10 are entitled to be registered as members in terms of the STFs. The

court will, in essence, refuse the reclaiming motion and adhere to the interlocutor of the commercial judge dated 25 August 2022. The interlocutor will specify with greater precision the orders made by the court and a time within which the orders are to be obtempered.