Case No: A2/2011/2884

Neutral Citation Number: [2012] EWCA Civ 1003
**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**His Honour Judge Seymour QC (sitting as a Judge of the High Court)**
**[2011] EWHC 3028 (QB)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/07/2012

**Before :**

**LORD JUSTICE MUMMERY**
**LORD JUSTICE RIMER**
and
**LORD JUSTICE PITCHFORD**

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**Between :**

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| **WESTCOAST (HOLDINGS) LIMITED (formerly known as KELIDO LIMITED)** | **Claimant//Respondent** |
| **- and -** | |
| **WHARF LAND SUBSIDIARY (NO 1) LIMITED** | **Defendant/Appellant** |
| **-and –** | |
| **WHARF LAND INVESTMENTS LIMITED** | **ThirdParty/ Appellant** |

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(Transcript of the Handed Down Judgment of
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**Mr Stuart Hornett** (instructed by **Jeffrey Green Russell**) for the **Appellants, Wharf Land Subsidiary (No 1) Limited** and **Wharf Land Investments Limited**
**Ms Michelle Stevens-Hoare** and **Mr Simon Allison** (instructed by **Pitmans LLP**) for the **Respondent, Westcoast (Holdings) Limited**

Hearing date: 22 May 2012

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# Judgment

**Lord Justice Rimer :**

1. The parties to the proceedings are (1) Westcoast (Holdings) Limited ('Westcoast'); (2) Wharf Land Subsidiary (No 1) Limited, the defendant ('the company'); and (3) Wharf Land Investments Limited ('WL'), a third party. Westcoast and WL are shareholders of the company. The order under challenge was made on 20 October 2011 by His Honour Judge Seymour QC, sitting as a High Court Judge of the Queen's Bench Division. Judge Seymour thereby entered judgment for Westcoast against the company for £999,900 due under a loan agreement dated 7 April 2006 and declared that Westcoast was entitled to present a winding up petition against the company based on that indebtedness. He dismissed the counterclaim of the company and WL and refused them permission to appeal, but he stayed the declaration until after the disposal of any permission application to the Court of Appeal and (if permission were to be given) until after the determination of the appeal.

2. The proposing appellants are the company and WL. Sir Mark Potter, on the papers on 19 December 2011, indicated his inclination to refuse permission to appeal but in fact adjourned the permission application to the full court, upon notice to Westcoast, directing that the appeal should follow if permission were to be given. The proposed appeal turns on the interpretation of an ill-drawn clause in a shareholders agreement made on 7 April 2006. We had the benefit of succinct arguments from Stuart Hornett, for the company and WL, and from Michelle Stevens-Hoare, leading Simon Allison, for Westcoast.

*The Shareholders Agreement*

3. The shareholders agreement was made between (1) WL, (2) Westcoast (then known as Kelido Limited, as it still was when it commenced its proceedings) and (3) the company. It recited that the company had been incorporated in 2005 and that Westcoast and WL had agreed to subscribe for shares. The company's authorised share capital was £1,000 made up of 50,000 'A' shares of 1 pence each and 50,000 'B' shares of 1 pence each. Its business was the investment in, and the development and disposal of, land at Temple Farm, Ship Road, West Hanningfield, Essex, and any other land the company might acquire, including by a subsidiary. It did not in fact invest in any other land and was therefore in practice a single purpose vehicle for the development of Temple Farm. A key definition in clause 1 was that of the 'Shareholder Loan Agreement', namely:

> 'the agreement in the Agreed Form between [Westcoast] and the Company under which [Westcoast] agrees to advance £999,900 to the Company, such amount to be repaid by the Company by the fifth anniversary of the date of this agreement'.

4. By clause 4.1.1, WL agreed to subscribe at par for 49,999 A shares in the company and Westcoast agreed to subscribe at par for 10,000 B shares (at a cost, therefore, of £100). By clause 4.1.4 Westcoast agreed to enter into the shareholder loan agreement and to 'advance the amounts required under the agreement to the Company'. The shareholders agreement contemplated that other investors would also acquire B shares, would sign deeds of adherence to the shareholders agreement and would also advance loan capital to the company. Other investors did become B shareholders and they signed deeds of adherence and made loans to the company.

5. Clause 5, headed 'Business of the Company', included in clause 5.2 an undertaking by WL that it owed a duty of care to the company and to the B shareholders to ensure that all company decisions were made in the company's best interests, in furtherance of its business (the development of Temple Farm) 'and in accordance with the Owner's requirements as defined in the Development Management Agreement'. The management agreement was made on the same day, 7 April 2006, and was between the company (therein described as the owner, although in fact Temple Farm was bought in the name of a subsidiary) and WL (the development manager). Clause 5.3 of the shareholders agreement, which is of particular importance, provided:

> 'Save as expressly set out in this agreement, or as permitted by law for the protection of an unfairly prejudiced or minority Shareholder, the Shareholders undertake to each other not to take any steps or action (including the commencement of legal proceedings) for the winding-up, dissolution or administration of the Company.'

6. Clause 6, headed 'Company Obligations', provided, so far as material:

> '6.1 Each of the Shareholders shall also procure, and the Company shall undertake and agree to discharge, without limitation, the following:
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> …
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> 6.1.3 to commence or defend litigation or other dispute resolution proceedings relating to the Company; …'

7. Clause 8 dealt with the constitution of the board of the company. It provided for a maximum of three directors, of whom two were to be appointed by WL and one by Westcoast. The chairman was to be one of the directors appointed by WL. WL therefore controlled the company in general meeting and the directors appointed by it controlled the board. Clause 10, headed 'Exercise of voting rights and conduct of the Company', provided, so far as material:

> '10.1 Each Shareholder undertakes with the other Shareholders to exercise all voting rights available to it in relation to the Company so as to give full effect to the terms and conditions of the Development Agreement and so as to act in the best interests of the Company'.

Clause 32, headed 'Further assurance and good faith,' provided so far as material:

> '32.2 The Shareholders shall at all times act in good faith towards each other in fulfilment of their obligations hereunder and in relation to the Company and this agreement'.

8. I come to clause 19, the provision at the heart of the dispute:

> '19. Duration
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> This agreement shall continue in full force and effect until the first to occur of the following events:
>
> 19.1 The fifth anniversary of this agreement;

19.2 The express written agreement of the Shareholders that this agreement should cease and determine; or

19.3 The completion of the dissolution and winding-up of the Company; or

19.4 The acquisition by one Shareholder of all the Shares registered in the name of the other Shareholders or beneficially owned by the other Shareholders,

*provided that the terms of this agreement shall nevertheless continue to bind the Shareholders thereafter to such extent and for so long as may be necessary to give effect to the rights and obligations embodied herein'* (Emphasis supplied)

It is the proviso that has given rise to the dispute. If it has any clear identifiable meaning, it is not one that leaps from the page.

*The shareholder loan agreement*

9. The shareholder loan agreement, as defined in clause 1 of the shareholders agreement and into which by clause 4.1.4 Westcoast agreed to enter, was made on the same day as the shareholders agreement, 7 April 2006. It was made between the company, as borrower, and Westcoast as lender. It recited Westcoast's agreement to lend £999,900 to the company (Westcoast in fact paid the company £1 million, of which £100 satisfied its share subscription). The agreement then provided, so far as material:

'2. Amount and Purpose

2.1 The amount of the Loan shall be £999,900 and it shall not bear any interest.

2.2 The Loan shall only be used for the purpose of investing in the Borrower.

3. Repayment

The Loan shall be repaid in full by the Borrower to the Lender on the fifth anniversary of the date of this Agreement or the earlier termination of the Shareholders' Agreement.

4. General

4.1 This Agreement constitutes the entire agreement between the parties.

4.2 Demand for payment or any other demand or notice under this Agreement shall be made in writing ….'

10. We were shown like loan agreements entered into by other B shareholders. Sheil Land Associates advanced £249,975 to the company under an agreement also dated 7 April 2006, a loan also expressed to be repayable on the fifth anniversary of the agreement or the earlier termination of the shareholders agreement. The Aeneid Fund Limited advanced £499,950 under a loan agreement dated 15 June 2006, that loan being stated to be repayable on the fifth anniversary of the date of the agreement (ie 15 June 2011) or the earlier termination of the shareholders agreement. As by clause 19 of the shareholders agreement that agreement was destined to determine on the first to occur

of the four events listed in clause 19, of which one was its fifth anniversary, it followed that the Aeneid loan was in fact repayable on 7 April 2011 at the latest.

*The proceedings*

11. Westcoast's £999,900 loan was due for repayment by 7 April 2011. It wrote to the company in March 2011 saying that it would require payment on 7 April. No payment was made and Westcoast made a formal demand for repayment on 20 April 2011 in compliance with clause 4.2 of the loan agreement. Still no payment was made and so on 3 June 2011 it issued a claim form against the company claiming repayment of the £999,900 plus statutory interest. It also claimed a declaration of its entitlement to present a winding up petition against the company. That was an unusual head of relief, but was, I presume, prompted by Westcoast's wish to remove any doubt that the proviso to clause 19 of the shareholders agreement might be said to override its prior provisions (in particular clause 19.1) and so give continued life to the restriction in clause 5.3.

12. Westcoast's claim provoked the issue by the company and WL of their own claim form on 24 June 2011 by which they sought (1) the dismissal of Westcoast's claim, (2) an injunction restraining the commencement by Westcoast of any form of debt recovery proceedings apart from by way of an 'unfair prejudice' petition in respect of the company under section 994 of the Companies Act 2006, and (3) an injunction restraining the presentation by Westcoast of a winding up petition. By their defence and counterclaim, they asserted that the development of the Temple Farm site was 'still ongoing' and that planning permission 'has now been obtained for the development'. They pleaded clauses 5.3, 6.1, 10.1 and 32.2 of the shareholders agreement, all of which I have set out. They asserted that clause 5.3 of the shareholders agreement precluded Westcoast from suing for the repayment of the loan or presenting a creditor's winding up petition, although they accepted that there could be no bar to the presentation by Westcoast of an 'unfair prejudice' petition.

13. Westcoast was unimpressed that there was any viable defence to its claim and so on 19 September 2011 it applied under CPR Part 24 for summary judgment on its case against the company and WL, alternatively a striking out under Part 3.4 of their defence and counterclaim. The application was heard by Judge Seymour who made the order I have summarised at [1] above. In his judgment he recorded that there was no dispute that the terms of the loan agreement showed that the loan was due for repayment but he said that the critical issue was as to whether clause 5.3 of shareholders agreement precluded the presentation by Westcoast of a creditor's winding up petition based on such unsatisfied indebtedness. Westcoast's answer to that was that, by clause 19.1, the shareholders agreement (including clause 5.3) was no longer in force. The rejoinder from the company and WL was that clause 19.1 was overridden by the proviso to clause 19 and so the shareholders agreement, including clause 5.3, continued to have full force and effect.

14. Judge Seymour noted that the witness statements before him were directed to informing the court as to the process of the negotiations of the shareholder and loan agreements and as to views of the makers of such statements as to what was intended to be achieved by them. He rightly held that evidence to be inadmissible for the purposes of resolving the issue of interpretation that was before him. As to the effect of the proviso to clause 19, Judge Seymour concluded:

> ‘13. … I accept the submissions of Miss Stevens-Hoare [for Westcoast] on the point. It is plain that what clause 19 is concerned with is the period for which the shareholders agreement will continue in force. The first part of clause 19 is concerned with prescribing those events upon which the shareholders agreement comes to an end. It cannot sensibly be suggested, in my judgment, that the effect of the proviso is to contradict all that which goes before in clause 19. It cannot sensibly be suggested that clause 19, properly construed, as it were, does not make any provision for determination at all. Plainly the first part does make provision for determination and the proviso is simply a proviso; it is simply a form of words which is intended to achieve something in circumstances in which the shareholders agreement has actually come to an end. Therefore the question is, what is it that the words in the proviso should be construed as preserving, notwithstanding that the shareholders agreement has otherwise come to an end? Commonsense, as it seems to me, indicates that it can only be those provisions of the shareholders agreement, if any, which would prejudice, if the shareholders agreement came to an end, rights and obligations which had already accrued.
>
> 14. In the circumstances of the present case there were no rights or obligations which were relevant to the issue of construction, as it seems to me, prior to the occurrence of the event upon which the sum the subject of the loan agreement, £990,900 [sic: should be £999,900], became due and payable to the claimant. In the circumstances of this case that happened at precisely the same moment that the shareholders agreement came also to an end, so there was no pre-existing right or obligation to which the proviso to clause 19 could relevantly apply to prevent the claimant from being entitled to claim the sum of [£999,900] or to prevent the claimant, once having obtained judgment for that sum, seeking to enforce that judgment in whatever way would otherwise be appropriate.
>
> 15. In those circumstances I am entirely satisfied, the issues between the parties being simply questions of construction, that it is appropriate to reach conclusions under Part 24 of the Civil Procedure Rules and the conclusions which I reach are that there should be judgment for the claimant in the sum of [£999,900] and a declaration in the terms sought by the claimant.’

*The application for permission to appeal*

15. As before the judge, neither counsel sought to rely on the inadmissible evidence to which the judge had referred. Mr Hornett, for the company and WL, conceded that nothing in the shareholders agreement (either in clause 5.3 or elsewhere) prevented Westcoast suing the company for judgment in respect of its £999,900 loan, as it had done. His submission was, however, that Westcoast was and remains barred by clause 5.3 from presenting a creditor’s winding-up petition against the company in reliance on its unsatisfied judgment.

16. It is not in dispute that during the currency of the shareholders agreement, Westcoast was so barred. Whilst the company was not itself the beneficiary of the clause 5.3 restrictions (which were expressed to be binding simply between the shareholders), the way in which they would work would be that, were any B shareholder to petition as a creditor for the winding up of the company, one or more of the other shareholders could apply to restrain by injunction the further prosecution of such a petition. Thus far there is no difficulty. Mr Hornett’s greater difficulty is that the natural sense of

clause 19 is that the shareholders agreement, including therefore clause 5.3, was destined to terminate on the first to occur of the four listed events, of which the first that in fact occurred was the arrival of its fifth anniversary on 7 April 2011. If, as happened, the company failed to repay Westcoast's loan on its due date for repayment on 7 April 2006, what could thereafter prevent the presentation by Westcoast of a creditor's winding up petition based on its unsatisfied debt?

17. Mr Hornett's answer to that was that the proviso to clause 19 continued to bar such a petition. He acknowledged, with perhaps some understatement, that clause 19 was framed in a 'slightly curious way'. That was a recognition of the fact that, down to the proviso, the sense of clause 19 is to bring the whole shareholders agreement to a full stop, whereas the proviso then purports to breathe renewed life into it 'to such extent and for so long as may be necessary to give effect to the rights and obligations embodied herein', language the meaning and intent of which might fairly be regarded as imprecise. Mr Hornett acknowledged that the proviso did not identify particular types of such 'embodied' rights and obligations that were intended so to survive and he said that one, extreme, interpretation of the proviso was therefore that *all* the provisions of the shareholders agreement were intended to survive its termination. It was suggested to Mr Hornett that if that were the right construction, the proviso might have to be regarded as repugnant to the substantive termination provisions of clause 19 and, in consequence, wholly void (compare *Forbes v. Git and Others* [1922] 1 AC 256, at 259). Mr Hornett was disposed to recognise that and to accept that the proviso could not sensibly be interpreted as intended to provide for the continuation of all the rights and obligations created and imposed by the agreement.

18. He submitted instead that clause 19, including the proviso, must be construed as a whole, with effect being given to all its constituent parts, and that the proviso was to be read as directed merely at preserving the enforcement of those rights that had in fact been acquired under the shareholders' agreement by the date of termination. He advanced no comprehensive submission as to the type of 'rights and obligations embodied' in the shareholders agreement that did *not* so survive. But he submitted positively that, whatever they might include, they did not include 'the rights and obligations embodied' in clause 5.3. That, he said, was because it must have been contemplated by the parties to the shareholders agreement that the likelihood was that it would only be *after* the termination of the shareholders agreement under the substantive provisions of clause 19 that circumstances would arise in which Westcoast (or any other B shareholder who had advanced loan capital to the company) would be likely to want to demand and/or sue for repayment and then present a creditor's winding up petition in order to achieve a class remedy for the company's creditors generally. Therefore, whilst the substantive provisions of clause 19 had the effect of terminating the shareholders agreement generally, the proviso must be interpreted as operating at least to give clause 5.3 continuing life so as to bar the post-termination presentation of a creditor's winding up petition. Mr Hornett went so far as to submit that the proviso impliedly operated to impose a perpetual bar on the presentation of any such petition. Clause 5.3, he said, made it clear that there was no bar in the presentation by a shareholder such as Westcoast of an 'unfair prejudice' petition under section 994 of the Companies Act 1996 and its right in that respect would continue after termination under clause 19. On such a petition it would, he said, be open to Westcoast to seek an order for the buy out of its shares by the company or other shareholders at fair value; and he said that the court could also provide in some

manner for the compulsory surrender of the debt. There was therefore no question of Westcoast being deprived of any remedy at all.

19. Ms Stevens-Hoare, for Westcoast, recognised the difficulties inherent in the interpretation of the sense of the proviso to clause 19 and that, if it were to be regarded as purporting to preserve, post-termination, *all* the rights and obligations 'embodied' in the shareholders agreement, it would probably be repugnant to the prior, substantive provisions of clause 19 and so void. She made, however, no submission in support of that conclusion but said that the court should endeavour so far as possible to give effect to the whole of clause 19, including the proviso. To that end, the limit of the commercial sense to be ascribed to the proviso was that it was directed at dealing with the run off following the termination of the shareholders agreement. It was, as the judge had held, directed at making clear that the accrued rights that any of the shareholders had acquired during the currency of the agreement were not be regarded as defeated by such termination. That did not, however, mean that the terms of the agreement simply continued after such termination, which would be contrary to the sense of the substantive provisions of clause 19. In particular, the proviso could not mean that the bar on a creditor's winding up petition imposed by clause 5.3 during the currency of the shareholders agreement would continue thereafter. That would be contrary to the scheme of the agreement, which was that the Temple Farm venture was to be given a five-year life. During that life, the company was to enjoy the benefit of interest free loans from the B shareholders and such shareholders could not frustrate the venture by calling for repayment and, in default, causing the collapse of the venture by petitioning for the winding up of the company. Once, however, the five-year term was up, the position was different. The clause 5.3 bar on a creditor's winding up petition came to an end. Moreover, it was impossible to see how the presentation of such a petition, based as it would be on the falling due of a debt *after* the termination of the shareholders agreement under the primary provisions of clause 19, could be regarded as barred by any right acquired or obligation imposed during the currency of the agreement. In addition, Ms Stevens-Hoare submitted that Mr Hornett's submission that the proviso imposed a permanent bar on the presentation of such a winding up petition could not stand with the qualification in the proviso inherent in the phrase 'to such extent and for so long as may be necessary'.

20. Mr Hornett's response to those submissions was that to treat the proviso as serving merely to meet the need to satisfy accrued rights cannot meet the applicants' case, because *all* the rights under the shareholders agreement are in the nature of accrued rights. That appeared to amount to a submission that the proviso serves to save the entirety of the terms of the shareholders agreement and to leave unexplained the function of the substantive provisions of clause 19.

*Discussion and conclusion*

21. It hardly needs to be said that the language of the proviso to clause 19 is obscure. That may be a more charitable description of the drafting than it deserves. There is, it seems to me, at least something to be said for the view that the proviso is simply repugnant to the preceding substantive provisions of clause 19 and is therefore wholly void (see again *Forbes v. Git and Others* [1922] 1 AC 256, at 259). That was not, however, advanced by Ms Stevens-Hoare, whose submission was that the court should endeavour, if it can, to give commercial effect to the entirety of clause 19,

including the proviso, and I have no doubt that she was correct that that is the approach that the court should adopt. The commercial men involved in this venture have chosen to lend their names to a document that includes the whole of clause 19, including its proviso, and the court must, if it can, endeavour to give a meaning to such whole.

22. As to what that meaning is, I agree with Ms Stevens-Hoare that it is essential to examine clause 19 in the context of the scheme of the commercial arrangement between the parties as a whole. The material before us makes it clear that the Temple Farm venture was a five-year one. That was the period within which, it must be inferred, it was contemplated that the company could obtain planning permission for a development of the land and could develop and dispose of it. Thus it was that, unless the shareholders agreement was earlier terminated, the B shareholders' interest free loans were only to be repayable at the end of that five-year period; and, consistently with the intention that the company should have the full five-year term in which to complete the venture if it could, clause 5.3 imposed, with express exceptions, a bar on any B shareholder from taking steps to achieve the winding up, administration or dissolution of the company, being steps that would be likely to result in the collapse of the further prosecution of the venture.

23. As, however, the scheme was a five-year one, the shareholders agreement, by clause 19, provided expressly for its own termination upon, at the latest, its fifth anniversary. As it seems to me, and subject to the effect of the proviso, it is obvious that the consequential intention was that, upon such termination, it would be open to the B shareholders to have recourse to all such rights and remedies that are ordinarily open to unsatisfied loan creditors to achieve the recovery of money due to them, including by suing the debtor to judgment and, in default of payment, having recourse to the class remedy ordinarily available to creditors by way of the presentation of a creditor's winding up petition.

24. Mr Hornett's proposition is, however, that clause 5.3 nevertheless continues, following such termination, to bar a B shareholder from taking such a course. He says that that is the effect of the proviso. I accept that, if the proviso had been expressed in language that unambiguously evinced an intention that clause 5.3 should survive the termination of the shareholders agreement, effect would have to be given to it. It plainly, however, was not so expressed. It was instead cast in generalised and imprecise terms, which I understand Mr Hornett to accept cannot, or at any rate should not, be read as simply negativing the substantive effect of the termination provisions that immediately precede it. In my view, to interpret its words as nevertheless implicitly giving continued life to clause 5.3 would be to give them an uncommercial interpretation. It would involve ignoring that the scheme is merely a five-year scheme; that during that term, the B shareholders' loans are interest free; and that the plain function of clause 5.3 was simply to ensure that during that five-year term, no B shareholder could spoil the party for the other shareholders. It makes no commercial sense to read the proviso to clause 19 as extending the effect of clause 5.3 beyond the five-year term. Indeed, it would seem to me to make commercial nonsense so to read it, as it would involve the fundamental undermining of the fact that this was merely a five-year scheme. I would hold, therefore, that the proviso is not so to be read.

25. That leaves the more difficult question of what the proviso was intended to achieve. I consider that the judge was right, and Ms Stevens-Hoare was correct in submitting, that it was intended to do no more than to ensure that the termination of the shareholders agreement was not to be regarded as in some way affecting the enjoyment of rights, and the enforcement of corresponding obligations, that had accrued during the currency of the shareholders agreement. We were not, however, given any examples of the types of accrued rights that might have been in the contemplation of the proviso, and I do not propose to speculate as to what they might be. But I agree with the judge that the proviso was directed at making clear, for the avoidance of doubt, that such rights were not to die with the termination of the shareholders agreement. Whatever the precise limits of the operation of the proviso, I have no doubt, however, that it is not to be read as simply extending the terms of the shareholders agreement beyond the termination date. In particular, it did not so extend the terms of clause 5.3.

26. In my judgment, therefore, the judge was correct to make the order that he did. I would give WL permission to appeal against his order but would dismiss the appeal.

**Lord Justice Pitchford :**

27. I agree.

**Lord Justice Mummery :**

28. I also agree.