

ENGLAND AND WALES / JUDGMENT

Thomas Joseph Gallagher v Stuart Alan Fraser & Anor

COURT
IN THE HIGH COURT OF JUSTICE

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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
CIRCUIT COMMERCIAL COURT (KBD)
Case No: CC-2023-MAN-000083
Date: 11 September 2025

Before : HHJ HALLIWELL SITTING AS A JUDGE OF THE HIGH COURT AT
MANCHESTER

Between : THOMAS JOSEPH GALLAGHER
- and -
(1) STUART ALAN FRASER
(2) GRACE FRASER

Claimant
Defendants
s
Mr Paul Chaisty KC and Mr Thomas Williams (instructed by Napthens) for the
Claimant
Ms Lesley Anderson KC (instructed by Gunnercooke) for the Defendants
Hearing dates: 24-28 February, 3-4, 12, 31 March 2025

JUDGMENT

This judgment was handed down remotely at 10.30am on 11 September 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives High Court

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Introduction

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Witnesses

- (a) Mr Thomas Gallagher
 - (b) Mr Jonnie Whittle
 - (c) Mr Stuart Fraser
 - (d) Mr Steven Fraser
 - (e) Mr Daniel Holland
 - (f) Mr Kevin Fowlie
 - (g) Mr Philip Birchall
 - (h) Ms Christine Oxenburgh (i) (j) Mr Saad Ahmed Ms Grace Fraser The DOU The Misrepresentation Claim Backdating of the 31 March 2020 Documents The GF Transfer Principles of contractual interpretation Calculation of the SF Payment Mr Gallagher's Clause 5.3 claims Disposal 5 7 9 0 1 1 62 75 82 87 91 100 125 166 177
 - (1) Introduction
1. These proceedings involve claims for the payment of a contractual debt and damages for misrepresentation. They arise from a contract, by deed, following the disposal of shares in a company called Gallagher Topco Limited ("Topco") and the formation of Network Plus Group Limited ("Superco"), as a new holding company, under which two of the parties to the original transactions agreed to pay additional amounts to one of the others.
 2. The contract was denoted as a Deed of Undertaking ("the DOU"). It was signed as a deed by or on behalf of two of the parties to these proceedings, namely the Claimant ("Mr Gallagher") and the First Defendant ("Mr Fraser"), together with a co- shareholder, Mr Daniel Holland ("Mr Holland"), and Superco itself. The additional amounts were payable to Mr Gallagher. Messrs Fraser and Holland are the parties who undertook to make the payments. Page 2 High Court Approved Judgment: Gallagher v Fraser

3. Mr Gallagher has elected to sue Mr Fraser and his wife, Mrs Grace Fraser (“Mrs Fraser”) only. He does not sue Mr Holland because he appears to accept that Mr Holland complied with his obligations, under the DOU. These provided for staged payments in a fixed amount.
 4. Mr Fraser was also under an obligation to make staged payments in a fixed amount. Again, these have apparently been made as required. However, the DOU provided, in addition, for Mr Fraser to make a payment in an amount equal to 7% of the net proceeds of sale received by him in the event of a subsequent disposal of the majority shareholding, in Superco, of Mr Fraser and Mr Holland.
 5. Mr Gallagher sues Mr Fraser on the DOU, contending he has not been fully paid the amount to which he is contractually entitled following a disposal of the majority shareholding. This is essentially on the basis Mr Gallagher is entitled to additional consideration with respect to the value of disposals and allotments made prior to the final disposal of the majority shareholding.
 6. Mr Gallagher has joined Mrs Fraser, as a co-defendant, to this part of the claim on the basis that the antecedent disposals included a sham transaction under which shares were purportedly transferred to her personally.
 7. Mr Gallagher also sues Mr Fraser for damages for a misrepresentation as to the proportion in which Mr Fraser would hold shares in Superco when the majority shareholding was finally disposed of. Mr Gallagher contends he was given a false impression about the basis on which his additional consideration would be calculated.
 8. The claim is defended on the basis that Mr Gallagher has been paid, in full, the amounts to which he was entitled, under the DOU, following disposal of the majority shareholding and, whilst Mr Fraser transferred some shares to Mrs Fraser prior to the disposal of the majority shareholding, this was a genuine transaction under which Mrs Fraser became beneficially entitled to the shares without any obligation to make a payment to Mr Gallagher.
 9. If the putative misrepresentation was based on a statement capable of giving rise to a cause of action at law, it is denied Mr Stuart Fraser made such a statement. On the hypothesis such a statement was made, it is also denied Mr Gallagher relied on the statement when entering into the DOU.
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10. At trial, Messrs Paul Chaisty KC and Mr Thomas Williams appeared on behalf of Mr Gallagher and Ms Lesley Anderson KC appeared on behalf of Mr and Mrs Fraser. They are to be commended for their skill in advocacy. This is my judgment following the trial.
- (2) Background
11. For many years, Mr Gallagher worked in the business of repairs and maintenance for utilities suppliers. In 1993 he commenced business, in partnership with his then wife Mrs Karen Gallagher, as “T&K Gallagher”. Their business included fixing water mains and attending to the problems of domestic customers.

12. In August 2000, a new company, T & K Gallagher Limited (“T&K Gallagher”), was formed as the vehicle for the business. Mr Gallagher and Mrs Karen Gallagher were each initially allotted 499 shares in the new company. However, at some point between 2008 and 2010, Mrs Karen Gallagher’s shares were disposed of and she ceased to be involved in the business. Eventually, they separated and divorced. However, T&K Gallagher continued in business with a growing turnover.
13. Mr Gallagher has been acquainted with Mr Fraser for many years. In 2010, Mr Gallagher was working for ARM Construction Limited which sub-contracted work to T&K Gallagher Limited. In 2011, he commenced work with another company, Leven Energy Services Limited, in which Mr Gallagher invested.
14. On 29 January 2014, Mr Gallagher formed another company, Gallagher Utility Services Group Ltd (“GUS Group”). With Mr Gallagher as majority shareholder of GUS Group, T&K Gallagher’s shares were transferred to the new company. Together with a business colleague, Mr Michael Vincent O’Connor, Mr Gallagher was also appointed a director.
15. Following the incorporation, on 13 March 2016, of Topco, new shares were allotted in GUS Group and Mr Gallagher sold his GUS Group shares to Topco. No doubt, this was for their full market value. Topco was then recorded, at Companies House, as the person with significant control, holding directly or indirectly 75% of the shares of GUS Group.
16. On 23 March 2016, Mr Gallagher was appointed a director of Topco. He was registered as the holder of 25% of the issued shares in Topco with the remaining 75% held by the trustees of an Employee Benefit Trust. It was envisaged that, shortly Page 4 High Court Approved Judgment: Gallagher v Fraser afterwards, Messrs Fraser and Holland would commence as employees. The EBT shares were earmarked for them. Once they commenced work in the business, they thus became entitled to 37.5% each in the shares of the new company.
17. Unfortunately, the relationship between Mr Gallagher and Mr Fraser deteriorated sharply during this period. Well before 2019, a point had been reached at which they were barely on speaking terms. However, there were discussions between Messrs Gallagher, Holland and Fraser with a view to severance or disposal of their shares in Topco to a third-party investor. Messrs Fraser and Holland were well aware they would be unable to buy out Mr Gallagher without third party funds. On this basis, there were negotiations with private equity investors, Rubicon Partners. Later, they also explored options for loan finance with Alcentra Limited. During 2019, progress was made with a view to the acquisition and disposal of Mr Gallagher’s interest.
18. On 3 May 2019, there was a meeting at the Marriott Hotel, Hale Barns, Cheshire between Messrs Gallagher, Holland and Fraser. Mr Gallagher attended the meeting mindful that his own shares in Topco were shortly to be disposed of in full. He also attended in the expectation that, when the opportunity arose, Messrs Holland and Fraser would seek to dispose of their own interest – whatever the new corporate structure – at an enhanced value. During the meeting, Mr Gallagher advised Messrs Holland and Fraser that, in addition to the

consideration for his shares in Topco, he was looking for an additional payment once Mr Fraser finally disposed of his remaining interest. This was denoted as a “rollover” payment, calculated at 10% of the sale proceeds.

19. Mr Gallagher contends that he made a contemporaneous handwritten note of the meeting in his Diary. This was in the following form. “Stuart and Dan Marriott *Look at exit 14th June, full payment* *I have given you pathway to make a lot of money. 26 months – I would say 12 of them selling the business Bought Restaurant – new house + villa 18th salary 10% monies Interest on my loans plus the outstanding Dividend Payment 10% Rollover – Stuart can’t Sell Shares without my say so. Agreed with Page 5 High Court Approved Judgment: Gallagher v Fraser Stuart and Dan.”
20. It was eventually decided that a new company would be formed to purchase Mr Gallagher’s shares in Topco and Mr Gallagher would cease to have any involvement in the business. As part of these arrangements, Messrs Fraser and Holland would also dispose of their shares in Topco to a new holding company. However, they would be allotted shares themselves in the new company.
21. Superco was incorporated, on 26 July 2019, initially with two ordinary £1 shares, in the expectation that it would ultimately be the new holding company. It was incorporated as “Gallagher Superco Limited” but, following a members’ special resolution on 6 December 2019, its name was changed. Messrs Fraser and Holland subscribed to the shares. They were also appointed directors.
22. On 31 July 2019, Mr Gallagher met Mr Holland at the Salford office. Mr Gallagher relies, again, on a handwritten Diary of the meeting. This culminates in a passage stating as follows. “Dan promised no games I will get my Roll over off Stuart or he would stand by it”.
23. On 30 August 2019, Messrs Gallagher, Holland and Stuart Fraser entered into a series of separate written agreements, by deed, with Superco and T&K Gallagher in connection with the ownership of the business and their relationship with one another. By these agreements, Messrs Gallagher, Holland and Mr Fraser disposed of their shares in Topco to Superco. There was also a consultancy agreement between Mr Gallagher and T&K Gallagher and deeds of release in respect of loans from Mr Gallagher to Messrs Holland and Fraser.
24. From these transactions, Mr Gallagher accepts that he received some £31,550,000, including £8,880,000 in respect of the amounts due to him under personal loans.
25. The transactions were substantially funded through bank finance. However, company monies were also utilised. The aggregate purchase price for the sale of the shares of Messrs Fraser and Holland was £20,000,000.

26. The transactions included a share purchase agreement between Mr Gallagher and Superco under which Mr Gallagher undertook, in clause 10.1, that (1) he had no claim or right of action against Superco or its directors or shareholders; and (2) there were Page 6 High Court Approved Judgment: Gallagher v Fraser no agreements under which Superco or any director of shareholder of Superco had “any actual or contingent obligation to or in respect of him or any person connected with him...”.
27. Following the transactions, Mr Gallagher sought to remind Mr Fraser that he had also agreed “that I would get 10% of your rollover”. He did so by an email timed at 14:40 on 9 September 2019 in which he asked Mr Fraser to confirm that it would be “ok to contact Keith at Napthens to draw up the agreement with Nick”. The reference to Keith and Nick was to their respective solicitors, Mr Keith Melling and Mr Nick Ducker, at Napthens and Gunnercooke.
28. By an email timed at 14:26 on 17 September 2019, Mr Gallagher advised Mr Melling that it had been agreed, in May, that he “would receive 10% of the proceeds of sale out of Stuart’s rollover on the next deal”. Mr Fraser and his solicitor, Mr Nick Ducker, of Gunnercooke, were copied into the email.
29. During September 2019, Mr Gallagher also contacted Mr Holland to demand, according to his calculations, the amounts outstanding to him. In a Whatsapp message on 30 September 2019, he advised Mr Holland that he had “until Friday” to pay him £200,000 and “come with a payment plan for £3.1 million”.
30. The message did not contain a threat in specific terms. However, in a message to Mr Fraser earlier in the year, Mr Gallagher had threatened to cause “a good friend” of his in the Manchester Police “to look into money laundering on VAT and tax”, stating that “I will make sure you do time” on the basis that “I know that much it’s unbelievable”. Mr Fraser thus considered Mr Gallagher was threatening to reveal details of historic transactions in relation to the business of T&K Gallagher of which Mr Gallagher was personally involved or had personal knowledge.
31. Messrs Fraser and Holland deny that T&K Gallagher or any associated company had entered into illegal transactions, whether by way of bribery, tax evasion, money laundering or, indeed, of whatever other nature Mr Gallagher might have been suggesting. Mr Gallagher has not provided evidence, in the current proceedings, to substantiate the allegations on which his threats were based. In these proceedings, Mr Gallagher also advances a case against Mr Fraser for fraudulent misrepresentation. This is based on an email message sent later, in November 2019, and is separate from the subject matter of his threats earlier in the year. However, any allegation of Page 7 High Court Approved Judgment: Gallagher v Fraser bribery, tax evasion or money laundering would be sufficiently serious to require cogent evidence. No such evidence has been adduced and, whilst Mr Gallagher’s threats form part of the factual background, it is un-necessary for me to consider whether there was ever any substance in the vague allegations on which the threats were based. Since I am not invited to

address the underlying substance of Mr Gallagher's threats – only the fact that they were made – I shall thus decline to do so.

32. In late September or early October 2019, an intermediary was approached with a view to negotiating a compromise acceptable to each of the parties. The intermediary, Mr Breandan Flynn ("Mr Flynn"), was a long-standing business acquaintance of each party. No doubt, the parties each provided Mr Flynn with background information and details about their negotiating stance, authorising him to disclose to one another at least some of this information. The extent of Mr Flynn's duties to the parties was not canvassed at trial. However, he was apparently asked to explore the basis on which the parties might reach an agreement in principle on mutually acceptable terms. In doing so, no doubt he was allowed to provide his own insight. However, there is no suggestion he was authorised to negotiate a binding contract on the parties' behalf.
33. Mr Flynn appears to have achieved a solution by early October 2019. There is an email dated 2 October 2019 from Mr Fraser to Mr Ducker confirming that Mr Flynn had "brokered" a "deal" providing for Mr Gallagher to be paid 7% of the net proceeds from "Mr Fraser's equity in business (split equally between SF and DH)" with provision for upwards adjustment to 10% if Mr Gallagher were able to prove "a specific tax liability...".
34. By then, however, mindful of Mr Gallagher's threats, Mr Fraser and Mr Holland had already determined to commence legal proceedings against him for injunctive relief. On 3 October 2019, proceedings ("the Injunction Proceedings") were issued on behalf of Superco and T&K Gallagher, as claimants, in the Business and Property Courts in London with an application for interim relief. Mr Gallagher was sole defendant. The application for interim relief was listed for hearing on 9 October 2019 before Nugee J.
35. At the hearing on 9 October 2019, Mr Gallagher undertook not to do or say anything harmful to the reputation of Superco or its subsidiaries or make any adverse or Page 8 High Court Approved Judgment: Gallagher v Fraser derogatory comment about T&K Gallagher, its employees, officers or workers. The undertakings were given on an interim basis pending final judgment.
36. Negotiations then ensued for Mr Gallagher to enter into a series of contractual warranties and undertakings, including warranties that he had not bribed third parties to obtain business for companies associated with Superco and undertakings to comply with most of his undertakings in the 9 October 2019 order in return for specific payments.
37. The parties continued to treat Mr Flynn as an intermediary. By an email timed at 15:05 on 14 October 2019, Mr Ducker, of Gunnercooke, forwarded a draft agreement for Mr Flynn's consideration. This draft or a subsequent version were then referred to Mr Gallagher who advised Mr Flynn that he intended to take professional advice.

38. By an email on 22 October 2019, Mr Gallagher advised Mr Flynn, or reminded him, that he was looking for £3.1m gross, personally guaranteed with an additional £200,000 from Mr Holland in respect of the amounts owed by him and interest of 8% on £3.3m.
39. Conversely, there is an email timed at 12:38 on 4 November 2019 from Mr Fraser to Mr Flynn (“the 4 November 2019 Email”) in which Mr Fraser stated as follows: “Bren Mr Flynn To discuss: EV of business £112m Less debt and costs of £31k =£27million each Tom got his full £27million SF got £10million and rolled over into new co. I need to receive my balance of £17 million before his 7% starts. Future EV Less bank debt of £73million Less bank warrant of 3% less management scheme of 7% Means he gets 7% of 40% after £17million. Give me a call to discuss if you don’t follow. Stuart Fraser”.
40. It appears Mr Flynn did not forward the 4 November 2019 Email to Mr Gallagher or show it to him. However, Mr Fraser later felt sufficiently confident to advise his solicitor, Mr Ducker that, having spoken to Mr Flynn, it appeared they were all agreed on the figures. He did so by email timed at 12:59 on 3 December 2019. Page 9 High Court Approved Judgment: Gallagher v Fraser
41. Mr Fraser instructed another solicitor, Mr Saad Ahmed, of Gunnercooke, for advice in connection with his personal tax affairs and, more generally, the tax affairs of his wife, Mrs Fraser and the companies in which he had an interest. Mr Ahmed advised Mr Fraser and Mr Holland that, from a tax perspective, it would make sense for them to transfer shares to their wives with a view to maximising their tax relief. By an email timed at 15:06 on 24 February 2020, from their agent, Mr Whittle to Mr Ahmed, they confirmed they each wished to keep 26% of their shares and transfer the balance of their respective shareholdings to their wives.
42. On the same day, 24 February 2020, Mr Ducker forwarded to Mr Melling the latest version of the draft agreement between Messrs Gallagher, Fraser and Holland for Mr Gallagher to be paid an amount calculated with respect to the proceeds of sale of the shares of Messrs Fraser and Holland in Superco. For this purpose, “Share Sale” was already defined so as to mean a share of the issued share capital which resulted in the acquirer obtaining a controlling interest. There were draft warranties from Mr Gallagher, including a warranty that he had not engaged in activities constituting the offence of bribery. The draft was denoted as a Deed of Undertaking.
43. Negotiations continued. The parties’ solicitors continued to negotiate with respect at least to the legal formalities and Mr Flynn continued to perform a role, as intermediary, with a view to achieving an outcome acceptable to both sets of parties. Mr Flynn was personally in contact with each of the parties.

44. By an email message timed at 10:44 on 12 March 2020, Mr Ducker advised Mr Melling that following “further discussions...between our respective clients via Breandan Flynn”, he had been advised that “your client has agreed to accept the proceedings against him in order for a permanent injunction [to] be granted”. On this basis, he confirmed that his clients would be prepared to enter into the Deed of Undertaking and his instructions were to proceed on this basis.
45. It is important to recognise that the Government later imposed severe restrictions on social distancing as part of the first Covid lockdown. Under these restrictions, first announced on 23 March 2020, the parties and their legal advisers were only able to communicate remotely. They were not lifted until 10 May 2020.
46. However, a series of documents has been admitted in evidence bearing the date 31 March 2020 (“the 31 March 2020 Documents”). These documents each relate to Page 10 High Court Approved Judgment: Gallagher v Fraser transactions in respect of Superco and include stock transfer forms by which Messrs Fraser and Holland each transferred to their wives, Grace and Wendy, 2002 shares in the company; board minutes approving the share transfers; and members resolutions authorising the directors to allot shares in Superco to participants in a management scheme (“the Management Scheme”) and approving the adoption of new articles of association together with related board minutes and attendant documentation (together “the Management Scheme Documents”). The share transfer to Mrs Fraser (“the GF Transfer”) and the Management Scheme Documents form important parts of Mr Gallagher’s claim. More generally, on some, but not all, the documents, the relevant date has been added in manuscript after the document was first printed. In the case of the board minutes, the date was added in manuscript and signed by Mr Fraser as “Chairperson”. There is an issue between the parties as to when this documentation was prepared signed and dated.
47. By an email timed at 9:06 on 22 April 2020, Mr Melling forwarded to Mr Ducker a copy of the Deed of Undertaking, signed by Mr Gallagher, on the basis it would be held to order pending completion. By email timed at 15:01 on 29 April 2020, Mr Ducker forwarded to Mr Melling a copy of the Deed signed by Messrs Fraser and Holland, again to be held strictly to order.
48. By this stage, the Court had been invited to approve a consent order providing for the Injunction Proceedings to be discontinued following final injunctions prohibiting Mr Gallagher from saying anything harmful to the reputation of Superco or its subsidiaries and using or disclosing confidential information. By an email dated 28 April 2020, the Court Service advised Ms Oxenburgh of Gunnercooke that the judge was minded to approve the order in a modified form subject to Naphthens’ confirmation that they had advised Mr Gallagher in relation to the consent order and, on this basis, Mr Gallagher had given his consent.

49. By an email timed at 15:52 on 30 April 2020, Mr Ahmed provided Mr Stuart Fraser with draft copies of a suite of documents, including unsigned and undated copies of several of the 31 March 2020 Documents. This included the board minutes approving a share allotment to participants in the management scheme. Mr Ahmed confirmed that some additional documents would be forwarded in subsequent emails. Page 11 High Court Approved Judgment: Gallagher v Fraser
50. By an email timed at 16:26 on 1 May 2020, Mr Ahmed forwarded to Mr Fraser draft copies of the stock transfer forms and board minutes. Mr Holland was copied in. In this email, Mr Ahmed confirmed that it was his understanding that "...the transfer took place on 31 March 2020" and stated that this was thus "the date I have inserted". He also advised that "each of you need to sign the form in the box in the middle of the stock transfer form..."
51. Shortly afterwards, at 16:39 on 1 May 2020, Mr Fraser returned signed copies of the stock transfers and Board minutes but the latter were still undated.
52. Having received signed copies of the stock transfers, Mr Ahmed emailed Mr Fraser, at 14:39 on 4 May 2020, to provide him with advice on the Articles and their effect on the share transfer transactions. Mr Holland was copied into the email together with Messrs Birchall and Whittle. In this email, Mr Ahmed confirmed that Messrs Fraser and Holland had transferred the relevant shares to their wives. His advice about the Articles was on this basis. He advised Mr Fraser that, in the event of her divorce, death or bankruptcy, his wife's shares would be re-transferred to him.
53. Arrangements were then made for participants in the share scheme to sign the share scheme documents. It is apparent from an internal email on 5 May from Ms Louise Lloyd to Mr O'Sullivan that this was to be achieved on 12 May 2020.
54. On the following day, 13 May 2020, HHJ Hodge KC formally approved the consent order in a modified form. The approved order was sealed some 13 days later, on 26 May 2020.
55. Once the order had been sealed, the deed of undertaking could be completed. On the following day, 27 May 2020, this date was entered on the Deed of Undertaking and, in this form, the agreement ("the DOU") was completed. The DOU provided for Messrs Fraser and Holland to make payments to Mr Gallagher in fixed amounts and for Mr Fraser to make a defined payment in the event of a share disposal resulting in the acquisition of a controlling interest. With the agreement of all four parties, the Deed took effect immediately.
56. Mr and Mrs Fraser and Mr and Mrs Holland later disposed of part only of their respective shareholdings, in Superco, to Livingbridge EP LLP ("Livingbridge"). They did so pursuant to a deed dated 31 October 2020. By this transaction ("the Page 12 High Court Approved Judgment: Gallagher v Fraser Livingbridge Transaction"), 20% of the issued shares were disposed of for a purchase price of £44,744,000.

57. By a deed of trust dated 28 April 2022 (“the 2022 Trust Deed”) – denoted as “the Fraser 2022 Discretionary Settlement” – Mr and Mrs Fraser and Mr Holland made a declaration of trust in anticipation that substantial assets would shortly be introduced to the trust. The “Trust Fund” (“the 2022 Trust”) was defined widely so as to include “all money, investments or other property paid or transferred by any Person to or so to be under the control of, and in either case, accepted by the Trustees as additions to hold on the terms of [the] Trust”. Mr and Mrs Fraser were together denoted as “the Settlers” and Messrs Fraser and Holland were denoted as “the Original Trustees”. “Beneficiaries” was defined so as to encompass Mr and Mrs Fraser’s descendants, the spouses of their descendants and surviving spouses of their descendants and such additional persons as the Trustees might by deed declare.
58. By deeds of gift dated 5 July 2022, Mr and Mrs Fraser respectively transferred 1,256,773 and 314,193 Y shares in Superco to Messrs Fraser and Mr Holland, as Trustees, as an addition to the 2022 Trust.
59. Pursuant to a deed dated 10 July 2022 between the shareholders of Superco, including Mr and Mrs Fraser, Mr and Mrs Holland, the management shareholders, Livingbridge, FIS Nominee Limited and Nyetimber Bidco Limited (“Nyetimber Bidco”), the entirety of the share capital was subsequently sold to Nyetimber Bidco for the sum of £408,696,662.51 with payment of additional consideration calculable according to a defined contractual formula (“the Nyetimber Bidco Transaction”). Completion was on 27 September 2022.
60. By letter dated 28 September 2022, Gunnercooke advised Napthens that, according to their calculations, the sum of £6,052,831 was thus payable to Mr Gallagher in respect of Mr Fraser’s share of the proceeds of sale. They asked for Napthens’ client account details by return. By letter dated 1 November 2022, Napthens provided Gunnercooke with details of their client account and, on 8 November 2022, Gunnercooke transferred to Napthens the sum of £6,052,831. Whilst payment was made with a view to satisfying their clients’ liabilities to Mr Gallagher, it is not suggested that this might somehow have given rise to a binding compromise. Page 13 High Court Approved Judgment: Gallagher v Fraser
61. On 23 October 2023, the current proceedings were issued on Mr Gallagher’s behalf following correspondence in which the parties set out their respective contentions. The Claim Form was served with Mr Gallagher’s Particulars of Claim. They included claims for a declaration that the transfer of shares from Mr Fraser to Mrs Fraser was “invalid and of no effect and/or alternatively, as of 22 September 2022” Mrs Fraser held such shares on trust for Mr Fraser. There were also claims for payments, inquiries and amounts in respect of the full amounts owing to Mr Gallagher under the DOU on the basis that he was entitled to credit for additional amounts in respect of the transactions involving Mrs Gallagher, Livingbridge and the 2022 Trust Deed. In the body of the Particulars of Claim, there was also a claim for damages for misrepresentation.

(3) Witnesses

(a) Mr Gallagher

62. Mr Gallagher gave evidence about his role in a series of evolving businesses and companies. This commenced with a construction company in Longridge, Preston and culminated in Gallagher Utility Services Limited (“GUSL”). GUSL provided services in connection with civil engineering projects and works of repair and maintenance. Mr Gallagher started work, at the age of 16 years, as the teaboy and progressed to a senior management role and chairman of the board of directors. In later years, this coincided with a rapid increase in the turnover of the companies.
63. Mr Fraser and Mr Daniel Holland were introduced to the main business as acquaintances of Mr Gallagher. In 2016, Mr Gallagher sold his shares in GUSL to Topco. He received some £24,000,000 for his shares. Messrs Fraser and Holland were issued with shares in Gallagher Topco Limited, as indeed, was Mr Gallagher. However, the relationship between Mr Gallagher and Mr Fraser deteriorated and it was soon obvious they needed to go their own separate ways. At one point, Mr Gallagher sent Mr Fraser a WhatsApp message implicitly threatening to refer him to the Manchester Police for offences involving “money laundering” in respect of “VAT and tax” and stating that “I will make sure you do time”. When giving evidence, he confirmed that this was a threat to make sure Mr Fraser was committed to prison.
64. There were negotiations with a view to severance. It was envisaged that Mr Gallagher would leave the business and dispose of his shares in Topco. These were conducted – Page 14 High Court Approved Judgment: Gallagher v Fraser he says – on the understanding that, whilst Messrs Fraser and Holland would then own the shares in the corporate vehicle for the business or its holding company, he would become entitled to a share of the net proceeds of sale when, in turn, they sold their own shares. Somewhat surprisingly, there was no provision for this in the agreements concluded on 30 August 2019. However, Mr Gallagher contends that this was orally agreed at a meeting between them earlier in the year, on 3 May 2019, at the Marriott Hotel, Hale Barns, Altrincham. According to Mr Gallagher, this amounted to a binding contract under which they promised to pay him an amount – denoted by him as a “rollover” – equal to 10% of Mr Fraser’s share of the proceeds of sale. Mr Gallagher also contends that, at a subsequent meeting between Mr Gallagher and Mr Holland, on 31 July 2019, Mr Holland confirmed he would honour the agreement.
65. Following the transactions on 30 August 2019, there were further negotiations between the parties. These were not conducted face to face since Mr Gallagher was no longer on speaking terms with Mr Fraser. At a preliminary stage, some of the negotiations were conducted through Mr Flynn as their intermediary. However, the DOU was drafted and finalised by the parties’ respective solicitors.
66. Mr Gallagher also confirmed that, having initially agreed to take 10% of Mr Fraser’s share of the proceeds of sale, he agreed to reduce this to 7% on the understanding Mr Fraser would be entitled to 50% of the proceeds of sale. This is inconsistent with his misrepresentation

claim in which it is at least implicit he entered into the DOU in reliance upon a representation that his 7% was applied to 40% of the proceeds of sale. It is also at variance with the DOU in which his contractual entitlement to 7% was confined, in the event of a Share Sale, to Mr Fraser's share of the net proceeds only of a transaction leading to the acquisition of a Controlling Interest, as defined.

67. Mr Gallagher was provocatively cross examined. However, he was an uncompromising witness. His stance was apparently coloured by a sense of grievance, entitlement and a perception Messrs Fraser and Holland have ultimately achieved a windfall, at his expense, from the acquisition of a business established by Mr Gallagher himself and built up, over the years, through his own hard work and endeavour. It emerged at trial that he has no scruple covertly recording telephone conversations, private or otherwise. Several witnesses gave evidence suggestive of a propensity, on the part of Mr Gallagher, to act in a threatening and intimidating Page 15 High Court Approved Judgment: Gallagher v Fraser manner to get his own way. This is consistent with the WhatsApp message in which he implicitly threatened to do what he could to put Mr Fraser in prison.
68. Whilst Mr Gallagher displayed a measure of proficiency and confidence in responding to the questions put to him by Ms Anderson, his evidence on the more contentious aspect of the case was unreliable. To take one example, Mr Gallagher's evidence that the parties entered into a binding contract at the meeting on 3 May 2019, was wholly implausible. More likely than not, his handwritten notes of the meetings on 3 May and 31 July 2020 were made following the meetings rather than at the meetings themselves. It can reasonably be inferred that they were prepared shortly after the meetings. However, they were obviously drawn up with the intention of providing Mr Gallagher with an aide memoire and commentary and cannot be relied upon as an accurate record. At their highest, they are indicative of discussions or an understanding or agreement in principle only, not a binding contract. If Mr Gallagher thought that he had obtained the benefit of binding contractual commitments, he could have been expected to instruct his solicitors to take action to enforce the commitments rather than issuing unrelated threats and entering into contractual negotiations following the transactions on 30 August 2019.
69. Contrary to his evidence before me, I am not persuaded Messrs Fraser and Holland entered into a binding contract, at the meeting on 3 May 2019, to make a payment to Mr Gallagher in the event of a future disposal of Mr Fraser's shares. More likely than not, the matter was discussed and they evinced a willingness to do so. However, they did not enter into a binding agreement. In all likelihood, Mr Gallagher indicated that he had in mind a payment based on 10% of the price at which Mr Fraser's shares were sold but there was no contractual commitment. Again, whilst Mr Holland re-affirmed his willingness to proceed with such an arrangement at the subsequent meeting on 30 August 2019, he did not enter into a binding agreement. Had it been otherwise, it is almost inconceivable that it would not have been spelled out in contemporaneous documentation prior to 27 May 2020 when the DOU took effect.

70. More generally, where it is not independently corroborated, I have treated Mr Gallagher's evidence with caution.
- (b) Mr Whittle Page 16 High Court Approved Judgment: Gallagher v Fraser
71. Mr Whittle provides professional services as a business consultant and independent financial adviser. Until January 2020 or thereabouts, he was an employee of Clarion Wealth. Since then, he has provided services through his own consultancy.
72. He has provided professional services for Mr and Mrs Fraser, in their personal capacity, since 2014 or thereabouts. This subsequently included advice in relation to the family trusts. From January 2020, he has also provided business consultancy and support services to Superco. He was thus able to give evidence about his services to them in connection with the share transfers from Mr Fraser to his wife, Mrs Fraser, and the Management Scheme.
73. He was not a dishonest witness. However, where required to cast his mind back to events that occurred several years ago, his memory was vague and he was sometimes prone to guess rather than answer to the best of his recollection. For example, he was aware that the prospect of Entrepreneurs Relief was critical to Mr Fraser's decision to transfer to Mrs Fraser shares in Superco. However, he was driven to guess that the idea was "probably" his (Day 2/191/25-192/1) and displayed little confidence when asked to address the conditions for such relief.
74. Mr Whittle was interposed to give evidence before the Defendants' other witnesses. Whilst there is no reason to doubt the general thrust of his evidence, I have exercised caution when considering his evidence on matters of detail.
- (c) Mr Fraser
75. Mr Fraser gave evidence about his evolving relationship with Mr Gallagher and the transactions for the disposal of Mr Gallagher's shares in GUSL and, later, Gallagher Topco. His evidence also comprehended the Deed of Undertaking, the share transfers and the growth scheme.
76. Significant passages of his testimony were based on the contemporaneous documentary evidence. However, when rigorously tested in cross examination, his evidence was at times prone to evasion, argument and tangential commentary. On some issues of detail, for example the date on which he signed the GF Transfer and approved the Management Scheme, his evidence was also vague and ambiguous, see for example Day 3/100/9-101/7, although he accepted that some of the documentation had been back-dated. Page 17 High Court Approved Judgment: Gallagher v Fraser
77. Mr Fraser also confirmed that, at times, in his discussions or written communication with Mr Gallagher, he had been content to give him a false and misleading impression, for example in an exchange of text messages on 10 December 2018 when he gave Mr Gallagher the false impression that he would call Mr Fowlie that night in relation to the repair and

maintenance contract with United Utilities. In cross examination, he accepted that, in doing so, he was “lying” to Mr Gallagher (Day 3/129/1-22). In Paragraph 20 of his first witness statement, Mr Fraser gave this account of their meeting at the Marriott Hotel on 3 May 2019. “TG was quite intimidating. The red mist descends on TG and I have seen him get physical in temper. I was scared about what TG would do if I said no so I thought I would play it smart and told him we would see how things panned out and get some legal advice. TG took that to be a yes. It was not”.

78. Whilst Mr Fraser’s evidence was thus suggestive of an unwillingness to confront Mr Gallagher or alert him to anything that might be unwelcome, the logic of this is that he was prepared to allow Mr Gallagher to form an inaccurate impression about Mr Fraser’s own negotiating stance. If Mr Fraser showed little scruple in misleading Mr Gallagher in this way, Mr Chaisty submitted that his evidence to the court should also be scrutinised carefully. I have borne this in mind.
79. Obviously, a clear distinction must be drawn between Mr Fraser’s evidence to the court on oath and his exchanges with Mr Gallagher, whether face to face or by text message. However, it is certainly indicative of his approach to the negotiations with Mr Gallagher and, based on the quality of his evidence before the court itself, I have treated Mr Fraser’s evidence with caution on the more contentious issues at least where such evidence is uncorroborated by plausible supportive evidence.
- (d) Mr Steven Fraser
80. Mr Steven Fraser is Mr Fraser’s brother. He was chief operating officer at United Utilities plc until June 2019 when he was appointed chief executive officer at Cadent Gas Limited. He has long been acquainted with Mr Gallagher on a personal and professional basis. This includes a period in which he stayed with Mr Gallagher when he was getting divorced.
81. No doubt he could be expected to give evidence supportive of his brother and his evidence did not generally pertain to the more critical issues. However, he gave his Page 18 High Court Approved Judgment: Gallagher v Fraser evidence in a straightforward way. To the extent his evidence was relevant, it was reliable. Where there was a conflict between the evidence of Mr Steven Fraser and Mr Gallagher, I have generally preferred Mr Steven Fraser’s evidence.
- (e) Mr Daniel Holland
82. Mr Holland provided a comprehensive account of the circumstances in which, together with Mr Fraser, he joined T&K Gallagher, acquired shares in Gallagher Topco and entered into the 2019 transactions. He gave evidence about the Marriott Hotel meeting on 3 May and his subsequent meeting with Mr Gallagher on 31 July 2019 followed by the negotiations leading to the DOU. He also gave evidence about the share transfers and management scheme which have given rise to these proceedings.

83. Although he is not a party to the proceedings, Mr Holland's interests are plainly aligned with the interests of Mr Fraser; he has agreed to assume equal liability for any judgment against Mr Fraser. I have borne this in mind when assessing and evaluating his evidence.
84. Moreover, Mr Holland's evidence was at times confused, for example in relation to the percentage of Mr Gallagher's "rollover" demand initially canvassed at the Marriott Hotel meeting on 3 May 2019 and re-considered at Mr Holland's meeting with Mr Gallagher on 31 July 2019. In Paragraph 15 of his first witness statement, Mr Holland stated that Mr Gallagher asked for 10% at the meeting on 3 May 2019 but, in cross examination, he appeared to suggest that the amount initially sought was revised upwards from 7% to 10%.
85. For the most part, however, Mr Holland's evidence was consistent and straightforward. At least where it was also consistent with the contemporaneous documentary evidence, I am satisfied he can generally be treated as a reliable witness.
- (f) Mr Kevin Fowlie
86. Mr Kevin Fowlie is now the Chief Executive Officer of Network Plus Group. He has previously worked for United Utilities plc and Amey plc. His evidence was clear, straightforward and reliable. Although there is no evidence to suggest he might have received monies from the proceeds of the transaction under which Mr Gallagher sold his shares in Topco, he was asked to confirm, which he did, that he had not receive any such monies. Somewhat surprisingly, he was also asked to confirm, which again Page 19 High Court Approved Judgment: Gallagher v Fraser he did, that he had not received any bribes. Suffice it to say there was no evidence, nor indeed any indication of evidence, before the court from which an inference might be drawn to suggest he did so.
- (g) Mr Philip Birchall
87. Mr Birchall is a former finance director of Superco, who participated in the Management Scheme. He was able to give helpful evidence in relation to the formation and implementation of the Management Scheme, confirming that the initial discussions for such a scheme were no later than April 2019. It was obvious from his evidence that Mr Gallagher was well aware of the proposals for the Scheme well before the commencement of the negotiations for the DOU.
88. He came across as an honest and straightforward witness who was scrupulous to set out the parameters of his knowledge. I am satisfied that I can rely on his evidence.
- (h) Ms Christine Oxenburgh
89. Ms Oxenburgh is a partner of Gunnercooke LLP. On this basis, she acts on behalf of Mr and Mrs Fraser in the current proceedings. She was also instructed to act on behalf of Superco and T&K Gallagher in the Injunction Proceedings. She gave evidence in relation to the genesis and progression of each set of claim confirming that the DOU was completed once HHJ Hodge's final order in the Injunction Proceedings had been sealed. She also gave

evidence in relation to the distribution of the completion monies following the August 2019 transactions and the Nyetimber Bidco Transaction.

90. Ms Oxenburgh's evidence was given in a clear and straightforward way. I have no doubt her testimony was accurate and I can rely on her evidence.
- (i) Mr Saad Ahmed
91. Mr Ahmed is also a partner of Gunnercooke LLP. At the outset, he advised Messrs Fraser and Holland in connection with tax consequences of the transfers of shares to their respective wives and, more generally, in relation to the steps to be taken in connection with these transactions. He also advised them in relation to the Management Scheme. In addition to his advisory work, he did a substantial amount of work preparing and circulating drafts and documentation. Page 20 High Court Approved Judgment: Gallagher v Fraser
92. He gave wide ranging evidence. On the less contentious issues, his evidence was helpful.
93. Unfortunately, however, Mr Ahmed's evidence in relation to the back-dating of the 31 March 2020 Documents was unreliable and misleading. In the face of the contemporaneous exchanges of emails, he refused to accept that the 31 March Documents were back-dated. At one point in his evidence, Mr Ahmed stated that he left at least some of the relevant documentation for signature following a meeting on 9 March 2020. This documentation allegedly included a copy of the share transfers to Mrs Fraser and Mrs Holland and board minutes in relation to the allotment of shares under the Management Scheme (Day 7/152/17-153/13). He later said that Mr Fraser and Mr Holland subsequently advised him that they had resolved to allot shares – presumably the Management Scheme shares – and signed the stock transfer forms on 31 March 2020 (Day 8/8/15-19). However, there is no contemporaneous documentary evidence to support this account and it is entirely inconsistent with the pattern of the email exchanges between Mr Ahmed and Messrs Fraser and Holland from which it is apparent that, as late as 30 April 2020, Mr Ahmed emailed Mr Fraser with a check list of documents for signature including the written resolutions for the allotment of shares and, as late as 1 May 2020, he emailed Messrs Fraser and Holland with unsigned stock transfer forms together with draft board minutes approving the share transfers. Signed copies of the transfer forms and board minutes were returned later that day. In the face of these email exchanges it is almost inconceivable Mr Ahmed would simply have accepted, at face value, assurances from Mr Fraser and Holland that they actually signed the documentation on 31 March 2020.
94. In these circumstances, I have treated Mr Ahmed's evidence on the more contentious issues with caution.
- (j) Mrs Fraser
95. Mrs Fraser made a short witness statement, amounting to no more than eleven paragraphs, in which she confirmed that, whilst she did not involve herself in Mr Fraser's work, she was aware that a point was reached when Mr Fraser and Mr Holland "intend[ed] to buy Mr

Gallagher out of the business and...knew when this happened". She stated that she was aware Mr Fraser gave her some shares in Superco and could recall an email from Mr Ahmed with advice about the tax advantages of the Page 21 High Court Approved Judgment: Gallagher v Fraser transaction. However, she was unaware – she said – that Mr Fraser entered into an agreement with Mr Gallagher to pay him in the event Superco was sold.

96. When her evidence was tested in cross examination, she stated that the GF Transfer was made following advice that it would achieve a "tax benefit" and this "was with regards to Entrepreneurs Relief" (Day 8/82/24-84/16). She also stated that she was made aware, at the time, this would involve her becoming an employee (Day 8/84/17- 22). She thought the anticipated remuneration – £12,500 – "wasn't a lot of money" but ultimately "it didn't end up going ahead. It didn't happen" (Day 8/84-85). A letter dated 28 July 2020 from Superco to Mrs Fraser was admitted in evidence with a formal offer of employment. However, no such offer was properly taken up.
97. At one memorable part of her evidence in answer to questions in cross examination, Mrs Fraser said that, as a couple, Mr and Mrs Fraser regarded their collective money or "ultimate wealth" as "one pot" (Day 8/134-136).
98. Mrs Fraser was at times disarmingly candid when confirming she knew and understood little about Superco's affairs and the successive transactions for acquisition and disposal of shares in the company. She was generally content to leave this to her husband. However, as a party to the transaction, she was aware that the GF Transfer provided for Mr Fraser to transfer to her 20% of his shares in Superco and understood she thus became the beneficial owner of the shares (Day 8/62-63).
99. Whilst lacking in confidence, I am satisfied that Mrs Fraser was an honest witness, who sought to give her evidence to the best of her recollection. I am also satisfied that, at least where cross examined on her own knowledge and understanding at the time, her evidence was reliable. I am thus satisfied that she entered into the GF Transfer on the understanding she was thus acquiring 20% of her husband's shares. As she stated, she was also led to understand she would be engaged as an employee and, although contractual documentation was drawn up on this basis, nothing ever came of it.
- (4) The DOU 100. The DOU provided for Messrs Fraser and Holland to make a series of payments to Mr Gallagher culminating in Mr Fraser's obligation to pay an amount calculated with reference to the amount received by him as a result of the disposal of the majority shareholding in Superco in consideration of Mr Gallagher's warranties. Page 22 High Court Approved Judgment: Gallagher v Fraser 101. By the DOU, Mr Gallagher warranted, in clause 4.1.1, that he had not been engaged in activities or conduct which might constitute an offence under sections 1 or 2 of the Bribery Act 2010. In clause 4.1.2, he made similar warranties in respect of Superco and its associated companies and, in clause 4.1.3, he warranted that "all or any allegations made by [him] prior to [the DOU] (whether in writing or not) concerning any activity, practice or conduct of any party to this deed, any Group

Company or any Associated Person which would constitute an offence under the Bribery Act 2010 are without foundation and not true". There were similar warranties in clause 4.1.4. In return, Messrs Fraser and Holland and Superco waived, in clause 4.3, any claim they may have had against Mr Gallagher for defamation or under the share purchase and settlement agreements on 30 August 2019. 102. By clause 3.1, Messrs Fraser and Holland undertook to make a series of payments to Mr Gallagher. They separately agreed to make cash payments of £350,000 on the date of the DOU, 27 May 2020, and then payments in the respective sums of £1,175,000 and £1,375,000 on 31 March 2021. 103. By Clause 3.1.3, Mr Fraser agreed to make a payment, calculated with respect to the net proceeds of sale, in the event that Mr Fraser and Mr Holland disposed of all or part of their shareholdings in Superco so as to cede their controlling interest. This was denoted as "the SF Payment" and it was calculable, in clause 3.3, as "an amount equal to 7% (seven per cent) of the Net Proceeds", subject to the following contractual definitions, on the basis that "Sale" was defined so as to include "Share Sale". "Connected has, in relation to a person, the meaning given in section 1122 of the Corporation Tax Act 2010 Control has the meaning given in section 1124 of the Corporation Tax Act 2010 Controlling Interest an interest in shares which confers Control on the holder of the interest Net Proceeds the proceeds in cash or cash equivalents actually received by [Mr Fraser] as a result of a Sale (including in the form of deferred contingent consideration or earn-out consideration or the encashed value of any securities or loan stock received in Page 23 High Court Approved Judgment: Gallagher v Fraser respect of a Sale) (or which would, but for any transfer, assignment or other disposal of any right to receive the same by [Mr Fraser] to any other person, have been paid to [Mr Fraser]), less any professional fees properly and reasonably incurred by [Mr Fraser] in respect of the Sale and less the amount of capital gains tax paid or payable on such sum (at the prevailing rate at the time of the Sale) Share Sale the sale of the issued share capital of Superco to a third party arms' length purchaser whereby each of [Mr Fraser and/or Mr Holland] dispose of all or some of their shareholding (whether in one or more series of transactions) in Superco which results in the acquirer (whether alone or together with any person(s) Connected with it) obtaining a Controlling Interest in Superco (and neither [Mr Fraser] nor any of his Connected persons holds a Controlling Interest in the acquirer" (Italics added). 104. By Section 1122 of the Corporation Tax Act 2010, a company is "Connected" with another company if the companies are under the control of the same person or connected persons connected. By Section 1124, "control" means the power of a person to secure that the affairs of a company are conducted in accordance with his wishes. 105. "Payment Period" was defined so as to mean "the period from the date of this deed until the earlier of the date of a Sale and the date of breach of the Agreed Obligations by [Mr Gallagher]". 106. By Clause 5.3, Mr Fraser undertook to Mr Gallagher "...that during the Payment Period: 5.3.1 he shall at all times act in good faith in relation to his obligations to pay any SF Payment to [Mr Gallagher] and give effect to clause 3.1.3; 5.3.2 he shall not take any action or do any other thing, with the intention of avoiding any of his obligations to pay the SF Payment to [Mr Gallagher], or otherwise with the intention of reducing the amount of the SF Payment which may become payable to [Mr Gallagher]; Page 24 High Court Approved Judgment: Gallagher v Fraser 5.3.3

he shall not effect or enter into any agreement or arrangement to effect the sale of all or any part of his shareholding in the capital of Superco other than to a third party purchaser on arms' length terms; and 5.3.4 if [Mr Fraser] disposes of his shareholding in Superco to an acquirer where [Mr Fraser] and/or any of his Connected persons holds a Controlling Interest in the acquirer then the definition of Share Sale...shall be deemed to refer to such acquirer in place of Superco. This clause shall apply mutatis mutandis to any subsequent disposal of an acquirer to any subsequent acquirer in respect of whom [Mr Fraser] and/or any of his Connected persons holds a Controlling Interest". 107. There were also "entire agreement" clauses ("the Entire Agreement Clauses"). 108. By clause 14.1, it was provided that "this deed, together with the matters and documents referred to herein, constitute the entire agreement between the parties and supersede and extinguish all previous agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to the Dispute". "Dispute" was denoted in the recitals to the DOU after a reference to the Injunction Proceedings and thus implicitly encompassed the issues and differences between the parties in the Injunction Proceedings. 109. By clause 14.2, it was provided that "each party agrees that it shall have no remedies in respect of any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this deed" and the August 2019 share purchase and settlement agreements.

- (5) The Misrepresentation Claim 110. The putative representation was contained in the 4 November 2019 Email. It is contended, in Para 21 of the Particulars of Claim, that Mr Fraser "...thereby represented to the Claimant, via Breandan Flynn acting on his behalf, that his shareholding in [Superco] as to which an entitlement on the part of the Claimant to 7% would apply would be no less than 40%" ("the Representation"). 111. In addition, the Representation was pleaded as "...a promise and warranty that at the relevant time [Mr Fraser] would hold 40% of the shares" ("the Warranty"). Page 25 High Court Approved Judgment: Gallagher v Fraser 112. No doubt it is implicit in the Representation and the Warranty, as pleaded, that Mr Fraser represented or warranted that he would not do anything to reduce his shareholding to less than 40% of the issued shares prior to disposal of the majority shareholding. 113. On Mr Gallagher's behalf, it is contended that the Representation was of continuing effect until the parties entered into the DOU. This can now be taken to have been on 27 May 2020. It is alleged that the Representation was false since, by that time, Mr Fraser's shareholding amounted to less than 40% of the issued share capital in Superco following the Spouse Transfers and the Management Scheme. It is also alleged that, as a proportion of the issued share capital in the company, Mr Fraser's shareholding was reduced further following the Livingbridge Transaction and his gifts of shares under the 2022 Trust Deed. 114. If this does not furnish Mr Gallagher with a claim based on misrepresentation, he has not formally abandoned his case that it amounts to a breach of the Warranty. 115. However, in my judgment the Entire Agreement Clauses were and are sufficiently wide to preclude the claim for breach of warranty since the Warranty was not made in the DOU itself. Clause 14.1 provided that the DOU should be taken to constitute the

entire agreement between the parties and to supersede or extinguish all previous agreements, promises or warranties. As Lightman J put it in *Inntrepreneur Pub Co Ltd v East Crown* [2000] 2 Lloyd's Rep 611 at 614, an entire agreement clause "... constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that, accordingly, any promises or assurances made in the course of negotiations (which in the absence of such a clause, might have effect as a collateral warranty) shall have no contractual force, save in so far as they are reflected and given effect in that document". The Entire Agreement Clauses achieved this purpose. There is thus no room for Mr Gallagher's case based on breach of collateral promise or warranty. 116. No doubt it is for this reason that, whilst Mr Gallagher's Warranty Claim was never formally abandoned, his case, at trial, was focussed on the Misrepresentation Claim. 117. On its face, the Entire Agreement Clause would also have precluded Mr Gallagher from bringing the Misrepresentation Claim. It was provided, by Clause Page 26 High Court Approved Judgment: *Gallagher v Fraser* 14.1, that the DOU should be taken to supersede and extinguish all representations. Moreover, by clause 14.2, the parties purported to agree that they would have no remedies for misrepresentation. However, there is obviously an important distinction between a clause which operates only to define or limit the scope of the contractual terms and a clause which purports to exclude or limit liability for misrepresentation. Contractual restrictions on liability or remedies for misrepresentation are of no effect save to the extent they satisfy the statutory requirement of reasonableness, Misrepresentation Act 1967 s3 and Unfair Contract Terms Act 1977 s11(1). In the absence of a case to the contrary, I shall assume that the statutory requirement is not satisfied and it remains open to Mr Gallagher to advance a case based on misrepresentation. 118. However, in my judgment, the Misrepresentation Claim is fundamentally flawed for other reasons. These are as follows. 119. Firstly, it is founded on a document – the 4 November 2019 Email – which was essentially intended to explain, albeit in coded language, how the parties had got to their current position and provide an indication of what Mr Fraser was seeking to achieve. On this basis, it was being suggested that, on the hypothesis Mr Fraser held 40% of the shares, Mr Gallagher would get 7% of Mr Fraser's shareholding after Mr Fraser was credited with the balance of £17 million to which he already had an expectation following the transactions on 30 August 2019. However, this could not reasonably be treated as a statement of fact nor, given the fluidity of the discussions, could it be treated as a fixed statement of intention. 120. Secondly, in the hypothetical event that the 4 November 2019 Email contained a statement of fact which was capable of amounting to a representation, the representation was made to Mr Flynn, not Mr Gallagher, and Mr Flynn did not forward or convey the representation to Mr Gallagher. This is fatal to the Misrepresentation Claim. Mr Flynn's role is obscure. He was not called to give evidence. More likely than not he was approached by each of the parties to act as their intermediary and was generally given their authority to convey to one another the information provided to him as such. There is no convincing evidence to suggest otherwise. However, this does not assist Mr Gallagher if, as I have found and he accepts, the information contained in the 4 November 2019 Email was never conveyed to Mr Gallagher personally. Had Mr Flynn made

recommendations to Mr Page 27 High Court Approved Judgment: Gallagher v Fraser

Gallagher informed by the contents of the 4 November 2019 Email, it might have been different. This is so regardless of whether Mr Flynn might himself have chosen to refer to the 4 November 2019 Email himself when disclosing the terms on which the parties were willing to do a deal. If Mr Flynn made recommendations to Mr Gallagher based on the information provided to him by Mr Fraser, there is certainly nothing to suggest this was based specifically on the contents of the 4 November 2019 Email. In cross examination, Mr Gallagher stated that – contrary to the 4 November 2019 Email – Mr Flynn had advised him the calculation would be based on a 50% shareholding (see Day 1, 164/19). 121. For the avoidance of doubt, there is also no suggestion Mr Flynn was authorised to enter into contractual commitments on behalf of the parties. It is inherently unlikely that he would have been authorised to do so. All discussions and negotiations prior to completion of the DOU were plainly on a subject to contract basis. 122. Thirdly, the 4 November 2019 Email was sent to Mr Flynn at a relatively early stage of the negotiations. By this stage, the parties had already instructed solicitors and the solicitors had commenced negotiations. However, these negotiations then continued for several months before the terms of the DOU were agreed with narrowly defined provisions governing the calculation of the “SF Payment” and specific anti-avoidance provisions in clause 5.3. These were supported by provisions for the supply of information in clauses 5.1 and 5.2. In an appropriate case, contractual representations are of continuing effect until the contract is concluded. However, there was limited room for this in the present case since the contractual machinery was designed to define, in precise terms, the circumstances for payment and calculate the amounts payable. These were supported by the anti-avoidance provisions. They can be taken to have superseded any preliminary understanding Mr Gallagher may have had, at the outset of the negotiations, about the provisions for quantification of the amounts to which he would be entitled once the majority shareholding was disposed of. 123. Fourthly, Mr Gallagher accepts that he did not rely on the Representation when entering into the DOU. In cross examination, he confirmed that he was not advised of the 4 November 2019 Email until 2023, well after the parties entered into the DOU (see for example, Day 1/162/9-22). If he was entirely unaware of the 4 November 2019 Email and Mr Flynn did not make recommendations to him based on the 4 Page 28 High Court Approved Judgment: Gallagher v Fraser November 2019 Email, it cannot be suggested that he somehow entered into the DOU in reliance upon the Representation. 124. On this basis, Mr Gallagher’s claims based on misrepresentation and breach of collateral warranty fail.

(6) Back-dating of the 31 March 2020 Documents

125. With effect from 14 March 2019, Superco’s accounting reference date was 31 March 2020. 126. The 31 March 2020 Documents included the GF Transfer, the Management Scheme Documents and a series of related documents. There were Share incentive agreements, Deeds of Adherence, statutory elections and signed forms – filed at Companies House – in relation to the allotment of shares and the variation of the rights attached to such shares. 127. Although Mr Fraser accepted, during cross examination, that there had been some back-

dating of such documentation, his evidence was not without ambiguity. According to his pleaded case, the GF Transfer and the Management Scheme were respectively made and created on 31 March 2020. In cross examination he appeared to accept that this was incorrect but his evidence was by no means unequivocal. Conversely, Mr Ahmed suggested that they could be taken to have been made and created on 31 March 2020 since that it is what he had been told. He appeared to suggest that the documentation, as a whole, would substantially have been signed on the same date. 128. However, it is obvious from the contemporaneous documentation that this is incorrect. Most, if not the entirety, of the relevant documentation was signed several weeks afterwards. No convincing explanation for back-dating the documents was given, not least given the ambivalence of the Defendants and their witnesses as to whether at least some of the documentation was back-dated at all. 129. The contemporaneous documentation includes exchanges of emails, in April 2020, between Messrs Whittle and Ahmed exploring the available options and their ramifications. As late as 30 April 2020, Mr Ahmed emailed Mr Fraser with a checklist of documents to be signed in connection with the Management Scheme. This included board minutes, written resolution of shareholders to approve allotments of shares and adoption of the new Articles, shareholder majority consent to allotment of Page 29 High Court Approved Judgment: Gallagher v Fraser growth shares and alteration of articles and share incentive agreements for each of the growth shareholders. Later, on 30 April 2020, Mr Ahmed emailed Mr Fraser with Forms SH01 and SH10 to be filed at Companies House. 130. On the following day, 1 May 2020, Mr Ahmed emailed Messrs Fraser and Holland with un-signed stock transfer forms for the transfer of the shares to their wives, Grace and Wendy, together with draft board minutes providing, in short form, for approval of the share transfers. This email was timed at 16:26. Towards the end of the email, Mr Ahmed stated that “each of you need to sign the form in the box in the middle of the stock transfer form (in which the following wording is stated “I hereby transfer the above security out of the name(s) aforesaid to the person(s) named below”. Mr Ahmed also stated, in the email, that “I understand that the transfer took place on 31 March 2020 and that is the date I have inserted”. However, it is obvious that Mr Fraser had not already signed such a transfer. Perhaps, the passage was intended to suggest that the parties had agreed to enter into the transaction on 31 March 2020 and the transfer would thus be deemed to take effect retrospectively from that date. 131. As late as 1 May 2020, the GF Transfer was not embodied in a signed written instrument. However, since Mr Fraser continued to maintain that the transaction took place on 31 March 2020 and Mr Ahmed was adamant in cross examination that this was so, the logic of the decision to back-date the transfer has not been properly explained. It can be surmised the decision was informed by the company’s accounting reference date, 31 March 2020, but the extent to which this was founded on tax planning or related considerations is obscure. 132. By the same email, on 1 May 2020, Mr Ahmed requested Mr Fraser to sign board minutes approving the share transfers. 133. By return of email – 16:39 on 1 May 2020 – Mr Fraser attached signed copies of the GF Transfer and the transfer to Mrs Wendy Holland together with a signed copy of the board minutes approving the same. The share transfers were dated 31 March

2020. The board minutes were undated. However, they were signed by Mr Fraser, as chairman. It is inherently unlikely there was a formal meeting of the board on 1 May 2020 but Messrs Fraser and Holland can be taken to have approved and signed the documentation, including the share transfers and the board minutes, when presented Page 30 High Court Approved Judgment: Gallagher v Fraser to them for signature on 1 May 2020. When the board minutes were signed, Messrs Fraser and Holland were the only directors of the company and they can be taken to have approved the relevant transactions in this capacity.
134. Mindful that the share transfers had been signed and the transactions approved, Mr Ahmed provided advice about the draft Articles in an email sent to Mr Fraser on the next working day, 4 May 2020, at 14:39. The advice was accompanied by an acknowledgment that Messrs Fraser and Holland had now transferred the shares to their wives. At this stage, Mr Ahmed would have had electronically scanned copies only of the share transfers in anticipation that he would collect the original documents bearing the wet ink signatures when they next met. It is unclear when this happened. However, it can be surmised Mrs Fraser and Mrs Wendy Holland were then entered in the register of members. Until registration, they would have been entitled to an equitable interest in the shares only, *Hawkes v McArthur* [1951] 1 AER 22. This is subject to the issue – to which I shall turn later – of whether the transfers were void as a sham transaction. 135. The Management Scheme Documents pertained to a scheme for the acquisition of shares by employees – a Growth Share Scheme – with a view to rewarding and incentivising the management. Designated employees were invited to subscribe for shares at market value. 136. By an email timed at 15:52 on 30 April 2020, Mr Ahmed forwarded to Mr Fraser draft documentation including board minutes, written resolutions and shareholder majority consent for the Management Scheme. Later the same day, he forwarded incidental documentation to Mr Fraser, including statutory elections for each participant and returns for the allotment of shares. It was necessary for some of the documentation to be signed by the designated employees. Arrangements were thus made for the designated employees to attend the company's Salford office, on 12 May 2020, to do so. Surprising as it may seem, there is no definitive evidence as to when the formalities for the Management Scheme were fully completed. However, it can reasonably be surmised that, although Mr Ahmed did not report the changes of shareholding until later, the management scheme documentation (including the board minutes and the shareholder consents) was fully signed off and completed by the end of the working week, Friday 15 May 2020. Page 31 High Court Approved Judgment: Gallagher v Fraser
137. Whilst the written resolutions were not passed at formal meetings of the members and board of directors, they were a function of the joint decision-making of Messrs Fraser and Holland designed to give effect to Mr Ahmed's legal advice. Communication was generally by email and they were each copied in to the relevant exchanges. Since Messrs Fraser and Holland were then the only members and directors of Superco and their decision-making was unanimous, it took effect as if given at formal meetings under the principle in *Re Duomatic* [1969] 2 Ch 365. 138. The 31 March 2020 Documents were not signed and completed for several weeks after 31 March 2020. This includes the GF Transfer, the board

minutes and the Management Scheme Documents. However, on the balance of probabilities, each of the documents was signed and, subject to registration at Companies House, the attendant formalities were completed prior to 27 May 2020.

- (7) The GF Transfer 139. By the GF Transfer, Mr Fraser transferred to his wife, for nil consideration, 2002 Ordinary class A shares with a nominal value of £0.001 each.
140. Mr Gallagher contends that the GF Transfer was a sham. The pleaded basis for this, in Para 12 of the Particulars of Claim, is that the transaction was not “intended to or was [in]effective to ...divest [Mr Fraser] of his beneficial interest in [the] shares”. In support of this allegation, Mr Gallagher contends, in Para 12(a), is that “at no time prior to such purported transfer did [Mrs Fraser] play any part or role in [Superco] and made no contribution, financial or otherwise to it and made no investment of any kind towards it”. In Para 12(b), it is pleaded that the GF Transfer is “matched” by the transfer from Mr Holland to his wife, Mrs Wendy Holland. 141. For the concept of a sham transaction, Mr Chaisty relied on the following passage from the judgment of Diplock LJ in *Snook v London and West Riding Investments Ltd* [1967] 2QB 786 at 802. “...it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the ‘sham’ which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing I think, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co v Maclure* (1882) 21 ChD 309; *Stoneleigh Finance Ltd v Page* 32 High Court Approved Judgment: *Gallagher v Fraser Phillips*...[1965] 2QB 537), that for acts or documents to be a ‘sham’, with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating”. 142. In *Snook v London and West Riding Investments* (supra), a majority of the Court of Appeal declined to treat a contract as a sham. They did so because one of the parties to the contract, a finance company, was unaware of the deception. The plaintiff had sought to refinance the purchase of a car by raising funds from a finance company which purported to re-sell the car to another finance company, the defendant. He contended that, whilst the contractual documentation appeared to comprehend transactions for the sale and re-sale of the car, the transactions were, in reality, a disguised loan. This contention did not find favour with a majority of the Court. They determined that there could be no sham if one of the parties – in this case the defendant – was unaware of the deception. Moreover, the plaintiff was estopped from denying the defendant’s title. 143. However, a different outcome was achieved in *Chase Manhattan Equities Ltd v Goodman* [1991] BCLC 897, a judgment of Knox J on which Mr Chaisty relied. 144. In *Chase Manhattan* (supra), the transaction was founded on a deception, of which each of the parties could be taken to have been aware, with a view to

putting the assets of one of the parties beyond the reach of his creditors. A company director and shareholder gave his cohabitee almost the entirety of his shares in the company. At the time, he was the company's chairman and chief executive. His shares in the company were his only substantial asset. Having purported to give the shares to his cohabitee, he instructed brokers to sell the shares to a third party. Having heard evidence from the director's cohabitee only, not the director himself, the judge concluded she had not "accepted the gift in the sense that she intended that the shares should be hers beneficially rather than [his]", *Chase Manhattan (supra)* at 910h. 145. In explaining why the deed of gift was a sham, the judge stated, at 923b-d, that "first and foremost, it was intrinsically an absolutely extraordinary transaction for [the director] to enter into. This hardly needs elaboration. He was parting outright with his only substantial asset at a time when he had very considerable actual and prospective liabilities, both on the business and on the family side of his affairs. On the other hand, although it was an extremely hazardous thing to do, he may well have Page 33 High Court Approved Judgment: *Gallagher v Fraser* thought he might succeed in engineering a sale by [his cohabitee] in such a way as to avoid the consequences that he had every reason to know would be very likely to follow if he openly sold the shares himself". At 923g-h, the judge was also mindful that "all the instructions for the sale of the shares and the mode and timing of sale were given by [the director himself] and "that is at least consistent with [him] remaining throughout the beneficial owner, although it does not of itself prove the point". It was thus possible for him to conclude that the transaction was void without the need to explore his statutory jurisdiction under Section 423 of the Insolvency Act 1986. 146. The present case shares some of these features. In each case, the relevant transaction was a gift of shares founded on a close personal relationship between the donor and the donee. In each case, the donor was a director and the shares were of substantial value. In each case, the donor subsequently arranged for re-disposal to third parties. However, there are critical differences. The gift to Mrs Fraser did not involve the "outright" disposal of Mr Fraser's "only substantial asset". It encompassed no more than 20% of his shareholding. Moreover, there is no suggestion his shareholding in the company was his only asset. If he had significant liabilities, there is also no suggestion these had anything to do with his decision to transfer the shares to his wife. The gift pre-dated the DOU and there is no convincing evidence it was designed to avoid Mr Fraser's prospective liabilities to Mr Gallagher under the DOU or put his assets beyond Mr Gallagher's reach. Moreover, whilst Mrs Fraser was content to allow Mr Fraser to attend to the future disposal of her shares, this was consistent with the general management of their family's financial affairs. Mrs Fraser dealt with the day-to-day household expenses and Mr Fraser had more general control of their financial and tax affairs. In this respect, Mrs Fraser was content to rely on her husband. 147. It is also notable that, unlike the present case, the *Chase Manhattan* director sought to dispose of the shares within days of his original gift. In the present case, Mrs Fraser's shares were transferred to Livingbridge LLP, the family trust and, ultimately, Nyetimber Bidco Ltd in transactions dated 31 October 2020, on 5 July 2022 and 10 July 2022, well after the GF Transfer. Whilst it was always envisaged Mrs Fraser's shares would be disposed of

once a satisfactory opportunity arose, it was not contemplated this would happen within days of the GF Transfer itself. If it were Page 34 High Court Approved Judgment: Gallagher v Fraser possible to characterise the GF Transfer as a sham, the underlying logic is thus distinct from Chase Manhattan (supra). Subject to the tax aspects of the transaction, it was not made with the intention of putting Mr Fraser's assets beyond the reach of his creditors. 148. Since it is of the essence of this type of sham transaction that the parties intended to "create one set of rights and obligations" whilst giving "the appearance of creating different rights and obligations", Hitch v Stone (Inspector of Taxes) [2001] EWCA Civ 63, at [63], it is necessary to identify the common intention of the parties and ask whether this was fundamentally different from the transaction on its face. 149. In Hitch v Stone (supra), farmers demised land for the payment of an annual rent and annuity. However, in addition to the stated consideration, they received benefits for which there was no provision in the written agreement. The Special Commissioners concluded that the written agreement was a sham in that it was intended to create the appearance of an agreement which did not reflect the parties' legal rights and obligations. Their determination was successfully challenged before the High Court. However, the Court of Appeal allowed an appeal on the basis that there was evidence before the Special Commissioners on which they could reasonably have reached their conclusion. 150. In my judgment, this is again distinct from the present case. In the present case, Mr and Mrs Fraser's main motivation for entering into the GF Transfer was to obtain tax relief. The same is true of Mr and Mrs Holland's motivation for entering into the transfer of shares to Mrs Holland. However, the transfers did not disguise the parties' intentions rather they gave effect to them. They intended to transfer the shares to Mrs Fraser and Mrs Holland in order to obtain tax relief mindful, at least in the case of Mrs Fraser, that she was content to cede the management of their financial affairs to her husband and generally regarded their collective assets as "one pot". However, it does not follow that the parties envisaged Mrs Fraser would hold her shares on trust for Mr Fraser. He had every expectation she would permit him to manage and dispose of the shares on her behalf in the interests of the family. However, it was not contemplated that, regardless of the requirements for tax relief, the shares would remain in Mr Fraser's beneficial ownership. Page 35 High Court Approved Judgment: Gallagher v Fraser

151. Whilst Mr and Mrs Fraser entered into the transaction with the object of obtaining tax relief and their intention to transfer Mr Fraser's interest in the shares was secondary and incidental to this object, it was indeed their intention that Mr Fraser's interest would thus be transferred to Mrs Fraser. If it was not transferred, they would not be entitled to the tax relief. Moreover, whilst their intention to transfer Mr Fraser's interest was secondary to the primary object of achieving tax relief, it was not conditional upon the achievement of this object. When the shares were transferred, they simply did not consider the ramifications of a failure to achieve the primary object.

152. Mr Chaisty submitted that, at all times, Mr Fraser provided all the relevant instructions to their professional advisers. He also submits that, owing to the requirements of the lender, Alcentra Limited, restrictions were imposed on Mrs Fraser's interests which were incompatible with her rights as a beneficial owner of the shares. Moreover, the requirements for tax relief were also not satisfied. 153. Each of these submissions merits careful consideration. However, the transfers were professionally prepared with a view to transferring the relevant shares to Mrs Fraser and Mrs Holland without declarations of trust. They were then executed on this basis mindful that the object of the parties was to acquire tax relief and that, if the shares remained in the beneficial ownership of Messrs Fraser or Holland, they would not be entitled to such relief. Moreover, the presumption of advancement continues to apply to transfers of property from husband to wife until section 199 of the Equalities Act 2010 is brought into force. In these circumstances, for Mr Chaisty to succeed in showing that the GF Transfer was a sham, a compelling case must be shown. 154. In my judgment, Mr Chaisty's submissions do not furnish Mr Gallagher with such a case. 155. Firstly, it is correct that Mr Fraser provided the Frasers' professional advisers with their instructions. This included their financial adviser, Mr Whittle. It also included Mr Ahmed who was instructed to provide professional services in connection with the GF Transfer. This included advice about the tax implications of the transaction. Moreover, whilst Mrs Fraser was made aware – in general terms – about the transaction and the tax implications of the transaction, she was content to rely on Mr Fraser to provide such instructions on their joint behalf on the basis that Page 36 High Court Approved Judgment: *Gallagher v Fraser* this would be in their collective interests and, more generally, the interests of their family. However, she was aware that the GF Transfer provided for Mr Fraser to transfer to her 20% of his shares in Superco and she understood this meant she became the beneficial owner of the shares (Day 8/62-63). Whilst much of her evidence was vague and she was content to rely on her husband and their professional advisers to attend to the formalities, I am satisfied that she entered into the transaction on the understanding she was thus acquiring 20% of her husband's shares. She did not know the value of the shares and she did not know the number of shares. Indeed, she accepted, in cross examination, that the number of shares didn't mean anything to her (Day 8/90/4-7). It is also correct that, prior to the GF Transfer, Mrs Fraser made no direct financial contribution or investment in Superco. To this extent, the averrals in Para 12(a) of the Particulars of Claim, are correct. Moreover, it is not without significance that Mrs Fraser, confirmed when giving her evidence, that she regarded their money as "one pot" (Day 8/135/2-3). The tenor of her evidence was that she generally regarded their assets as joint family property. 156. However, it is Mrs Fraser's case that she entered into the transaction on the understanding that the shares were intended as a gift – not a reward for any investment she may have made in Superco prior to the GF Transfer itself – and the gift was being made with the intention that she would become the legal and beneficial owner of the shares. There is no convincing evidence to contradict the essential elements of her case. Whilst she was content to apply the shares as family assets and, in this respect, be guided by Mr Fraser himself and allow him to take such action as he considered appropriate, there is no convincing evidence to suggest she contemplated she would hold

the shares on trust for Mr Fraser. Nor, indeed, is there convincing evidence Mr Fraser saw it any differently. He knew Mrs Fraser was content to rely upon his advice and, more specifically, to rely on him to take such action as he considered appropriate with her general authority to do so. 157. Secondly, whilst it is true that substantial restrictions were imposed, at Alcentra's request, on Mrs Fraser's rights as a shareholder, it does not follow that the GF Transfer was a sham. For these restrictions, Mr Chaisty relied, in particular, on amendments to the Articles pursuant to a special resolution of the members. The special resolution was not made at a formal meeting of the members. Consistently, however, with the rest of the documentation, the amendments were no doubt Page 37 High Court Approved Judgment: Gallagher v Fraser informally approved by Messrs Fraser and Holland, as the only registered shareholders, on 1 May 2020. 158. By Article 1.1, the shareholders' spouse and children were denoted as "Privileged Relation". Once the Articles were amended, it was provided, by Article 18.4, that, in the event such a person ceased to be a "Privileged Relation", they must re-transfer to the original shareholder any shares transferred to them by the original shareholder. No doubt, this would include a cessation of their status as a Privileged Relation following divorce. In such an event, the shares were to be re-transferred for an agreed consideration or consideration determinable by valuers, in accordance with Article 19.3. If Mrs Fraser was a "Bad Leaver" or required to leave under a "Compulsory Transfer Notice" – as defined – she would be entitled only to the "Issue Price" of the shares. She would otherwise be entitled, if higher, to the "fair value" according to a series of assumptions for a hypothetical sale on arm's length terms between a willing seller and a willing buyer.

159. Mr Chaisty also relies upon exchanges of email, on 29 April 2020, between Mr Whittle and Mr Uzair Chiragdin, of Alcentra, in which Mr Chiragdin sought confirmation, in substance, that Messrs Fraser and Holland would themselves be in control of the company and they would manage the voting rights in respect of any shares transferred. No doubt, he was given the impression this would be so. However, in view of the fact that Messrs Fraser and Holland were the majority shareholders and their wives had manifested no interest in intervening in the management or direction of the company's affairs, this is not in the least surprising. 160. There are potential issues in relation to the interpretation and effect of the amendments and the extent to which they were applicable to the relevant transfers. However, in my judgment, it does not, in any sense, follow that the GF Transfer was a sham. If anything, the perceived need to amend the Articles in order to accommodate the transfer of shares to Mrs Fraser and Mrs Holland suggests the parties and their advisers regarded the transfers as valid transactions for the transmission of title to the shares. Similarly, at least in part, it was the share transfers – as valid dispositions of the company's share capital – which prompted Alcentra to seek assurances about the control of the company. Page 38 High Court Approved Judgment: Gallagher v Fraser 161. Thirdly, whilst Mr and Mrs Fraser were motivated by the prospect of tax relief in entering into the GF Transfer, this was not a condition of the gift nor was it otherwise fatal to the gift that the parties might fail to achieve such relief.

162. Messrs Fraser and Holland, and their respective spouses, were motivated by the prospect of obtaining Entrepreneurs Relief in respect of their liability for Capital Gains Tax on the future disposal of their shares. By an email message timed at 23:22 on 10 February 2020, Mr Ahmed provided Messrs Fraser and Holland with a note in relation to the requirements for such relief. They were advised that, to claim such relief, their wives would have to hold at least 5% of the company's ordinary share capital and they would each be required to serve as an employee or hold office as a officer for a period of 24 months preceding disposal.
163. Mr Chaisty submits that, at least in respect of Mrs Fraser, these requirements were not satisfied. Whilst Mr Fraser purported to enter into the GF Transfer and there was discussion, at the outset, about engaging her as an employee, she never took office as a director nor did she ever perform services for the company as an employee. Moreover, evidence was not adduced that tax relief was ever claimed in respect of the disposal of her shares. Mr Chaisty submits that, whilst there was a suggestion in Mr Fraser's evidence that he was subsequently advised these requirements had ceased to apply, there is no contemporaneous written evidence to corroborate such a suggestion. 164. In my judgment, there is a substantial factual basis for each of these submissions. In the absence of corroborative evidence, I am not persuaded Mr Fraser was subsequently advised that the requirements identified by Mr Ahmed no longer applied nor, indeed, that a future role for Mrs Fraser was abandoned in reliance upon such advice. More likely than not, having initially decided, in principle, to engage their wives as employees, Messrs Fraser and Holland allowed the opportunity to slip. They did not assiduously implement Mr Ahmed's advice, their wives were not engaged as employees and the conditions for Entrepreneurs Advice were not satisfied. 165. However, there is no room, on the evidence, for a conclusion that the share transfers to Mrs Fraser and Mrs Holland were a sham on the hypothesis that they were fundamentally at variance with the parties' intentions. Unlike *Hitch v Stone* (supra), the transfers did not disguise another transaction nor were they intended to do so. In transferring the shares to their wives, Messrs Fraser and Holland were motivated by Page 39 High Court Approved Judgment: *Gallagher v Fraser* the prospect of tax relief. They entered into the transactions with the intention that their wives would become beneficially entitled to the shares. Had this not been their intention, they would never have had an expectation of tax relief. Ultimately, of course, they did not obtain such relief or at least there is no evidence that they obtained such relief. However, the most obvious explanation for this is that they simply failed to properly implement the advice given to them.
- (8) Principles of contractual interpretation 166. The remaining issues involve mixed questions of interpretation and fact. 167. In recent years, the principles of contractual determination have repeatedly been revisited by courts at the highest level of authority. This includes *Investors Compensation Scheme v West Bromwich BS* [1998] 1 WLR 896, *Rainy Sky SA v Kookmin* [2011] UKSC 50 and *Wood v Capita Insurance Services Limited* [2017] AC

1173. However, Lord Neuberger's guidance, in *Arnold v Britton* [2015] UKSC 36 at [15], is clear and authoritative. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38,
- [2009] 1AC 1101, para 14. And it does so by focussing on the meaning of the relevant words ... in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [contract], (iii) the overall purpose of the clause and the [contract], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. 168. In the present case, the DOU was not completed and thus did not take effect until 27 May 2020. It follows this is the date with respect to which the court must address the factual context. The parties' intentions are to be elicited objectively by focusing on the natural or ordinary meaning of the words used and the apparent purposes of the parties when entering into transaction. Subjective evidence of the parties' intentions is to be entirely disregarded.
- (9) Calculation of the SF Payment
169. Mr Fraser's obligation to make the "SF Payment", as defined, could only be triggered by a "Share Sale" and there could only be a "Share Sale" in the event of a Page 40 High Court Approved Judgment: *Gallagher v Fraser* share disposal which resulted in "the acquirer... obtaining a Controlling Interest in Superco". For these purposes, "Controlling Interest" was defined so as to mean an "interest which confers Control on the holder of the interest" and "Control" was defined so as to have the meaning given in section 1124 of the Corporation Tax Act
2010. It was thus defined so as to mean the power to secure that the company's affairs were conducted in accordance with the purchaser's wishes through his shares, voting rights or as a result of powers in the Articles or other documents relating the company's affairs. No other transaction for the sale of shares attracted Mr Fraser's obligation or liability to make the SF Payment. He could only come under such an obligation if and once a Controlling Interest in Superco was acquired by a purchaser of the share capital. 170. The Nyetimber Bidco transaction satisfied the contractual definition of a "Share Sale" in clause 1.1 of the DOU since Messrs Fraser and Holland thereby disposed of all their shares in Superco and Nyetimber Bidco thus obtained "a Controlling Interest in Superco".
171. Mr Fraser thus became liable to make the SF Payment to Mr Gallagher, itself calculable by applying the contractual percentage, 7%, to the "Net Proceeds", as defined in the DOU. 172. The Net Proceeds was itself an amount equal to "the proceeds in cash or cash equivalents actually received by [Mr Fraser] as a result of [the] Sale..." However, this was expressly

extended so as to include amounts “which would, but for any transfer, assignment or other disposal of any right to receive the same by SF to any other person, have been paid to SF”. In Paras 201 and 203 of their written Closing Submissions, Messrs Chaisty and Williams submitted that this should be construed widely so as to include additional amounts in respect of the shares created under the Management Scheme and the shares subsequently transferred to Livingbridge. However, in my judgment, this interpretation is significantly wider than the parties can reasonably have intended. The qualification was plainly intended to capture the diversion of the proceeds of sale of the relevant transaction itself rather than the proceeds of antecedent transactions. It comprehends the “transfer, assignment or other disposal of any right to receive the same...” (my italics) and is intended only to apply to “the proceeds in cash or cash equivalents actually received by [Mr Fraser] as a result of a Sale”, not the proceeds of other transactions. For the avoidance of doubt, Page 41 High Court Approved Judgment: Gallagher v Fraser the extended definition of Net Proceeds does not apply to the GF Transfer, the shares issued under the Management Scheme, the Livingbridge Transaction or the dispositions to the 2002 Trust. 173. By their letter dated 28 September 2022, Gunnercooke advised Napthens how they had calculated that the SF Payment amounted to £6,052,831.

174. Mindful that the consideration payable to Mr Fraser was satisfied partly in cash (75%) with the balance (25%) rolled over into preference shares, the SF Payment of £6,052,831 was calculated on the basis Mr Fraser was notionally entitled to the sum of £108,086,260 as his share of net proceeds of the Livingbridge transaction net of his “share of seller costs” after adding back the shares which he had transferred, in July 2022, to the 2022 Trust. However, this did not include any amount in respect of the shares transferred to the 2022 Trust by Mrs Fraser at the same time. After deducting £21,617,252 for tax at 20%, there was a net balance of £86,469,000. By applying 7% to this amount – as envisaged in clause 3.3.1 - the SF Payment was calculated in the sum of £6,052,831. This amount was remitted to Mr Gallagher on 8 November 2022. 175. Under clause 3.1.3 of the DOU, the SF Payment was payable within 10 Business Days of the relevant transaction. Mr Fraser can be taken to have received his share of the net proceeds of the Nyetimber Transaction several weeks before payment was remitted to Mr Gallagher. At present, there is no discrete claim in relation to the delay in payment but I shall hear further submissions on this if invited to do so. 176. Subject to this issue and Mr Gallagher’s claims under the warranties and anti- avoidance provisions in Clause 5.3 of the DOU and on the assumption that he was, indeed, entitled to credit for an amount equal to 7% of the value of the shares transferred by Mr Fraser to the 2022 Trust, Mr Gallagher has not demonstrated that the SF Payment was incorrectly calculated.
- (10) Mr Gallagher’s claims under Clause 5.3 of the DOU 177. Clause 5.3 contained a series of provisions in support of Mr Gallagher’s right to the SF Payment. They amounted to personal undertakings from Mr Fraser to Mr Gallagher and encompassed promises to act in good faith (5.3.1), to avoid acting to avoid his obligations to make or reduce the amount of the SF Payment (5.3.2) and not to enter into any agreement or arrangement to effect the sale of his shares other than to a third party purchaser on arms length terms (5.3.3). Page 42 High

Court Approved Judgment: Gallagher v Fraser 178. It is important to recognise, from the outset, that these obligations only took effect, on 27 May 2020, when the DOU was completed and they were expressly limited to the Payment Period. The Payment Period was defined to commence on the date of the Deed, 27 May 2020, and end on “the earlier of the date of a Sale and the date of breach of the Agreed Obligations by TG”. It is not alleged that the Payment Period was brought to an end owing to a breach by Mr Gallagher. It follows that the Payment Period, as defined, came to an end on 10 July 2022 when Messrs Fraser and Holland sold their remaining shares to Nyetimber Bidco. 179. It is arguable that, by transferring shares to the 2022 Trust on 5 July 2022, Mr Fraser committed a breach of his undertaking, in clause 5.3.3, not to “effect or enter into any agreement or arrangement to effect the sale of...part of his shareholding in the capital of Superco other than to a third party purchaser on arms’ length terms”. Had Mr Gallagher advanced such a case in his Particulars of Claim, no doubt it would have been open to Mr Fraser to argue that a gift is not a sale. However, the obvious answer is that the parties’ intention, objectively construed, was to prohibit the disposal of shares otherwise than under an arms length transaction. If so, “sale” would be construed widely to comprehend such a disposition. 180. Nevertheless, this does not form part of Mr Gallagher’s pleaded case and it was not the subject of argument at trial. No doubt, this is because Mr Fraser recognised, at the outset, that the SF Payment should be calculated so as to include the shares personally transferred by him to the 2022 Trust on 5 July 2022. Following the Nyetimber Bidco transaction, the sum transferred to Mr Gallagher thus encompassed an amount in respect of the shares transferred to the 2022 Trust by Mr Fraser personally. For the avoidance of doubt, this does not include any amount in respect of the shares transferred to the 2022 Trust by Mrs Fraser. However, these shares do not form part of Mr Fraser’s undertaking in clause 5.3.3. It follows that the transfer of Mrs Fraser’s shares to the 2022 Trust did not, in itself, amount to a breach of Mr Fraser’s obligations in clause 5.3.3 of the DOU. It matters not whether Mr Fraser himself attended to the transfer of Mrs Fraser’s shares as her agent or, more specifically, under a power of attorney. 181. If Mr Fraser technically committed a breach of clause 5.3.3 when he personally transferred some of his own shares to the 2022 Trust, he implicitly sought to compensate Mr Gallagher through the payment of an enhanced amount in respect of Page 43 High Court Approved Judgment: Gallagher v Fraser his liability for the SF Payment when his solicitors transferred to Napthens the aggregate sum of £6,052,831. Napthens have effectively treated the aggregate amount as a payment on account. In due course, I shall thus hear further from counsel in relation to the consequences. However, in view of the fact that the Particulars of Claim does not encompass a claim for damages for a breach of clause 5.3.3, based on the transfer of Mr Fraser’s shares to the 2022 Trust and the payment to Mr Gallagher was calculated on the footing that the value of these shares was part of his holding, at the time of the Nyetimber Bidco transaction, I am disinclined to award Mr Gallagher damages for breach of clause 5.3.3. 182. Subject to this discrete issue, I am not persuaded Mr Fraser has committed a material breach of any of the provisions of Clause 5.3. 183. Firstly, on the balance of probabilities, the essential formalities for the GF Transfer and the Management Scheme were completed prior to 27 May 2020 when the DOU took effect and the Payment Period, as

defined, commenced. By that time, board minutes approving the GF Transfer and the share transfer to Mrs Holland, together with the transfers themselves, had been signed and delivered to Mr Ahmed. By this time, it is also likely the board minutes, written resolutions and shareholder majority consent for the Management Scheme had been signed and approved together with the incidental documentation including the statutory elections and returns. By then, the designated employees had themselves attended the company's Salford office, and signed the documentation required. No doubt, the new shareholders were then entered in the company's register of members. If this was not achieved prior to 27 May 2020, it was by then a formality as, indeed, was the process of filing, at Companies House, copies of the written resolutions and the revised statement of capital following the allotment of shares. Moreover, there is nothing to suggest Mr Fraser was himself involved in attending to the outstanding formalities. Had it been otherwise, it was no longer open to him to reverse the transactions unilaterally. It is, of course, unfortunate that much of the original documentation was back-dated to 31 March 2020 and does not record the dates on which it was completed or signed. However, it has been possible to draw clear inferences from the contemporaneous exchanges of email messages. 184. This is fatal, in itself, to any case Mr Gallagher may otherwise have had against Mr Fraser for breach of clause 5.3.1, 5.3.2 and 5.3.3 of the DOU in respect of the GF Page 44 High Court Approved Judgment: Gallagher v Fraser Transfer and the Management Scheme. Under these provisions, Mr Fraser's contractual obligations were only timed to commence when the DOU itself took effect, namely on 27 May 2020. 185. Secondly, it has not successfully been demonstrated that Mr Fraser committed breaches of his duty of good faith in clause 5.3.1. This provision did not import a general duty of good faith. It was specifically geared to Mr Fraser's obligation to make the SF Payment. 186. For the ambit of such an obligation, Ms Anderson relied, in her written closing submissions on the following passage from the judgment of Leggatt LJ (as he then was) in *Al Nehayan v Kent* [2018] EWHC 333 (Comm), at [175]. "In *Paciocco v Australia and New Zealand Banking Group Limited* [2015] FCAFC 50, para 288, in the Federal Court of Australia, Allsop CJ summarised the usual content of the obligation of good faith as an obligation to act honestly and with fidelity to the bargain; an obligation not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for; and an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained. In my view, this summary is also consistent with the English case law as it has so far developed, with the caveat that the obligation of fair dealing is not a demanding one and does no more than require a party to refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people: see *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch), para 295, referred to above; and *Astor Management AG v Atalaya Mining Plc* [2017] EWHC 425 (Comm), para 98." 187. Leggatt LJ's observations cannot be applied without qualification in the present case. Unlike the present case, they were made in relation to a so-called relational contract in which a general duty of good faith was implied. In the present case, the DOU was not such a contract. It did not

involve collaboration between the parties in anything analogous to a joint venture. Moreover, Mr Fraser's express duty of good faith was confined to his obligation to make the SF Payment. It must thus be tailored to this particular obligation. As Leggatt LJ recognised, the essence of a contractual duty of good faith is honesty, fidelity to bargain and fair dealing so as to refrain from commercially unacceptable conduct. Since Mr Fraser's material contractual obligation was to make a defined payment following the disposal of a controlling interest in the company, his duty of good faith required him to advise Mr Gallagher promptly of a disposal of shares resulting in the acquisition of a Controlling Interest – Page 45 High Court Approved Judgment: Gallagher v Fraser as defined - in Superco, to respond openly and honestly to Mr Gallagher's inquiries about the disposal and the calculation of the amounts due to him under Clause 3.1.3, and to pay Mr Gallagher the amount due to him. No doubt, it is a material part of the factual matrix that, by the time the parties entered into the DOU, the relationship between Messrs Fraser and Gallagher was strained to the point that they were barely on speaking terms. However, in these circumstances, Mr Fraser could reasonably be expected to provide Mr Gallagher with the information to which he was reasonably entitled through his solicitors. 188. No specific claim is pleaded for breach of clause 5.3.1. However, once the ambit of Mr Fraser's contractual duty of good faith is properly understood, the only basis for such a claim is in relation to his delay in formally advising Mr Gallagher of the Nyetimber Bidco transaction and arranging for him to be paid the amount due to him under the DOU. Gunnercooke's explanatory letter dated 28 September 2022 was delivered one day after the Nyetimber Bidco transaction was completed. However, according to Gunnercooke's calculations, Mr Gallagher was not paid the amount to which he was contractually entitled until 8 November 2022. This is so notwithstanding that Mr Gallagher was contractually entitled, under Clause 3.1.3, to payment within 10 business days of receipt of the Net Proceeds, as defined. 189. At present, this is not pleaded as a breach of clause 5.3.1 and it is notable that, to facilitate payment, Napthens did not provide Gunnercooke with details of their client account until 1 November 2022. Since no claim has been specifically pleaded in relation to this issue, I am currently minded not to award damages on it. However, I shall hear further from counsel on the issue. 190. In any event, I am not persuaded that Mr Fraser has otherwise been shown to have committed a breach of his obligation of good faith in clause 5.3.1 of the DOU. Following the Nyetimber Bidco transaction, he instructed his solicitors, Gunnercooke, to advise Mr Gallagher, of the transaction. By their letter dated 28 September 2022, they advised Napthens that, according to their calculations, the sum of £6,052,831 was due and they explained the basis on which they had reached this conclusion. Payment was remitted on 8 November 2022. 191. It is true that Mr Fraser and his advisers did not advise Mr Gallagher, at the time, about the GF Transfer, the Livingbridge Transaction or the gifts to the 2022 Trust nor, Page 46 High Court Approved Judgment: Gallagher v Fraser indeed, did he advise Mr Gallagher of his intention to enter into these transactions. However, I am not persuaded that he was under any obligation to do so. Mr Fraser's contractual duty of good faith, in Clause 5.3, of the DOU was limited to his obligation to make the SF Payment. This was, in turn, to be calculated with respect to the Net Proceeds, as defined, following a Share Sale, itself also defined so as to apply only to a disposal resulting

in the acquisition of a Controlling Interest. The GF Transfer, the Livingbridge Transaction and the gifts to the 2022 Trust were only relevant in the calculation of the amounts ultimately due to Mr Gallagher in the event of a Share Sale, as defined. No doubt, it was ultimately necessary for Mr Fraser or his advisers to provide details of these transactions in explaining the calculation of the SF Payment or responding to specific inquiries, on behalf of Mr Gallagher, about the calculation of the SF Payment. However, provided he was not otherwise in breach of the DOU, he was not under a free-standing obligation to provide details of the relevant transactions prior to a Share Sale, as narrowly defined in the DOU itself.

192. Mr Fraser also had contractual duties to Mr Gallagher under Clauses 5.3.2, 5.3.3 and 5.3.4. However, he did not have a separate free-standing duty to Mr Gallagher, under clause 5.3.1, in respect of the subject matter of these obligations. In the absence of a breach of clause 5.3.2, 5.3.3 and 5.3.4, it did not amount to a breach of contract, under Clause 5.3.1, for Mr Fraser to make no disclosure in respect of matters pertaining to such clauses. 193. Thirdly, I am not persuaded that Mr Fraser has committed a breach of clause 5.3.2. This encompasses two personal undertakings on the part of Mr Fraser only, namely undertakings not to take action or do anything else with the intention of (1) avoiding his obligations to make the SF Payment (“Undertaking One”); or (2) reducing the amount of the SF Payment (“Undertaking Two”). 194. The initial question of construction is whether the references, in clause 5.3.2, to Mr Fraser’s intention are limited to his objectives when acting in a particular way or extend to the natural and foreseeable consequences of such action. Mindful of this, Ms Anderson submitted, in Para 42 of her Skeleton Argument dated 20 February 2025, that “an outcome was not intended where the outcome was neither an end in itself nor a means to an end but merely the foreseeable consequence of [Mr Fraser’s] actions. In short, Mr Gallagher must be taken to understand (as would any objective observer) that Mr Fraser could dispose of shares before any Sale (meaning a Share Page 47 High Court Approved Judgment: Gallagher v Fraser Sale, Disposal, Listing or Liquidation) as long as such disposal was not with the intention of reducing the SF Payment”. 195. On this issue, namely the ambit of Mr Fraser’s intention, the interpretation of Clause 5.3.2, is by no means straightforward. Where an outcome is a natural and foreseeable consequence of an act, it will often be inferred that it was an intentional consequence of the act. This is particularly so where the outcome appears to be in the financial interest of the party who commits the act. In a suitable case, this will give rise to an irrebuttable presumption. However, in the present case, I am satisfied that, on the true construction of the DOU, there is no room for an irrebuttable presumption that Mr Fraser intended the natural and foreseeable consequences of his action. This is for the following reasons. 196. Firstly, Mr Fraser was generally at liberty to dispose of shares under the DOU provided that the disposal did not result in the acquisition of a Controlling Interest, as defined. If this was to be precluded in any case where the disposal reduces the amount of the SF Payment, Mr Fraser’s right to dispose of such shares would be illusory in most cases since any disposal will inevitably reduce the number of shares available for acquisition of the Controlling Interest. 197. Secondly, the parties have

specifically qualified Mr Fraser's rights and obligations with reference to his "intention". Had the parties been minded to provide otherwise, they could easily have reframed clause 5.3 as an absolute proviso precluding disposals which have the effect of reducing the amount of the SF Payment. 198. Thirdly, there is good reason for the parties to have focussed, in the present case, on Mr Fraser's intention when taking action rather than the outcome of such action. To the extent that it applies to the amount of the SF Payment, the outcome of such action was likely to shift over time until the point at which there is a Share Sale, Disposal, Listing or Liquidation, as defined. Mindful of this, Undertaking Two related to action taken with a view to reducing the amount which may become payable, not the amount which becomes payable. 199. I am thus satisfied that the test of Mr Fraser's intention, in Clause 5.3.2, is as to his actual intention geared to the outcome he was seeking to achieve and does not extend to any outcome which was a foreseeable consequence of his action. Page 48 High Court Approved Judgment: Gallagher v Fraser Obviously, however, a measure of scepticism is exercisable to the extent it can be shown Mr Fraser seeks to deny it was his intention to achieve such consequences.

200. With this in mind, I shall now turn to Undertakings One and Two. 201. There is no evidential basis for a claim that Mr Fraser took action or, indeed, did anything else during the Payment Period – as defined - with the intention of avoiding his obligations to make the SF Payment to Mr Gallagher. There is thus no room for a case that he has committed a breach of Undertaking One. 202. The GF Transfer and the Management Scheme pre-date the Payment Period. Mr Fraser transferred shares to the 2022 Trust during the currency of the Payment Period. However, this was shortly before the Nyetimber Bidco transaction. Far from setting out to avoid his liability to make the SF Payment, Mr Fraser then instructed his solicitors to account for the value of the shares transferred by him to the 2022 Trust when quantifying the SF Payment and remitting it to Mr Gallagher. 203. Nor was the Livingbridge Transaction made with the intention of enabling Mr Fraser to avoid his obligations to make the SF Payment. This was, again, a collective decision. For their part, Messrs Fraser and Holland participated jointly in the decision following professional advice. 204. Livingbridge's interest in Superco can be traced at least as far as February 2020, prior to the DOU and the commencement of the Payment Period. At one point, it was envisaged Livingbridge would acquire a controlling interest. When, on 31 October 2020, the Livingbridge Transaction was completed it involved the sale of a minority shareholding only. However, there is no evidence that Messrs Fraser and Holland opted, at this stage, to sell only a minority interest owing to a perception that this would somehow enable Mr Fraser to avoid his obligations to make the SF Payment. 205. From the perspective of Mr Fraser and Mr Holland, the logic of the transaction was best explained, in evidence, by Mr Holland whose evidence I accept on this issue. In Para 29 of his witness statement dated 20 September 2024, Mr Holland said as follows. "SF and I got advice on the minority investment. We were told it would be like a 'kitemark'. We were assuring the quality of the organisation by having an institutional investor. Meaning that we were more likely to be able to sell and sell at a premium when we wanted an exit. We referred to KPMG who Page 49 High Court Approved Judgment:

Gallagher v Fraser confirmed it. We were told it would get us at least one more turn on the multiple when we eventually sold the majority of our shares. That was conclusive for us". 206. This part of Mr Holland's evidence was not specifically challenged in cross examination. However, after Mr Holland observed in cross examination that, after the Livingbridge transaction, "there was no erosion of value for that because they definitely enhanced our multiple", (Day 6/167/1-3), it was put to him that "the immediate impact of the sale to Livingbridge was for you and Mr Fraser to sell 10% each of the company in return for 44 million" (Day 6/167/4-8). In answer, Mr Holland accepted that this was the effect of the transaction but, at no stage, did he seek to qualify his explanation for the Livingbridge transaction as an opportunity to increase the value of the shares in Superco through the introduction of a substantial third-party investor". 207. No doubt it is correct that, by the Livingbridge Transaction, Messrs Holland and Fraser disposed of shares which thereby ceased to form part of the share capital available for sale when the Controlling Interest in Superco was finally disposed of. However, there is no evidence that, had it not been for the Livingbridge Transaction, Mr Fraser would ultimately have been able to dispose of shares to achieve a Share Sale, as defined, at a price higher than the amount he received from Nyetimber Bidco. It was implicit in Mr Holland's evidence that, in the absence of a preliminary transaction with a substantial third-party investor, this was unlikely. Counter-intuitive as this might seem, no evidence was adduced to the contrary. More significantly, there is no evidence Mr Fraser entered into the Livingbridge transaction with the intention of avoiding his obligation to make the SF Payment and it is unlikely that he was prompted to do so by this consideration. Indeed, the conduct of Messrs Fraser and Holland following the transaction is entirely inconsistent with such an intention. Following the Nyetimber Bidco Transaction, Mr Fraser instructed his solicitors to provide Mr Gallagher with details of the amount to which he was thus entitled under Clause 3.1.3 of the DOU and transfer the same to him. 208. Undertaking Two was obviously narrower than Undertaking One. It amounted to an undertaking from Mr Fraser not to take action otherwise (ie action otherwise than to avoid his obligation to make the SF Payment) with the intention of reducing the amount of the SF Payment. Page 50 High Court Approved Judgment: Gallagher v Fraser 209. Nevertheless, in my judgment, Mr Gallagher fails on this part of his claim for reasons that are closely analogous to the legal and evidential barriers to a successful claim on Undertaking One. 210. Again, the GF Transfer and the Management Scheme pre-date the Payment Period. In the hypothetical evidence it could be shown that there remained some outstanding formalities to which Mr Fraser attended personally on or after 27 May 2020, it is inherently unlikely that he attended to such formalities with the intention of reducing the amount of the SF Payment. 211. There is no evidence Mr Fraser had the DOU in his contemplation when entering into the GF Transfer or the Management Scheme. From his perspective, it is fortuitous that there was a delay between 28 April 2020 when the Court indicated it was minded to approve a consent order on modified terms and 26 May 2020 when such an order was approved. However, this had nothing to do with Mr Fraser who was content to enter into the DOU as soon as the order was approved. During this period, it is plain he was not alive to the risk that, by entering into the GF Transfer or approving the

Management Scheme, he might be avoiding his obligations to make the SF Payment or otherwise reducing the amount he would thus be liable to pay so as to attract a claim under Clause 5.3.2. 212. As it happens, Mr Fraser had his own reasons for entering into both transactions. He entered into the GF Transfer in order to afford his wife the opportunity to obtain Entrepreneurs Relief on a future disposal of the shares. He did so mindful that this would ultimately benefit them both. He entered into the Management Scheme in order to incentivise and secure the loyalty of designated employees. There is no convincing evidence he entered into either transaction with the intention of avoiding his obligations to make the SF Payment or reduce the amount of the SF Payment. 213. In my judgment, there is again no room for a claim that Mr Fraser participated in the Livingbridge Transaction with the intention of reducing the amount of the SF Payment. I am satisfied that he entered into the Livingbridge Transaction for the reasons identified by Mr Holland in his evidence as an opportunity to increase the value of the shares in Superco through the introduction of a substantial third-party investor. Page 51 High Court Approved Judgment: Gallagher v Fraser 214. It is all the more unlikely that Mr Fraser transferred his shares to the 2022 Trust with the intention of reducing the amount of the SF Payment in view of the fact that, shortly afterwards, he instructed his solicitors to calculate the SF Payment on the footing that these shares should be taken into consideration when doing so. It is true that the shares transferred by Mrs Fraser to the 2022 Trust were not taken into consideration. However, these were distinct since he had already disposed of his interest in such shares prior to the DOU. 215. No claim is advanced against Mr Fraser under clause 5.3.4. This was applicable only in the event that Mr Fraser disposed of his shares in Superco to an acquirer in which he (or persons connected with him) retained an interest in the party which acquired a Controlling Interest.

- (11) Disposal 216. I shall hear further from counsel in relation to all consequential directions and costs. However, the main elements of Mr Gallagher's claim fail. He has failed in his claims for misrepresentation and breach of collateral warranty. He has also failed to establish that the GF Transfer was a sham transaction. For the most part, he has also failed on his contractual claims under Clause 5.3 of the DOU. 217. Contrary to Mr Gallagher's claim for relief, he is not entitled to a declaration that the GF Transfer was void or that, as at 22 September 2022, Mrs Fraser held her shares on trust for Mr Fraser. Nor is he entitled, in general terms, to (1) damages, (2) an account of 7% of the Net Proceeds as defined in the DOU or (3) a general inquiry as to the fees paid and deducted from the amounts due to him pursuant to the Deed. 218. However, there potentially remain issues as to whether Mr Gallagher is entitled to interest owing to the late payment of the amounts due to him under the DOU or compensation for Mr Fraser's breach of trust when transferring, on 5 July 2022, some of his own shares to the 2022 Trust. Such compensation would notionally be on the basis that, whilst the SF Payment to Mr Gallagher was ultimately calculated and paid an enhanced amount to comprehend the apportioned value of such shares, this does not adequately compensate him for his attendant loss. It may ultimately emerge that if Mr Gallagher did sustain such a loss it is de minimis. However, this has not yet been the subject

of argument. Page 52 High Court Approved Judgment: Gallagher v Fraser Page 53

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