Neutral Citation Number: [2021] EWCA Civ 1697

Case Nos: A3/2021/0480
A3/2021/0465

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES IN BIRMINGHAM
BUSINESS LIST AND COMPANIES LIST (ChD)
HHJ Cooke sitting as a High Court Judge
Claim Nos. CR-2020-BHM-000301 and BL-2020-BHM-000019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 November 2021

Before:
LORD JUSTICE BEAN
LORD JUSTICE NUGEE
and
MRS JUSTICE FALK

- -

Between:

(1) IVY LOVERIDGE
(2) ALLDEY LOVERIDGE

Appellants

- and -

ALLDEY MICHAEL LOVERIDGE

Respondent

- -

Lance Ashworth QC and Dan McCourt Fritz (instructed by **Thursfields**) for the **Appellants**
Mark Anderson QC and David Stockill (instructed by **Silverback Law**) for the **Respondent**

Hearing date: 28 October 2021

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APPROVED JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30 am on Friday 19 November 2021.

Mrs Justice Falk

INTRODUCTION

1. This is the second occasion on which this court has had to consider orders made at an interlocutory stage in proceedings arising out of an acrimonious dispute about a series of caravan parks owned and operated by the Loveridge family. I will refer to family members by their first names for convenience of identification.

2. In brief, Ivy and her husband Alldey founded a caravan park business as a partnership. Their sons, Michael and Audey, became involved over time. Michael joined his parents' partnership and the scale of its business expanded. In due course a number of companies were also acquired to hold additional parks and two further partnerships were formed.

3. The proceedings followed the development of apparently irreconcilable differences between Michael and the other members of the family, who include Michael's sisters Lesa and Mersadie as well as his parents and brother. There are two sets of proceedings, both initiated by Michael. The first relates to the winding up of the three partnerships (the "partnership proceedings"). In the second (the "company proceedings"), Michael seeks orders under ss 994-996 Companies Act 2006 (unfair prejudice) or for winding up under s 122(1)(g) Insolvency Act 1986 (the just and equitable ground) in respect of five family companies. Those companies are Kingsford Caravan Park Limited ("Kingsford"), Breton Park Residential Homes Limited ("Breton Park"), Quatford Park Homes Limited ("Quatford"), Riverside Caravan Park (Stourport) Limited ("Riverside Stourport") and Bewdley Caravan Sales Limited ("Sales").

4. In its earlier decision, *Loveridge v Loveridge* [2020] EWCA Civ 1104, this court discharged orders made in both sets of proceedings by HHJ McCahill QC (sitting as a High Court judge) that in broad terms had the effect of placing Michael in sole charge of the caravan parks pending trial. A replacement order was made in the partnership proceedings which had the effect of putting different family members in charge of each partnership. No replacement order was made in the company proceedings. The court's decision to that effect was communicated at the end of the hearing, on 29 July 2020, and judgment was handed down on 24 August 2020. Permission to appeal to the Supreme Court was subsequently refused.

5. The two further appeals the subject of this decision relate to orders made by HHJ Cooke (sitting as a High Court judge) in the company proceedings and partnership proceedings respectively on 1 December 2020, following a three day hearing. Ivy and Alldey appeal in the company proceedings against the judge's decision to allow Michael to amend his petition and refuse their application to strike it out in whole or in part, and against his decision to injunct Ivy and Alldey from demanding repayment of certain inter-company loans or taking enforcement action in respect of them pending trial (the "company appeal"). In the partnership proceedings, Ivy appeals against the judge's decision to make no order for costs following the withdrawal by Michael of a committal application against her (the

"costs appeal"). (Another part of that appeal, which related to a refusal to allow the defence and counterclaim to be amended, has already been allowed by consent.)

6. Permission to appeal was granted by Andrews LJ in respect of the company appeal and by Asplin LJ in respect of the costs appeal. The two appeals were heard together. I will address the company appeal, which raises more issues and submissions on which occupied most of the available time, first.

THE COMPANY APPEAL

Background and the earlier Court of Appeal decision

7. As already indicated, the company proceedings relate to five family owned companies, Kingsford, Breton Park, Quatford, Riverside Stourport and Sales. The first four of these companies each owns an individual caravan park, either directly or through a subsidiary. The fifth company, Sales, carries on a business of dealing in caravans. The shares in Kingsford, Riverside Stourport and Sales are owned as to one third each by Michael, Ivy and Alldey. All three of them were also the directors of those three companies until Michael was removed as a director of Sales as described below. He has also since been removed as a director of Kingsford. He remains a director of Riverside Stourport.

8. The ownership of Kingsford, Riverside Stourport and Sales, and their Boards before action was taken to remove Michael, reflects the two main partnerships, Riverside and Redstone. The partners in both of those partnerships are Michael, Ivy and Alldey. Riverside is the oldest partnership and has a number of sites. Redstone has a single, but significant, site. (The third partnership relates to a more modest site that Lesa claims as hers.)

9. The shares in Quatford are owned equally by Michael and Ivy, and both are directors of it and of the subsidiaries through which it owns a caravan park called Hollins Park. However, it was not disputed that Michael is currently in de facto control of these companies. He currently lives on the Hollins Park site.

10. The shares in Breton Park are also legally owned equally by Michael and Ivy, but on Ivy and Alldey's case Michael has no beneficial interest in them. Ivy and Audey are the directors.

11. The background to the company appeal has its origin in the Court of Appeal's earlier decision. Floyd LJ, with whom Lewison LJ and Asplin LJ agreed, concluded that the petition as then formulated, or with the draft amendments put to the court, disclosed no arguable case to support Michael's claim under ss 994-996 or to have the companies wound up on the just and equitable ground.

12. The pleadings considered by the Court of Appeal averred that Michael had legitimate expectations giving rise to equitable constraints on the use of majority control, and that he had both the right to be involved in management and the sole right to manage the companies without interference from other family members. Floyd LJ said this at [49] to [52]:

"49. I would be reluctant at the interim stage to hold Michael to the form of petition which was before the judge if the facts credibly alleged in the petition or in the evidence supported the existence of some equitable constraint of the kind now contended for by [the proposed amended pleading]. I am, however, entirely unpersuaded that the petition or evidence did support the existence of such a constraint. First, it is to be noted, as Lewison LJ pointed out in the course of argument, that the equitable constraint is said to arise from the history and the circumstances set out in the petition. We asked Mr Stockill [counsel for Michael] to identify the paragraphs of the petition on which the equitable constraint was founded. He pointed us to paragraphs 43 to 49. These paragraphs recite the history of the development of the business. I hope I do not do injustice to these paragraphs if I summarise them as allegations that Michael was the driving force behind the more recent expansion of the business through the corporate vehicles of Kingsford (from 2004), Breton Park (from 2014), Riverside, Stourport (from 2016) and Quatford (from 2017). His efforts in expanding the business were "to the exclusion of his parents" who are and were not so business minded. These efforts included sourcing sites, liaising with local authorities on planning and building regulations and licensing, arranging finance and dealing where necessary and appropriate with professionals such as solicitors and accountants. Further, Michael ran the companies on a day to day basis, including the organising, maintenance and servicing of the sites, liaising with staff, employees and contractors and arranging for the collection of rents.

50. All this is of course the subject of challenge. What matters for present purposes is whether, taking these allegations at their highest, they are capable of supporting the existence of the right to continue to carry on these functions if a company, acting through its constitutional rules, wishes to change those arrangements. Mr Stockill accepted that there was no express agreement or understanding that Michael would have that right, but submitted that such an understanding was to be inferred. In my judgment, no such agreement or understanding or any form of equitable restraint can properly be inferred from these facts. It is not the law that progressive and energetic managers, however well they perform their duties to the benefit of the company, acquire entrenched rights not to be removed from their positions if the constitution of the company permits their removal. Such a principle would act as a significant but unjustified restriction on countless companies with dynamic executives from operating their companies in accordance with their constitutions.

51. Mr Ashworth coined the phrase "the driving force fallacy", by which he meant that the fact that an individual has played an important, and even a leading part in the development of a company's business, does not entitle him as of right to special treatment under the company's constitution. I agree that the fact that an individual has had such a role is not a sufficient indication that he is entitled to maintain it in the face of constitutional rules which permit it to be terminated.

> 52. Accordingly, I would hold that it was not open to the judge to find an arguable case of the equitable restraint on the companies' powers. As such a constraint forms an essential part of Michael's section 994 petition, I would accept Mr Ashworth's contention that Michael has not demonstrated an arguable case under sections 994-996 ."

13. Floyd LJ then reiterated at [53] that a petitioner under ss 994-996:

> "…must show that there is something in the conduct of the affairs of the company which is prejudicial to the interests of the petitioner as a shareholder, and that the prejudice is unfair."

14. He went on in the same paragraph to observe that in the cases of three of the companies (Breton Park, Quatford and Riverside Stourport), apart from attempts to change the accountants, there was no allegation of anything done in the conduct of their affairs. He also concluded at [54] and [55] that a change in accountants and an alleged non-payment of tax liabilities did not give rise to a seriously arguable case of unfair prejudice.

15. Floyd LJ then considered a decision that had been taken to remove Michael as a director of Sales, and concluded that it was not arguable that that amounted to conduct unfairly prejudicial to him (paragraphs [56] to [60]). This was because he had no seriously arguable defence to an action by Sales for breach of fiduciary duty, relating to Michael's abstraction of £1.25 million in contravention of the wishes of his fellow shareholders and board members. Further, Michael could not be prejudiced as a shareholder of Sales by action of its Board in seeking to restore its assets following that misappropriation. Floyd LJ also concluded that the claim that it was just and equitable to wind up the companies was equally flawed (paragraphs [63] to [65]).

Events following the Court of Appeal's decision

The intercompany loans

16. On 5 October 2020 Ivy and Alldey's solicitors, Thursfields, wrote to Michael's solicitors about the repayment of the £1.25 million misappropriated from Sales, and about amounts outstanding under certain interest free intercompany loans (the "Intercompany Loans"). Those amounts comprise a total of around £1.3 million owed to Kingsford and Sales by Far Forest Limited (a company wholly-owned by Michael), a total of around £5.3 million owed to Kingsford and Sales by Quatford, and around £0.6 million owed to Sales by Riverside Stourport. There was also a request to deliver up the books and records of Breton Park.

17. In relation to Far Forest, the letter requested proposals for the repayment of the loans and, if it was not effected immediately, security pending a refinancing, for which three months would be allowed. A similar request was made in respect of Riverside Stourport. In respect of Quatford there was a reference to a failure to consult Ivy in respect of the running of the park and an invitation to place it on the market to allow funds to be raised for the loans to be repaid, or alternatively for the grant of security followed by a refinancing.

18. Michael's solicitors, Silverback Law, responded on 12 October referring to a loan facility that had been approved to allow repayment of the misappropriated £1.25 million. In respect of the Intercompany Loans to Far Forest and Riverside Stourport, security was offered on the proviso that the charge would not be enforceable until after the substantive litigation was concluded. As regards Quatford, Michael was prepared to agree to a sale, but proposed that this should be done simultaneously with sales of other parks held within the partnerships.

19. Thursfields' response dated 14 October reiterated the requirement to repay within three months and rejected the offer of a charge on the terms proposed. In relation to Quatford, concerns were raised in relation to management and activities on the site and it was stated that agreement would not be provided to a sale until those matters were resolved. The letter went on to say:

> "Given that Michael Loveridge has refused to consult Mrs Loveridge on previous financial decisions and has ignored our requests in the past there is a real concern that Hollins Park cannot repay the significant loans to Kingsford and Bewdley. We remind him that as majority creditors of Quatford those companies can request the appointment of an administrator who will then run Hollins Park. We trust that the actions above will be complied with to avoid this occurring."

20. In respect of Breton Park the letter referred to a claim by Audey's wife in divorce proceedings that a transfer of its shares by Audey to Michael and Ivy in April 2019 be set aside[1] and noted the potential impact of that claim, which Michael had not sought to oppose, on the unfair prejudice petition. The request for records was repeated.

21. In further correspondence on 21 October and 4 November 2020 Silverback Law reiterated Michael's position in relation to the Intercompany Loans and commented that he saw no commercial need for them to be demanded. The threat constituted another element of unfair prejudice which would be addressed in the proposed amended petition. Written undertakings were requested that no demand would be made or enforcement action taken, failing which injunctive relief would be sought.

22. In its response dated 6 November 2020 Thursfields objected to this course. In respect of Quatford the letter clarified that there had been no demand for repayment. Rather, agreement was sought to secure the loans. There was a reference to continued exclusion of Thursfields' client from management and access to information, and an expression of concern that Hollins Park would not be able to repay and that Michael's proposal would leave Quatford free to take on other borrowings and secure them in priority. As regards Riverside Stourport the letter again reiterated the request for security, and pointed out that no Board meeting had been called to consider repayment proposals. Concerns were expressed that Michael was acting without agreement in relation to that site. In relation to Breton Park it was noted that there had been no demand for repayment

[1] Pursuant to s 37 Matrimonial Causes Act 1973 (Avoidance of transactions intended to prevent or reduce financial relief).

but that Michael continued to interfere with day to day running. Disclosure of company records was required for all the companies.

The offer for the Kingsford shares

23. On 30 October 2020 Thursfields wrote to Silverback Law making an offer to purchase Michael's shares in Kingsford. The letter states that it "constitutes an *O'Neill v Phillips* offer" (that is, an offer made in line with the guidance given by Lord Hoffmann in *O'Neill v Phillips* [1999] 1 WLR 1092 at pp.1107-1108) and that if it was not accepted they intended to apply to strike out the petition in respect of Kingsford. The terms of the offer included:

> "1. Michael's shares in Kingsford will be purchased at fair market value;
> 2. The value of Michael's shares will not be subject to a minority discount;
> 3. Should the parties not be able to agree the value, an independent expert will be appointed (to act as an expert to produce a non-speaking determination) to determine the fair market value of Michael's shares in Kingsford…"

24. The offer went on to make provision for the appointment of the expert and for the costs of the expert, and to state that both parties would be entitled to inspect Kingsford's books and records so far as relevant, together with other information provided to the expert, and that both parties would be permitted to make submissions to the expert. The letter also explained the reasons for not offering to pay any of Michael's costs of bringing the petition in respect of Kingsford. There was an invitation to identify any element of the offer which failed to comply with the requirements of an *O'Neill v Phillips* offer.

The applications considered by the judge

25. On 13 November 2020 Ivy, Alldey and Audey applied to strike out the petition or alternatively parts of it. This was met by an application dated 17 November seeking permission to amend the petition and an interim injunction. HHJ Cooke's order dated 1 December 2020 in the company proceedings gave permission for certain amendments and otherwise dismissed both applications. The order further granted an interim injunction preventing Ivy and Alldey from taking any action to demand repayment of, or take steps to enforce, amounts owed under the Intercompany Loans. (Earlier in the hearing, on 24 November, HHJ Cooke had also ordered Michael to deliver up books and records of the companies.)

26. It is convenient to consider the petition in the form amended by the judge before considering his decision. As already indicated, some amendments were not permitted. There is no appeal in respect of those.

The amended petition

27. In its amended form the petition maintains the allegation that Michael was the driving force in building and running the business (paragraphs 43 to 49, summarised by Floyd LJ in his judgment at [49]: see above). It also continues to

plead a list of facts which it says supports the existence of a deliberate strategy of destruction of the businesses on the part of Ivy, Alldey and Audey, albeit that the list is now materially reduced. There is a new allegation that the actions pleaded were generated by a desire to "do the petitioner down at all costs".

28. Additional background is now pleaded at paragraphs 66 to 79 to support the allegation of unfairly prejudicial conduct. In particular, the amended petition pleads that Michael brought his own successful business into his parents' partnership when he was admitted to it in 1990, that he worked for no salary, and that a number of sites were acquired by that partnership (which became known as the Riverside partnership) using reinvested profits. It is alleged at paragraph 68 that it was the mutual aim of Michael and his parents, which they "discussed and agreed", to continue to expand the business by reinvesting profits and using them to acquire additional sites. The acquisition of Kingsford was the first time that a corporate vehicle had been used, and that was only because the relevant park was being sold in corporate form. The price was debited to the partnership accounts. The business of Sales was previously carried on by the partnership, with that company subsequently being incorporated for tax reasons. Breton Park, Riverside Stourport and Quatford were also all incorporated to acquire new parks.

29. The amended petition also refers to certain parks as having been gifted to Michael's siblings from partnership funds, and asserts that the advances by Sales and Kingsford to Far Forest, which were made to enable Michael to acquire a caravan park on his own account, were made as loans for tax reasons because any other treatment would have attracted a substantial tax charge. The petition asserts that a similar arrangement was put in place in respect of Breton Park (which was lent around £0.6 million by Kingsford), Riverside Stourport and Quatford.

30. A further new section is included from paragraph 80 onwards, headed "The basis of the petitioner's association with first two respondents" (Ivy and Alldey). This pleads that, since 1990, Michael, Ivy and Alldey had "implemented their stated intention of expanding the family business by reinvesting profits and using them to acquire additional caravan sites", that this strategy was "at the heart of their association" both in partnership and as shareholder/directors. Michael's case remained that he was the driving force and "was, at the very least, entitled to participate in the management of all aspects of the business". Corporate structures were not used because of a desire to change the basis of their business relationship as partners, and all the corporate respondents were formed "on the basis of the personal relationship involving mutual confidence" between Michael, Ivy, Alldey and Audey (paragraph 83). It is asserted that "[t]hey are quasi-partnerships".

31. In relation to the Intercompany Loans, it is pleaded at paragraph 84 that they were intended to remain outstanding "indefinitely", being intended by Michael, Ivy and Alldey as "investments" for the benefit of the shareholders of the borrower, as had been case with cash contributions in respect of three parks "which had been made as gifts to Mersadie, Audey and Lesa respectively" from the Riverside partnership. Paragraph 85 states that it was the "clear understanding" between Michael, Ivy and Alldey that the loans would remain outstanding indefinitely and would only be paid when the parties agreed. This was both subjectively understood and "would also have been the understanding of any reasonable person". There had also been a long-standing practice of the parties taking ad hoc

benefits for themselves personally in an informal manner, with the extraction being accounted for in the year end accounts as drawings or loans (paragraphs 86 and 87).

32. Paragraph 88 draws these threads together as follows:

> "The matters mentioned in paragraphs 80 to 87 above formed the basis of the parties' association in business together. Until the events recounted herein, they were a close family, and the petitioner's untiring work and efforts (and his increasing financial contribution) in building the businesses were made in the belief and with the intention (shared by all the parties to this Petition) he was building (without any obligation) long-term wealth and stability for himself and his parents directly, and for other members of the family indirectly, on the basis of the practices and strategies described in those paragraphs 80 to 87 above. As the respondents all knew, recognised and agreed, the petitioner would not have devoted his energy and skills to the family business (including the companies which are the subject of this petition) but for that common understanding which grew over the years and was shared by all the respondents and the petitioner."

33. In a further new section at paragraphs 89-91 Michael relies on the then proposed removal of him as a director of Kingsford, and pleads that in the case of that company and any other respondent except Sales the removal of him as a director, with the intention of excluding him from management, was unfairly prejudicial because it was in breach of the pleaded agreement and basis of association, and "because [Ivy and Alldey] are less capable than he of managing the corporate respondents".

34. New paragraphs 92-98 deal with the calling in of the loans. It is pleaded that the actions taken were motivated by personal interest rather than the best interests of Kingsford and Sales, and aimed to damage Michael (in the case of the loan to Far Forest) and to obtain control of Quatford and Riverside Stourport. It is alleged that the threats and demands were unfairly prejudicial to Michael in the conduct of the affairs of Kingsford and Sales because they were in breach of the understanding pleaded at paragraph 84, and because calling in the loans would deprive Michael of one of the benefits of his hard work and shrewd decision-making. It is also alleged that those actions were unfairly prejudicial in the conduct of the affairs of Quatford and Riverside Stourport because of Ivy's role as a director of those companies (and Alldey's role as a director of Riverside Stourport).

35. At paragraphs 99-101 there is a further new pleading that, irrespective of fault, the basis of the parties' association had been frustrated by the breakdown in relations, by the refusal to allow Michael to pursue the previously understood investment strategy, by his exclusion from management and by the threats to call in the loans. In order to remedy the unfairness of Michael being bound into a situation to which he did not agree, his shares in all five companies should be bought out at an undiscounted fair value.

36. The alternative claim that there should be a winding up on just and equitable grounds has also been amended to reflect the other changes, including pleadings that the companies are quasi-partnerships, that all mutual trust and confidence has been destroyed, that it was never in the parties' contemplation that Michael should be locked in when no longer working for the companies or participating in management, and further that:

> "The respondents intend in the future to continue to run the companies as if the petitioner was not a shareholder at all. They intend to exclude him from management, to oppose everything he proposes, to withhold all the benefits of being a shareholder and to refuse him participation in available investment capital."

There is also a pleading that Quatford and Breton Park are deadlocked.

The judge's decision

37. HHJ Cooke's decision is recorded in a relatively detailed ex tempore judgment. After summarising the proposed amendments, the judge concluded that there was an arguable case in respect of the amendments he was proposing to permit. He considered it arguable that the parties regarded the partnerships and companies as a single business and that there was a common understanding about which family members should be involved in management. In response to the issues raised by the Court of Appeal he said this:

> "22. The driving force argument, as presented before the Court of Appeal, was held not capable of showing any equitable entitlement to management in the absence of an agreement or understanding that Michael would be involved in the management. It was not sufficient that he had de facto acted as manager; there had to be an allegation of an agreement or understanding that he would do so. Such an understanding is now alleged, albeit, it might be said, in somewhat oblique terms.
> 23. Similarly, it was the case before the Court of Appeal that there was no case for equitable limitations on the powers of the majority directors or shareholders in the absence of a pleaded agreement or understanding that might override or qualify those legal powers. But there is now such a pleading and it is not, in my view, obviously, incredible or inconsistent with the evidence so far.
> 24. Further, it seems to me to be properly arguable that depending on the agreements or understandings made between the shareholders, the arrangements they make for operation of their company or companies may include provision of benefits to them, other than the opportunity to participate in any dividends that the companies might pay, or in the increased value of the shares in those companies that the individuals hold."

38. HHJ Cooke went on say that such benefits arguably included access to assets or funds, and that losing such opportunities or having them withdrawn was arguably prejudicial conduct of the affairs of the company (paragraph 25). Further, whilst funds might be repayable on demand in law, it was not incredible that participants

in a joint business could have a common understanding that the finance was long-term and not expected to be repayable without agreement "or, perhaps, some other good reason" (paragraph 26). At paragraph 28 the judge noted that it was well established that equitable constraints that might give rise to the unfair prejudice jurisdiction did not require the same level of certainty as required for the formation of a contract, and further that exclusion from management may amount to unfair prejudice without it being necessary for the individual to be a de jure or de facto director. In respect of Quatford, the pleading that exclusion from other directorships was part of a strategy of excluding Michael from management of the (overall) business was arguably sufficient, together with a threat to appoint an administrator in connection with the loans to that company (paragraphs 29 and 30).

39. At paragraphs 31 to 34 the judge stated that, although it was necessary to consider the position of each company, it was arguable that a course of conduct across a wider business may be relied on as evidence that acts in relation to a particular company are sufficiently serious to justify relief, even if they otherwise would not have been. For that reason he considered that allegations in the petition relating to the operation of the partnership business were potentially relevant. Further, the plea that the basis of association had been destroyed related to all the companies. It was also not unarguable that the breach of fiduciary duty that justified Michael's removal from Sales did not justify his exclusion from the management of other companies.

40. HHJ Cooke then considered the Intercompany Loans in more detail, concluding that it was arguable that they were made because of Michael's position as a one third shareholder in Sales and Kingsford, with their withdrawal prejudicing his interest as a member. He concluded at paragraphs 38 and 39 that whilst there had not been a formal demand the wish to have all the loans repaid within three months had been made clear, with an explicit threat to make Quatford insolvent and thereby obtain control of its business. The judge also commented that in so far as security was requested Ivy and Alldey could frustrate that by exercising their powers as directors of the borrower (other than in respect of Far Forest). He determined that there was an arguable case that the affairs of Kingsford and Sales were being conducted in way prejudicial to Michael's interest as a shareholder, and that there was an arguable case of equitable constraints in relation to the loans, which should be determined at trial (paragraphs 40 and 41).

41. Having determined that some other parts of the pleadings were not maintainable, the judge concluded at paragraph 45 that there remained an arguable case in respect of Sales by virtue of Michael's interest in the loans, in respect of Breton Park, Quatford and Riverside Stourport by virtue of the exclusion or threatened exclusion from management and implied threat of withdrawal of funding, and in respect of Kingsford by virtue of exclusion from management and the withdrawal of the loans. In addition, the case as to basis of association related to all of the companies.

42. The judge then considered the offer for the Kingsford shares. At paragraphs 50 and 51 he rejected arguments that the offer did not comply with *O'Neill v Phillips* guidelines because it referred to "fair market value" not "fair value" and because it did not enhance the price to reflect a loss of value by Michael no longer being

in control. However, he concluded that the offer would not cure the alleged prejudice in respect of the loans that Kingsford had made unless Michael was simultaneously bought out of the joint companies to which it had lent money (paragraphs 52-54).

43. HHJ Cooke went on to consider the application for an injunction to restrain calling in the loans. He referred to an assertion on Michael's behalf that demanding the loans would cause unquantifiable harm and to the reference in the correspondence to appointing an administrator of Quatford, noting that Ivy would be in a position to prevent it meeting a demand. He concluded that there was an arguable case under the first part of the *American Cyanamid* test that the ability to call in the loans was subject to equitable constraints, that there was no credibly asserted commercial need for the money to be returned (and indeed an appearance of doing so in pursuit of the family dispute), and that given the rejection of the offer of security the balance of convenience favoured the grant of an injunction to maintain the status quo.

44. Following the judgment there were further email exchanges with the judge in the course of agreeing the terms of the order. HHJ Cooke repeated his view that it was arguable that the removal of the availability of the loans was unfair prejudice which would not be cured by an offer to buy out Michael's shares in Kingsford without including the borrower, but also made clear that there should be no uplift in the valuation to compensate Michael for the loss of the benefit of the Intercompany Loans.

The grounds of appeal

45. Ground 1 of the appeal maintains that the petition should have been struck out, either in full or in part. The judge had misdirected himself as to the effect of the Court of Appeal judgment, in particular at [49]-[52], and had reached an erroneous view that Michael had pleaded a maintainable entitlement to participate in management. Neither an express agreement or understanding of entitlement to participate was pleaded, nor were sufficient facts pleaded to support an inference of such an agreement or understanding.

46. Alternatively, the claim that Michael's exclusion from management of companies other than Sales was unfairly prejudicial was not maintainable given the Court of Appeal's findings about his conduct in misappropriating £1.25 million from Sales.

47. Further, the argument that it would be unfairly prejudicial for the "beneficial funding" to be withdrawn was not maintainable. It could not prejudice the interests of a shareholder in the creditor in his capacity as such, and could not amount to conducting the affairs of any of the debtors. The judge erred in concluding that equitable considerations could arise from an informal understanding that the loans would not be enforced without agreement. That would be unsupported by authority and contrary to principle, and a loan repayable only with the agreement of the debtor would be unenforceable. The constraint would prevent creditor companies from getting in their assets, and was impossible to reconcile with the loans being repayable on demand.

48. The offer for Kingsford in any event made the petition in respect of it abusive. The judge only refused to strike that element out by reference to the Intercompany Loans. The judge had also refused to accept that it was arguable that the price paid on any share purchase order should be uplifted for the loss of benefits associated with the Intercompany Loans, and so should have held that the offer would have placed Michael in materially the same position that he would have been in if he had been granted all the relief sought. Further, the separate position of Breton Park (of which Michael had never been a director) had not been considered, and there was no allegation as to the conduct of its affairs.

49. Ground 2 of the appeal maintains that the interim injunction should be set aside, either on the basis of Ground 1 being allowed in respect of the Intercompany Loans, or because the judge failed properly to address whether damages would be an adequate remedy for Michael, or erred in concluding that they would not be. Any prejudice could be adequately compensated by adjustments to valuations on any orders for sale, or by an award of equitable compensation. The judge had also failed properly to consider whether damages would be an adequate remedy for the appellants, or for Kingsford or Sales (which had no right to enforce Michael's cross-undertaking).

The Respondent's notice

50. Michael filed a Respondent's notice in relation to the Intercompany Loans and the offer for the Kingsford shares. This alleged that the threat to call in the loans was made for an ulterior purpose, would withdraw benefits given to Michael as a shareholder in Kingsford and Sales, and amounted to a breach by Ivy of her duty as a director of the debtor companies because she could block attempts to repay or give security for the loans, thereby obtaining control through an insolvency process.

51. Michael also alleged that the offer for the Kingsford shares did not remedy the unfair prejudice because it was not expressed to remain open for a reasonable time and so would leave him without a remedy, because it used the wrong basis of valuation and because the offer would not bring the litigation to an end as it did not extend to Michael's shares in the other companies or include proposals for winding up the partnerships. Any offer should reflect the fact that the affairs of the companies and partnerships are inextricably linked.

Submissions

Appellants' submissions

52. Mr Ashworth's submissions for Ivy and Alldey reflected the grounds of appeal. He pointed out that Michael had made several attempts to put forward amendments to the petition before settling on the one before the court. Given the earlier Court of Appeal decision his ducks should have been in regimental order, and he should not be granted further indulgence. His recast complaint of exclusion from management did not satisfy the minimum requirements explained by the Court of Appeal, because there was neither a pleading of an express agreement or understanding of an entitlement to participate, nor were there sufficient pleaded facts to support an inferred agreement. A pleading in "oblique

terms" was insufficient. Michael could also not suggest that he had been excluded from the management of Quatford, of which he was in de facto control, and there was no allegation of exclusion from (or other conduct in respect of) Breton Park. Further, the judge did not give appropriate weight to the Court of Appeal's adverse comments regarding Michael's misappropriation from Sales: their effect was that it was not arguably unfair to exclude him from the management of any of the other corporate respondents. The only relevant distinction between Sales and the other companies was that the misappropriated cash happened to be in Sales.

53. In relation to the Intercompany Loans, Mr Ashworth submitted that the equitable constraints that the judge found arguably existed were illogical, contrary to principle and irreconcilable with Michael's averment that the amounts were loans repayable on demand. A claim contingent on the debtor's agreement would be unenforceable. It was also necessary to distinguish Michael's interest as a shareholder of the creditor and debtor companies respectively (and to further distinguish Far Forest as a third party). Calling in a loan could not arguably prejudice his interest in the creditor and did not arguably amount to conducting the affairs of the debtor. There were also acute concerns in respect of Far Forest because Michael had indicated that he had borrowed against its assets to repay the sums misappropriated from Sales.

54. The Kingsford offer also cured any possible prejudice in respect of that company. The further email exchanges with the judge had made it clear that there should be no uplift to value by reference to the loss of the loans.

55. As regards Ground 2, the judge made additional errors in failing to discuss or make findings as to whether damages would be an adequate remedy for any of the parties, so overlooking the second stage of the *American Cyanamid* test. Any damage caused by calling in the loans could be addressed by adjustments to share valuations or by way of equitable compensation. Further, Michael's cross-undertaking in damages (which was not recorded in the order) could not benefit Kingsford or Sales.

Respondent's submissions

56. Mr Anderson submitted that the facts now pleaded were sufficient to give rise to equitable constraints on the basis of the existence of a quasi-partnership. Circumspection was also required in considering each company separately, and the court should be wary of compartmentalising the issues. Regard should be had to the overall effect of the amended petition. Michael no longer took the position that he was entitled to remain the driving force because he had been in the past. The allegations in the revised pleadings were credible and the appellants were wrong to criticise the judge, who correctly considered whether sufficient new facts had been pleaded to justify the claim that it was unfair to exclude Michael from management while insisting that he kept his investment. It was important to bear in mind that this was an appeal from a decision that a pleaded case was not hopeless: it was not a final order made after a trial. If the pleadings did not give sufficient particulars, then clarification could be sought.

57. Michael also no longer maintained a claim for unfair exclusion in respect of Sales. However, his actions in relation to Sales did not destroy the whole basis of association between the parties, and to deny him any role in the management of other entities for that reason would be disproportionate and unfair having regard to what the Court of Appeal actually decided. Whether Michael's exclusion from the management of other companies was unfair would depend on a whole raft of factual issues which had not been addressed.

58. The new allegations in respect of the Intercompany Loans reflected the fact that the threat to call them in was only made after the hearing in the Court of Appeal. The loans to Far Forest were intended to provide a benefit to Michael, and there was a clear understanding that they would remain outstanding indefinitely, until the parties agreed otherwise. The action taken by the appellants was plainly prejudicial. It was part of the agreed basis of association that Michael would continue to enjoy benefits, including the loans, having regard to the benefits that the companies received by retaining his services. The unfairness was obviously associated with Michael's interest as a member of the lender. As alleged in the Respondent's notice, the decision was also taken for ulterior purposes rather than in the interests of the creditors, who had no business need for the funds. Similar considerations applied to the loans to Quatford and Riverside Stourport.

59. As regards the debtors, Ivy could block any attempt by Quatford and Riverside Stourport to repay the loans or give security. Her conflict of interest was a breach of her duty as a director of those companies and was unfairly prejudicial to Michael as a shareholder.

60. Further, the overall business had developed as a unitary enterprise. Calling in the loans traversed the general equity and equitable constraints that had arisen because of the quasi-partnership, not only of each individual company but across the group of trading entities. The approach contended for by the appellants denied the court the ability to take a reasoned and broad view of Michael's interest as a member. The judge had also not confused the position of the lender and the borrower as the appellants suggested. The appellants' arguments also did not deal with Michael's claim for a just and equitable winding up.

61. Michael's case in respect of the Intercompany Loans was not contradictory. He accepted that the loans were legally repayable, but the parties shared a common intention. That intention would be irrelevant if the lender became insolvent and a liquidator needed to get in the assets. In that case the parties' intentions would have failed but the loan would be recoverable. The arrangement did not involve a breach of duty by directors. It was approved by all the shareholders and would not have bound creditors.

62. The offer to buy out Michael's Kingsford shares did not remedy the unfair prejudice for the reasons given in the Respondent's notice. What was relevant was the fair market value of the company, not the shares. Further, if the petition was struck out it would be open to the appellants to withdraw the offer and leave Michael tied in to his investment. Ivy and Alldey could also not dictate the order in which Michael's investment in the family business should be extracted by a series of tactical offers. The judge had found it arguable that the businesses were not considered separate by the parties, and it was more than arguable that it would

be unfair to insist on a buyout from one company while insisting on maintaining the association in another, particularly where the former is a creditor of the latter on terms which reflect their close connection.

63. As regards Ground 2, Michael had offered security for the loans and a cross undertaking in damages. The loans had only been called in as a response to the family feud. In the circumstances an injunction was unsurprising.

Discussion: Ground 1

Principles to apply on applications to amend

64. We did not receive submissions on the legal principles to apply. It is worth reiterating them briefly.

65. The effect of the earlier Court of Appeal decision was that Michael's petition disclosed no arguable case. It was common ground before the judge that (leaving to one side any appeal to the Supreme Court) this was fatal to the petition in its then form, such that the strike out application would succeed. The judge's decision was therefore concerned with whether the proposed amendments to the petition should be permitted, and the question whether an injunction should be granted.

66. The test to apply when considering an application to amend a statement of case was recently restated by Popplewell LJ in *Kawasaki Kisen Kaisha Ltd v James Kemball Limited* [2021] EWCA Civ 33 at [16] to [18]. Permission will be refused where the amended case does not have a real prospect of success. Further:

> "18. …(1) It is not enough that the claim is merely arguable; it must carry some degree of conviction: *ED & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 at paragraph 8; *Global Asset Capital Inc. v Aabar Block SARL* [2017] 4 WLR 163 at paragraph 27(1).
>
> (2) The pleading must be coherent and properly particularised: *Elite Property Holdings Ltd v Barclays Bank Plc* [2019] EWCA Civ 204 at paragraph 42.
>
> (3) The pleading must be supported by evidence which establishes a factual basis which meets the merits test; it is not sufficient simply to plead allegations which if true would establish a claim; there must be evidential material which establishes a sufficiently arguable case that the allegations are correct: *Elite Property* at paragraph 41."

The need to consider the companies separately

67. As a preliminary point, I would reiterate the point made by Floyd LJ in the earlier Court of Appeal judgment at [45] that it is necessary to consider the various business entities through which the family have decided to carry on business separately. This includes the individual companies insofar as there are relevant differences between them. Whilst a blinkered approach which ignores the wider factual context is clearly inappropriate, questions of unfairly prejudicial conduct and whether it is just and equitable to wind a company up must be determined by reference to each individual company, and Michael's interest as a member of it.

The fact that the affairs of one entity may have been conducted in an unfairly prejudicial manner, or that the facts are such that it is just and equitable to wind that entity up, does not by itself justify a similar conclusion in respect of other entities, even if they are in some senses regarded as part of the same overall business.

68. This does not mean that an overly strict approach should be taken to determining whether Michael has suffered a particular detriment in respect of a particular company. In the context of ss 994-996 it is clear that the conduct must be unfairly prejudicial to the interests of one or more members as members, but in *O'Neill v Phillips* Lord Hoffmann stated at p.1105, by reference to *R & H Electrical Ltd v Haden Bill Electrical Ltd* [1995] 2 BCLC 280 ("*R & H Electrical*"), that "the requirement that prejudice must be suffered as a member should not be too narrowly or technically construed". As discussed further below, in *R & H Electrical* account was taken of the interest of a loan creditor that was controlled by the relevant shareholder. A more recent example is *Gamlestaden Fastigheter AB v Baltic Partners Ltd* [2007] UKPC 26; [2007] BCC 272 ("*Gamlestaden*"), where account was taken of the benefit that could be obtained from the relief sought by an unfair prejudice petition by a joint venturer in its capacity as a loan creditor of an insolvent joint venture company.

69. A broad approach is also taken in the context of the winding up jurisdiction. In *Ebrahimi v Westbourne Galleries* [1973] AC 360 ("*Westbourne Galleries*") at p.374-375 Lord Wilberforce rejected the argument that the words "just and equitable" should be confined to circumstances affecting a shareholder in his capacity as such. Instead the shareholder could rely on "any circumstances of justice or equity which affect him in his relations with the company, or… with the other shareholders".

70. Lord Wilberforce's comment that a shareholder does not need to be affected in his capacity as a shareholder should not be taken to indicate that a broader approach is necessarily required to the winding up jurisdiction as compared to ss 994-996. I would respectfully agree with the comment expressed by Warner J in *Re JE Cade & Son Ltd* [1992] BCLC 213 at p.233 that what Lord Wilberforce was referring to was capacity in the strict sense, rather than suggesting that a shareholder could seek winding up on the just and equitable ground to protect a wider range of interests than could be protected by an unfair prejudice petition. In particular, in the context of this case, the focus must remain on each individual company and whether it is just and equitable to wind that company up.

Entitlement to participate: Kingsford, Sales and Riverside Stourport

71. In my view, whilst still lacking in clarity, the amended petition does include sufficient new material to amount to an arguable claim that Michael has or had an entitlement to participate in the management of Kingsford, Riverside Stourport and Sales, such that (subject to the effect of the Court of Appeal's earlier decision) his exclusion from management could potentially justify a claim for relief. The position in relation to Quatford and Breton Park is considered separately below.

72. The basis for Michael's arguable entitlement arises from the pleaded history of Michael's association with his parents in what became known as the Riverside

partnership. He traded with them in partnership from 1990, with each having a one third share. Profits were reinvested. Kingsford was only acquired in corporate form in 2004 because that was what was on offer, and it was held in the same shares as the partnership and with the same directors. Sales took over the partnership's caravan sales business in 2010 and was again held in the same shares and with the same directors. Its business was clearly related to that of the partnership because it handled sales of caravans on partnership sites. Riverside Stourport is a more recent acquisition but again is held in the same shares as the Riverside partnership and with the same directors.

73. This history, together with the close family links, provides a basis for asserting that, as with the partnership that actually existed, the association between Michael, Ivy and Alldey was a personal relationship involving mutual confidence, in which there was an entitlement to participate in management. It would have been inherent in the terms of the Riverside partnership that Michael was entitled to participate in management (*Lindley & Banks on Partnership, 20th ed.* at 15-01; s 24(5) Partnership Act 1890). In this case this was reinforced by the actual conduct of the affairs of the partnership. It is arguable that Michael relied on an understanding of his entitlement to participate in continuing to work in the business and in allowing profits to be reinvested.

74. In *Westbourne Galleries* at pp.379-380 Lord Wilberforce recognised that the conversion of a pre-existing partnership into a limited company (as occurred on the facts of that case) was a common example of a situation where an association on the basis of a personal relationship involving mutual confidence would be found to exist, justifying the superimposition of equitable considerations on the legal structure of the company and its articles of association. The label quasi-partnership reflected the application, in that case through the remedy of winding up on just and equitable grounds, of principles that allowed the court to dissolve a partnership where there had been an exclusion from management, on the basis that such exclusion was contrary to the obligations owed between the partners.

75. Similarly in this case, Michael's pleaded case is that he has been actively involved in the partnership business since 1990 and that there was no understanding that the basis of the association should change in respect of the corporate entities. There is no suggestion that (prior to the Court of Appeal's previous order) he was not entitled to participate in the management of the partnership business. In relation to those companies held in the same proportions as the partnership, and with the same directors, it must be arguable that he had a similar entitlement to participate in management.

Entitlement to participate: Quatford

76. Quatford is held 50:50 by Ivy and Michael. Both are directors. The question of entitlement to participate in the management does not arise because Michael cannot and does not complain about being excluded as a director. Given the deadlock I also cannot see how other arguments based on exclusion from management could succeed (quite apart from Ivy's uncontradicted assertion that Michael is in any event in de facto control of this company). As mentioned at [14] above, in the earlier Court of Appeal judgment Floyd LJ commented at [53] that

there had been no allegation amounting to conduct of the affairs of Quatford apart from the (dismissed) allegation about a change of accountants.

77. With respect, I find HHJ Cooke's comment that a strategy of excluding Michael from management of the (overall) business was arguably sufficient in the case of Quatford difficult to follow. The existence of the separate legal entities, and (in this case) their different ownership and management structures, cannot be ignored. Michael cannot, as things stand, be excluded from the management of Quatford. Indeed, it was not disputed that he is currently in de facto control of it. The fact that the parties may regard the various activities as being in some senses a single business is not arguably sufficient to outweigh this. There is no evidence that the caravan parks owned by the various different entities trade with each other or that Michael's exclusion from management of other companies prejudices his position in respect of Quatford in other ways, other than in respect of the Intercompany Loans, which are considered below. I therefore conclude that the judge erred in respect of Quatford. Michael cannot realistically complain about being excluded from the management of that company.

Entitlement to participate: Breton Park

78. It was conceded on behalf of Michael that evidence that he had been excluded from the management of Breton Park has not found its way into the amended petition "with clarity". Mr Ashworth submitted that there was in fact no such complaint in the petition.

79. Michael is not and has never been a director of Breton Park, and indeed was not a shareholder until its shares were transferred by Audey to Ivy and Michael in 2019 (see above). Floyd LJ's comment at [53] of the earlier judgment also applied to Breton Park.

80. Given the history of Breton Park and the lack of any directorship held by Michael at any stage, I am not persuaded that the general assertions in the amended petition that Michael is entitled to participate in the management of all the companies has a sufficient pleaded factual foundation in respect of Breton Park. The different shareholdings and directorships do not indicate any intention or understanding that Breton Park should be managed in the same way as the Riverside partnership, in which Audey was not a partner. While an entitlement to participate in management may arise in the absence of a directorship, that absence in circumstances where Michael has been a director of all other relevant companies calls for explanation. That explanation is lacking.

81. As with Quatford, there is no evidence that Michael's exclusion from management of other companies prejudices his position in respect of Breton Park. Further, there is no complaint in respect of the loan outstanding from Kingsford to Breton Park, which has not been the subject of any request for repayment.

82. I therefore conclude that the judge also erred in respect of Breton Park. Again, an argument based on the activities being viewed as a single business is not arguably sufficient to address the differences in shareholdings and directorships, and the lack of a clear pleaded factual foundation for Michael's alleged entitlement to participate in the management of that company. The petition does not disclose a

realistically arguable case that Breton Park was a quasi-partnership of which Michael was a member. He cannot therefore realistically complain about being excluded from its management.

Exclusion from management

83. Michael accepts, in the light of the Court of Appeal's findings, that he was justifiably excluded from the management of Sales, but denies that his exclusion from the other companies is justified for the same reason. He points out that the Court of Appeal's findings related to Sales alone, that it made no finding of dishonesty and that it was prepared to make an order putting Michael in charge of the Redstone partnership.

84. HHJ Cooke concluded that it was arguable that the breach of fiduciary duty which justified Michael's removal from Sales did not justify his exclusion from the management of other companies. In my view this was a conclusion that he was entitled to reach. Whilst there would be a strong argument that the misappropriation fully justifies Michael's removal from other companies (particularly if regard is had to Michael's own position that family members view the activities as a single business), whether Michael was justifiably excluded or not would be better determined in the light of the full facts. For the reasons already discussed this is relevant only to Kingsford and Riverside Stourport, and not to Breton Park or Quatford.

85. However, while the amended petition relies on an intended removal of Michael as a director of Kingsford, it makes no similar complaint in respect of Riverside Stourport, and simply includes a general complaint that exclusion from other companies would be unfairly prejudicial. A pleading that the respondents intend to exclude Michael from management of all companies is relied on only in support of a winding up on the just and equitable basis. At present, therefore, no actual or intended exclusion from management is pleaded as a basis for an allegation of unfairly prejudicial conduct in respect of Riverside Stourport. Whilst s 994 can extend to intended acts, they must at least be "proposed" (s 994(1)(b)). There is no such pleading in support of the unfair prejudice petition in relation to Riverside Stourport. Given the history of the petition there is no excuse for a lack of clarity on this point, and I do not consider that Michael should be given the benefit of any doubt. In my view the judge erred in that respect.

The Intercompany Loans

86. The judge found at paragraph 35 of his judgment that the Intercompany Loans are treated in the companies' accounts as amounts repayable within 12 months. Michael accepts that the Intercompany Loans are loans as a matter of law, and that no fixed date was agreed for their repayment. Before HHJ Cooke it was also accepted on Michael's behalf that the legal effect was that the loans were repayable on demand. Mr Anderson modified that before us to suggest that they were repayable forthwith, without any demand being required.

87. However, Michael's position is that there was a non-contractual understanding between the parties that the loans would remain outstanding "indefinitely", that the benefit of the loans was received by him in his capacity as a shareholder in

the lending companies and that the understanding was part of the basis on which he agreed to remain a member and to continue working for them. The threat to call the loans in, unaccompanied by an appropriate offer to buy him out, was prejudicial to him. The amended petition alleges that the threat was made in Ivy and Alldey's personal interests to damage Michael and obtain control of Quatford and Riverside Stourport, in other words for ulterior purposes and not for reasons of business need.

88. It is of course quite possible to enter into informal arrangements or understandings which fall short of a legal agreement, including an understanding that in certain circumstances one entity will not insist on enforcing its legal rights against another. The judge correctly recognised this. Michael's position is therefore not as inconsistent as Mr Ashworth suggested. However, there are significant problems with it.

89. The amended petition refers to an understanding between Michael, Ivy and Alldey that the loans would remain outstanding "indefinitely". It goes on to say that the "only" circumstance in which they would be repaid would be if all three agreed in pursuit of the business strategy. In other words the loans would remain outstanding unless and until the parties agreed otherwise. The one exception to this is that it was accepted in argument that the arrangement would not survive an insolvency, because it would not bind creditors. This exception is not reflected in the petition.

90. However, even if Michael was correct that there was an understanding that the loans would be left outstanding, it does not follow that it is realistically arguable that that understanding was that the only circumstance in which the loans would be repaid would be if all the parties (in context, all the shareholders of Kingsford and Sales) agreed. Such an arrangement would be unworkable. It would mean that however challenging the borrower's financial position became, and whatever the business needs of Kingsford or Sales might be, Michael could insist on the loans remaining outstanding, interest free and unsecured. This would also be the case even if Michael was no longer involved in management, so that any benefit obtained from his continued services was lost. The understanding would have to encompass Ivy and Alldey agreeing that the loans would be allowed to remain outstanding even if that meant them having entirely to disregard their duties as directors of the lenders.

91. The judge indicated that the understanding might encompass repayment where there was a "good reason" to do so. If that were the case, the question must arise as to how those reasons should be defined. Mr Anderson submitted that because this was not a legal agreement we should not be seeking to determine what terms should be implied to cover circumstances that the parties had clearly not contemplated. But with respect, by treating the understanding as one in which, whatever happened in the future, the loans would be repayable only if all the parties agreed, amounts to doing just that. If there was an understanding that the loans would not be required to be repaid immediately then in my view it could only realistically exist in the circumstances that prevailed at the time. Any material change of circumstances could affect it.

92. In my view by far the most plausible understanding would be one that accords with the terms of any debt without an agreed date for repayment, namely that either party can bring the arrangement to an end at any time. In other words, the arrangement lasts for so long as the parties are in agreement that it should. If this was not correct then in my view the only realistic alternative would be that any understanding that the debt would not be required to be repaid immediately was one that existed in the then prevailing circumstances, and would be understood not to survive any material change of circumstances.

93. In this case there has of course been a material change of circumstances. The relationship between the parties has wholly broken down. Michael has taken steps to dissolve the partnerships. He wishes to break up the single business that he says exists. I do not see how it is arguable that any understanding that the parties had about the loans could realistically be interpreted as surviving this.

94. There are also broader considerations. Michael's position is that we should recognise the existence of equitable constraints on the exercise of a creditor's rights, even if their effect is prejudicial to the creditor's interests and therefore involves recognising fetters on the directors' obligations to act in the best interests of the creditor companies. I agree with Mr Ashworth that, whilst the scope of possible equitable constraints is not to be unduly limited, there are some limits. The suggested exception for (actual) insolvency does not properly address this. Directors may owe duties to creditors in circumstances falling short of insolvency: *BTI 2014 LLC v Sequana SA* [2019] BCC 631 at [220]. But irrespective of whether any duties are owed to creditors, the proposed constraint would prevent the directors of the lending company from taking action, for example in response to concerns about the financial position of the debtor, that is in the best interests of the company's shareholders as a whole.

95. As Lord Hoffmann explained in *O'Neill v Phillips* at p. 1099F-G, "a balance has to be struck between the breadth of the discretion given to the court and the principle of legal certainty". In circumstances where a loan is interest free and legally repayable either immediately or on demand, it seems to me that the court should be very reluctant to impose equitable constraints that, if recognised, would fetter the exercise of directors' duties and could in reality significantly impair the value of the chose in action that the loans represent, potentially making them unenforceable unless and until a winding up was ordered or relief was granted under ss 994-996. If Michael were correct then it would appear to follow, among other things, that consideration should be given to impairing the loans in the books of Kingsford and Sales, which I understand has not been done to date. It could have a material adverse impact on either or both of Sales or Kingsford.

96. In *O'Neill v Phillips* Lord Hoffmann said this at p.1101F about the circumstances in which equitable constraints could apply to the exercise of legal rights:

> "…I think that one useful cross-check in a case like this is to ask whether the exercise of the power in question would be contrary to what the parties, by words or conduct, have actually agreed. Would it conflict with the promises which they appear to have exchanged?"

97. It is notable that Michael wants to have it "both ways" in respect of the loans. He says that they were structured as loans rather than gifts for tax reasons, and that he does not want to resile from their treatment as immediately repayable loans as a matter of law. Whilst it is said that Michael relies on the alleged understanding only to justify his claim that he should be bought out or that the companies should be wound up (that is, as imposing equitable considerations rather than any binding obligation), it cannot be ignored that what he is alleging to exist directly contradicts what he contends to be the legal, and presumably tax, effect of the arrangements.

98. I have concluded that it is not realistically arguable that the parties did agree or have a common understanding that the loans would not be called in unless everyone agreed. The only legal arrangement is an immediately enforceable debt. There is no sound basis for recognising an equitable constraint in the terms contended for by Michael, which is inconsistent with the legal effect of the arrangements and which could have a material adverse impact on the lending companies. I therefore conclude that the judge erred in finding that such a constraint arguably existed.

99. In my view these points are sufficient to determine the issue in relation to the Intercompany Loans in favour of Ivy and Alldey. It is therefore not strictly necessary to deal with the additional challenge raised on their behalf, namely whether the prejudice that Michael complains of in relation to the Intercompany Loans is really attributable to his interest as a member of either the creditor or the debtor companies. However, it is an obvious question to raise and was considered by the judge, and I think it is appropriate to address the full argument we received on it.

100. An unfair prejudice petition in relation to a company can only succeed by reference to conduct of that company's affairs, and not the affairs of another entity: *Scottish Co-Operative Wholesale Society Ltd v Meyer* [1959] AC 324 at pp.346-347. So, for example, Michael cannot complain in relation to Quatford about action taken in the conduct of the affairs of Kingsford. Further, and as already mentioned, the conduct complained of must be unfairly prejudicial to the interests of a member in his capacity as a member.

101. Looking first at the position of the two creditors, Kingsford and Sales, the starting point must be that repayment of, or security for, an interest free loan cannot itself prejudice Michael as a shareholder of those companies. In principle it can only improve their position, and therefore Michael's position as a shareholder of them. What Michael seeks to establish is the existence of an arrangement that would appear to run directly contrary to his interest as a shareholder.

102. Mr Anderson submitted that this would be too narrow an approach. The benefit of the loans was attributable to Michael's position as a shareholder, and the companies had benefited from his continued work.

103. Whilst the requirement that conduct must be unfairly prejudicial to the interests of a member in his capacity as such must not be too narrowly construed, there are some limits to it. Michael compares the loans to Far Forest to gifts made to his siblings from the partnership. But those gifts were made to individuals who were

not members of the partnership. It is not obvious that what Michael presents as the equivalent benefit to him should be attributed to his role either as a partner or a shareholder in the company concerned, rather than as a son and sibling. There is no indication, for example, that the loans to Far Forest were matched by any equivalent benefit provided to the other shareholders of Sales or Kingsford, despite the shareholdings being equal.

104. Mr Anderson relied on *R & H Electrical.* In that case Mr Pitt was a 25% shareholder of Haden Bill and controlled a loan creditor of it, R & H. It was held that Mr Pitt had a legitimate expectation of being able to participate in the management of Haden Bill for so long as R & H remained a significant creditor, such that Mr Pitt's ouster from management should be remedied by having his shares bought out and the loans repaid. Robert Walker J concluded that the fact that R & H was a separate legal entity from Mr Pitt, and that it was said that the prejudice was to R & H rather than to Mr Pitt as a shareholder, did not make a difference. There was a relationship based on mutual trust, and the loans were procured by Mr Pitt and formed an essential part of the arrangements entered into for the venture (p.968G).

105. In reaching his conclusion Robert Walker J relied on an earlier decision of Hoffmann J in *Re a Company No. 00477 of 1986* (1986) 2 BCC 99. In that case a husband and wife had sold a company in exchange for shares in the respondent on the basis of various understandings, including that they would continue to participate as directors and the husband would be employed as managing director. Hoffmann J declined to strike out the petition on the grounds that the wrongs complained of were wrongs done to the petitioners as vendors or as a wrongfully dismissed employee.

106. In each of those cases the court's approach allowed account to be taken of broader considerations, going beyond the interests of an individual strictly in his capacity as a shareholder, in determining whether the actions taken were unfair. Similarly in *Gamlestaden*, in circumstances where a joint venturer had invested in the joint venture by means of loans as well as shares, it was decided that there was locus standi for the application where the relief would be of real value in facilitating recovery of part of the investment even though the company was insolvent (paragraphs [33] and [36]-[37]). But common to all of these cases was the petitioners' relationship with the company in question, and the petitioners' objective of safeguarding the value of their investment in it, whether by share capital or otherwise.

107. What is more difficult is whether it would be right to extend this principle to a case such as this, where the result would be a recognition of constraints that run directly counter to the interests of the company, and to Michael's interest as a shareholder in it, even if broadly construed. However, I do not think that the point can be regarded as unarguable. In principle, a withdrawal of benefits made available to a shareholder could arguably be treated as prejudicial to him in that capacity, even if the same benefits have not necessarily been made available to other shareholders, and possibly even if it is in the interests of shareholders as a whole to withdraw them.

108. Turning to the position of the debtor companies, it is correct that Ivy and Alldey's actions in relation to the loans could prejudice Michael's position as a shareholder of those companies. They currently enjoy the benefit of interest free, unsecured loans, and that benefit risks being lost. Michael relies on this point in respect of Quatford and Riverside Stourport. (He obviously cannot complain in that respect in relation to Far Forest, which he wholly owns and in respect of which no relief is sought.)

109. Again, there are difficulties with this argument. The actions actually being complained about are those of the creditors, not the debtors. I have difficulty in discerning any real allegation of conduct of the affairs of Quatford or Riverside Stourport that is arguably unfair to Michael. Whilst the judge commented that Ivy and Alldey could frustrate the grant of security by them, there is no indication that they have either done so or have threatened to do so. Similarly, a threat to "make" Quatford insolvent does not indicate any prejudicial conduct by Ivy as a director of that company. Quatford either is insolvent or it is not. The comment made in the correspondence about the appointment of an administrator was in the context of an alleged failure by Michael to consult his fellow director and shareholder about the company's financial decisions. There has been no rebuttal of that.

110. The amended petition simply asserts that there is unfairly prejudicial conduct because of the roles of Ivy and Alldey as directors of Quatford and Riverside Stourport, and claims that in making the demands they "acted deliberately against the interests of those companies". I have some difficulty in seeing how this allegation, which relates to steps in fact taken by them as directors of the creditors, amounts to an allegation of conduct of the affairs of the debtors. On the face of it, the steps that have been taken are the result of arm's length decisions taken by directors of the creditors, and not actions taken in the affairs of the debtors (cf. *Hawkes v Cuddy* [2009] EWCA Civ 291; [2010] BCC 597 at [49] and [50]).

111. It is also of some relevance that Ivy and Alldey maintain that what is being sought from Quatford and Riverside Stourport is security. That was the position taken in the last letter (dated 6 November 2020, see [22] above) and was reiterated in submissions. The concerns that Ivy and Alldey expressed about Michael's alternative offer of security have not been addressed. It is difficult to see how a request for security amounts to deliberate action against the interests of Quatford and Riverside Stourport. There is no indication that Ivy or Alldey have actually refused to grant security or propose to do so, or indeed that they propose to refuse to consider refinancing proposals: indeed, any such refusal in the face of the requests that have been made would appear perverse, and certainly arguably prejudicial.

112. Nonetheless, I would be reluctant to conclude in the context of a strike out application that the point is unarguable. I am conscious that if the matter proceeded then it may be possible to demonstrate that Ivy (and Alldey for Riverside Stourport) were not straightforwardly taking decisions in what they considered to be the best interests of the lenders but were in reality conducting the affairs of Quatford and Riverside Stourport as well as or instead of those of the creditor companies. Indeed, the judge made a finding at paragraph 60 of his judgment that there was no "credibly asserted need in commercial terms for the

money to be returned to the lending companies", and that the correspondence gave the appearance of being in pursuit of the family dispute rather than "to serve any objective business need". As already explained, a broad approach is required. There is an illustration of this in the Court of Appeal decision in *Nicholas v Soundcraft Electronics Ltd* [1993] BCLC 360, where a failure by a parent company to provide financial support to a subsidiary was held on the facts to amount to conduct of the affairs of the subsidiary. I would add also that in this case the correspondence is not as clear as it might be as to the precise scope of the demands in respect of the loans, and whether the provision of security would suffice.

113. In conclusion on the Intercompany Loans, it is not realistically arguable that the parties did agree or have a common understanding that the loans would not be called in unless everyone agreed. That is sufficient to justify striking out the petition so far as it relates to Michael's complaints about the Intercompany Loans.

The "basis of association" pleading

114. As already explained (see [35] above) the amended petition pleads that, irrespective of fault, the basis of the parties' association has been frustrated by the breakdown in relations, by the refusal to allow Michael to pursue the previously understood investment strategy, by his exclusion from management and by the threats to call in the loans, such that he should be bought out. The last two of these complaints have already been considered. As regards the first two, and in so far as the second one is not a repeat of the complaint about Michael's exclusion, the question arises as to whether they amount to an arguable case of unfairness or instead to a request for what Lord Hoffmann referred to in *O'Neill v Phillips* as a "no-fault divorce".

115. The starting point is Lord Hoffmann's reminder at pp.1098-1099 of that case that the concept of unfairness must be applied judicially. Ordinarily there can be no complaint of unfairness unless there has been a breach of the terms on which the parties agreed to conduct the affairs of the company. However, equitable considerations may make it unfair to use rules in a manner which equity would regard as contrary to good faith.

116. Lord Hoffmann recognised that breaches of promises or understandings may not be the only form of conduct that will be regarded as unfair. He said this at pp.1101H-1102A:

> "I do not suggest that exercising rights in breach of some promise or undertaking is the only form of conduct which will be regarded as unfair for the purposes of section 459[2]. For example, there may be some event which puts an end to the basis upon which the parties entered into association with each other, making it unfair that one shareholder should insist upon the continuance of the association. The analogy of contractual frustration suggests itself. The unfairness may arise not from what the parties have positively agreed but from a majority using its legal powers to maintain the association in

[2] Now s 994 Companies Act 2006.

> circumstances to which the minority can reasonably say it did not agree: *non haec in foedera veni*. It is well recognised that in such a case there would be power to wind up the company on the just and equitable ground (see *Virdi v Abbey Leisure Ltd* [1990] BCLC 342) and it seems to me that, in the absence of a winding up, it could equally be said to come within section 459."

117. However, at pp.1104-1105 Lord Hoffmann also made it clear that a breakdown in relations, including where there has been a loss of trust and confidence, is not sufficient to found an unfair prejudice petition where (as on the facts of that case) there has been no exclusion from management. There was no right to exit "at will" where trust and confidence has broken down. Lord Hoffmann also doubted whether a dissolution would even be granted under partnership law if there was no exclusion from management and the business could be continued.

118. This point is relevant to Breton Park, Quatford and Riverside Stourport. There has been no actual or proposed exclusion from the management of those companies. Leaving the Intercompany Loans to one side, there has also been no other specific allegation of any alleged prejudicial conduct in respect of them.

119. The question arises whether any different approach should apply to Sales. Mr Anderson sought to argue that, notwithstanding Michael's justified exclusion from the management of that company, the loss of the basis of association arguably entitled him to be bought out from it. I cannot accept that. The notion that a justified exclusion from management, which this court has already found was not arguably unfairly prejudicial to Michael, could nonetheless result without more in a state of affairs which amounts to unfairly prejudicial conduct for which he should be rewarded by being bought out is impossible to accept. Michael has been guilty of a serious breach of fiduciary duty. The situation in which he now finds himself is not one that makes it arguably unfair for the other shareholders not to buy him out. It is the result of his own unjustifiable actions. There would need to be some further conduct, or proposed or actual act or omission, that is unfairly prejudicial to Michael's interests as a member of Sales to justify a claim. None such is pleaded.

120. Mr Ashworth invited us to overrule the decision of HHJ Hodge QC in *Re Lloyds Autobody Ringway Ltd* [2018] EWHC 2336 (Ch) to the extent that it suggests any different approach. In that case there was a justified exclusion of a 25% shareholder from management, but the judge nonetheless determined that remaining locked in to the company would be unfair and justified an order for the purchase of the shares, albeit on a fully discounted basis. It would not be appropriate to accept Mr Ashworth's invitation. Every case must be decided on its facts, and given Lord Hoffmann's analogy with frustration the conclusion that the judge reached may have been open to him on the facts. But in this case, taking account of the serious nature of Michael's conduct, it would not arguably be unfair to leave Michael without a remedy.

121. Mr Anderson also sought to rely on HHJ Cooke's conclusion that a number of allegations relating to the partnership business should remain in the petition on the basis that they supported Michael's allegation of prejudicial treatment across the combined business (see [39] above). But this sits uneasily with the Court of

Appeal's conclusion that there was no allegation in the petition of conduct of the affairs of Breton Park, Quatford or Riverside Stourport. Consistent with that decision, I do not consider that the allegations that remain amount to an arguable case of unfairly prejudicial conduct in respect of any of the companies, or are sufficient to demonstrate that this would arguably not be a "no fault" divorce which justified Michael's shares being bought out even if there was no exclusion from management.

122. Mr Anderson also sought to rely on the pleading at paragraphs 86 and 87 of the amended petition that there was an understanding that ad hoc benefits could be taken from the companies, the loss of which the judge found to be arguably prejudicial conduct. However, apart from the Intercompany Loans there is no pleading of an actual or proposed loss or withdrawal of any such benefits in support of the claim under ss 994-996. The only allegation to that effect is made in support of the claim to wind the companies up, which is considered below.

123. It follows from the above that, other than in respect of Kingsford, the amended petition does not disclose an arguable case of unfairly prejudicial conduct.

Offer for Kingsford shares

124. In my view the judge was correct to conclude that the offer for Michael's Kingsford shares complied with *O'Neill v Phillips* guidelines. The argument that what is relevant is the fair market value of the company rather than of shares in it is misconceived. Lord Hoffmann expressed the first of the guidelines as follows at p.1107D:

> "In the first place, the offer must be to purchase the shares at a fair value. This will ordinarily be a value representing an equivalent proportion of the total issued share capital, that is, without a discount for its being a minority holding…"

125. It is apparent from this that what must be valued is the share capital. That must be correct. The notion that the "company" has some distinct meaning for valuation purposes is wrong. Whilst the assets of a company could be valued, valuing them rather than the share capital would not ordinarily result in a value that would be attributable to the shares, because it would ignore debts and other liabilities.

126. Mr Anderson submitted that there was a risk that an expert would interpret the offer as requiring a valuation of Michael's shareholding in the open market, which could be nil or close to it on the basis that there was no market for a minority shareholding. I do not agree that this is a real risk. Paragraph 2 of the offer made it clear that no minority discount is to be applied. The offer letter also stated that both parties would be permitted to make submissions to the expert, and contained an invitation to identify any element which failed to comply with the requirements of an *O'Neill v Phillips* offer. What the expert would be required to do is clear, but if there was any doubt at all the position could be clarified.

127. However, whether an offer complies with *O'Neill v Phillips* guidelines is not by itself determinative. As the Court of Appeal stated in *Re Sprintroom Ltd* [2019]

EWCA Civ 932; [2019] BCC 1031 at [129], judges have "counselled against treating the reasonableness of an offer as being a trump card in the hands of the respondent majority shareholder". The court referred with approval to the judgment of HHJ Cooke in *Harborne Road Nominees Ltd v Karvaski* [2011] EWHC 2214 (Ch); [2012] 2 CBLC 420 ("*Harborne Road*"), where he pointed out at [26] that Lord Hoffmann's guidance does not have the status of legislation, and that it would be a cardinal error to approach the matter as if sufficient compliance with the guidelines would inevitably protect the respondent. The question is always whether, in all the circumstances of the case, the applicant has satisfied the conditions required to have the petition struck out or summary judgment granted in his favour, namely that continued prosecution of the petition after making the offer amounts to an abuse of process or is bound to fail. The issue is highly fact sensitive and "consideration of the nature and terms of any offer made can only ever be an intermediate step in the process".

128. In *Re Sprintroom* the court went on at [130] to summarise the existing case law as follows:

> "The terms of any offer made by the majority to purchase the petitioner's shares, the circumstances in which the offer was made and the reasons why it was rejected are one aspect of the overall consideration by the court of whether an unfair prejudice petition should succeed… There is no one feature of an offer which will automatically make it either a reasonable or unreasonable offer for this purpose. In *Maidment v Attwood; Re Tobian Properties Ltd* [2012] EWCA Civ 998; [2013] B.C.C. 98 , Arden LJ (with whom Aikens and Kitchin LJJ agreed) said that the dominant characteristic of the unfair prejudice remedy is its adaptability, enabling the courts to produce a just remedy where minority shareholders can show wrongdoing that prejudices their interests. The case law in this area has consistently declined to introduce 'bright lines' and the assessment of an offer to purchase is no exception to this flexible approach."

129. Mr Anderson submitted that it was relevant that the offer was not to buy out Michael's shares in all the companies and was not accompanied by proposals for winding up the partnerships. The judge had found it arguable that the parties regarded the partnerships and companies as one overall business. It was arguably unfair for Ivy and Alldey to be in a position of being able to insist on buying Michael out from one company selected by them whilst maintaining the association in other parts of the business. It would enable them to make offers for different companies at times that suited them tactically.

130. Mr Anderson also relied on the fact that the offer was not expressed to remain open for a reasonable time after the hearing before the judge, and Ivy and Alldey declined to confirm that it would be kept open. As it happens, the offer has not been withdrawn, but Mr Ashworth similarly had no instructions to confirm to us that the offer would continue to be left open. There is therefore a risk that, if the petition in respect of Kingsford was struck out, the offer would be withdrawn before Michael could accept it. Mr Anderson submitted that, in the absence of

any assurance that it would remain open for a reasonable time, the offer did not provide a good reason to strike out the petition.

131. The risk of an offer being withdrawn is not itself a sufficient reason to disregard it. In *O'Neill v Phillips* at p.1107C Lord Hoffmann said that:

> "… the unfairness does not lie in the exclusion alone but in exclusion without a reasonable offer. If the respondent to a petition has plainly made a reasonable offer, then the exclusion as such will not be unfairly prejudicial and he will be entitled to have the petition struck out."

132. The purpose of *O'Neill v Phillips* offers is to avoid litigation or bring it to an end, by curing the alleged prejudicial conduct. The basis of Ivy and Alldey's appeal in respect of the offer for the Kingsford shares is that it makes the continuance of the petition in relation to Kingsford abusive. Michael has been offered all the relief that he could reasonably expect to obtain at trial. He could have accepted the offer at any time in the last year. It cannot be right that a petitioner should be entitled to keep proceedings alive simply by failing to accept a fair offer and then complaining in the face of a strike out application that the offer might not remain open, in circumstances where an actual rejection of a reasonable offer would have led to the petition being struck out.

133. This does not mean that a remedy could not arise in the future if there is a further act of unfair prejudice. But as HHJ Cooke remarked in *Harborne Road* at [34] a petitioner "is not entitled to insist on a standing offer being made".

134. The argument that there is a single overall business and that the order of extraction should not be dictated by Ivy and Alldey at first sight appears to be stronger. However, as already mentioned there is no evidence that the caravan parks owned by the various different entities trade with each other. Each company has an independent operation. Separate management of them is clearly possible. For example, Michael has had to accept his exclusion from the management of Sales, and the Court of Appeal's order put different members of the family in charge of different partnerships. Importantly, no suggestion has been made that the value of the shares in the individual companies would be enhanced if they were sold with shares in any of the other companies. The real links between the companies, apart from common ownership, lie in the Intercompany Loans. Those have already been addressed.

135. If Michael has not established an arguable case of unfair prejudice in respect of companies other than Kingsford, then he should not be assisted to escape from that simply by complaining that the offer for his Kingsford shares does not extend to his shares in those other companies. Equally, Ivy and Alldey should not be forced to continue to litigate in circumstances where they have offered all that Michael could realistically hope to obtain from the litigation as a whole. To do that would ignore the separate existence of the companies and the requirement to determine in respect of each of them individually whether there has been unfairly prejudicial conduct or whether it would be just and equitable to order a winding up.

136. This conclusion does not mean that an offer which "cherry picked" some but not all of a number of commonly owned companies would necessarily cure unfair prejudice in the companies the subject of the offer. It may well not do so if, for example, the value of the whole would be worth more than the sum of the parts. But on the facts of this case there is no sound basis for alleging that the offer did not cure the alleged prejudice.

137. Mr Anderson also raised a specific concern that the value of the Kingsford shares could be depressed by valuing the Intercompany Loans it has made at less than face value, whereas in any valuation of the borrowers the full liability would be recognised. That may be the case if the loans are not repaid (or at least adequately secured pending their repayment), but the remedy for that lies in Michael's hands. This is not a case where the value is said to have been depleted by action taken by the majority shareholders of which Michael complains, where it might not be just to require him to accept a price that reflected the depletion (see *Harborne Road* at [30]; *Re Sprintroom* at [133]).

138. The judge decided that the offer to buy out Michael's Kingsford shares would not arguably cure the alleged unfair prejudice without including the borrower company (see [42] and [44] above). This conclusion was affected by the judge's error in respect of the Intercompany Loans and cannot stand. The petition in respect of Kingsford falls to be struck out as an abuse of process, because the offer provided all the relief that Michael would have been entitled to seek under the amended petition.

Just and equitable winding up

139. We did not receive any detailed submissions in relation to the alternative remedy of just and equitable winding up. Whilst there are common principles, there are some differences. It is therefore necessary to consider separately whether Michael has a (realistically) arguable case to seek a winding up. I will deal with the five companies in turn.

140. The offer for the Kingsford shares not only cures any prejudice in respect of that company but fully meets Michael's alternative claim to wind it up.

141. As regards Sales, for the reasons already given it is not arguably unjust or inequitable to leave Michael in the position he is now in, having been justifiably excluded from management.

142. Quatford is held on a 50:50 basis, and Michael relies on the existence of a deadlock as justifying his claim to wind it up. Deadlock is an example of a situation where it can be just and equitable to order a winding up: *In re Yenidje Tobacco Co. Ltd* [1916] 2 Ch 426, discussed by Lord Wilberforce in *Westbourne Galleries* at p.376. However, as Floyd LJ pointed out in the earlier decision of this court at [64], a simple breakdown in relations is not sufficient. The business of Quatford continues, with Michael in de facto control. The directors will have to address the question of the Intercompany Loans. There has already been some discussion of a sale of Hollins Park, and there may need to be a further discussion. But I am not persuaded that the amended petition provides a realistically arguable

case that there is currently such a deadlock as would justify Michael in petitioning for a winding up.

143. In respect of Breton Park, I have concluded that the pleaded claim to a quasi-partnership involving Michael has an insufficient factual foundation. The principles laid down in *Westbourne Galleries* therefore cannot realistically assist him. Michael again relies on deadlock in respect of this company. However, there is no deadlock at Board level and there is no suggestion that the company's business is being affected by the deadlock (or apparent deadlock, given the ownership dispute) at shareholder level.

144. I have concluded that Riverside Stourport is arguably a quasi-partnership in the management of which Michael is entitled to participate. However, he has not been excluded. Further, it was explained to us that Riverside Stourport has no active business. It owns a site which remains undeveloped. I do not consider it to be realistically arguable on the basis of the pleaded facts that a winding up should be ordered on just and equitable grounds. As with Quatford, steps may need to be taken in respect of the Intercompany Loans, but that is a matter for the company's Board, of which Michael remains a member.

145. I have already mentioned that the amended petition includes a general allegation, in support of the claim to wind the companies up, that Ivy and Alldey intend to run the companies as if Michael was not a shareholder, and to exclude him from management, oppose everything he proposes, withhold all the benefits of being a shareholder and refuse him participation in investment capital (see [36] above). I do not consider that this is sufficient to overcome the shortcomings of the pleadings in relation to the individual companies. Exclusion from management has already been addressed. The allegation about exclusion from benefits echoes the pleading at paragraphs 86 and 87 of the amended petition that there was an understanding that ad hoc benefits could be taken from the companies. The fact that Michael may no longer be able to help himself to benefits informally does not strike me as arguably sufficient of itself to make it just and equitable to order a winding up, in circumstances where Michael does not complain of other family members continuing to take such benefits whilst unfairly excluding him, and where in contrast the appellants have properly complained about Michael's behaviour in misappropriating a substantial sum from Sales. The same considerations would apply to participation in investment capital.

146. It is clear from the judgments of Lord Wilberforce and Lord Cross in *Westbourne Galleries* that it is not a prerequisite of a winding up order on the just and equitable ground that there is a deadlock affecting the operation of the business, or that the conduct of those opposing the order should have been unjust or inequitable. In a quasi-partnership case a winding up may be ordered where there has been a complete breakdown of trust and confidence of a kind that would have justified dissolution of a partnership (see for example the judgment of Lord Cross at pp.383-4). For a recent discussion of this see Lord Briggs' judgment in *Lau v Chu* [2020] UKPC 24; [2020] 1 WLR 4656 at [15]-[19]. However, whilst such a breakdown is a relevant factor it is not by itself determinative. The test remains whether it is just and equitable to order a winding up. This is illustrated by a recent Court of Appeal decision, *Re Paramount Powders (UK) Ltd* [2019] EWCA Civ 1644; [2020] BCC 152. In that case there was a breakdown of trust and confidence

between brothers in a quasi-partnership, but the petitioner failed in a winding up petition in circumstances where the situation was attributable to his own misconduct. I would respectfully agree that a breakdown of trust and confidence cannot of itself be determinative. If it were otherwise, what is generally regarded as the exceptional remedy of winding up would offer a route to the sort of "no-fault divorce" that Lord Hoffmann concluded was not available.

Discussion: Ground 2 (the interim injunction)

147. On the basis of my conclusion that Ground 1 should succeed in respect of the Intercompany Loans, Ground 2 must also succeed. The interim injunction should therefore be set aside. In the circumstances it is not necessary to consider whether the judge erred in relation to the question of adequacy of damages.

THE COSTS APPEAL

148. The committal application was issued on 2 July 2020, a week after Carr LJ granted permission to appeal against the injunctions granted by HHJ McCahill QC and around four weeks before the expedited appeals were heard. The application alleged 18 contemptuous breaches of the injunction granted in the partnership proceedings. There was a directions hearing on 20 July 2020 and an eight day trial was listed to commence in November 2020. On 14 August 2020 Michael's solicitors indicated that he would no longer be proceeding with the committal application in the light of the Court of Appeal's decision. On the same day Ivy's solicitor responded offering to agree to the withdrawal by consent if her costs were paid on the standard basis. The offer was not accepted. On 23 September 2020 Michael formally applied for permission to withdraw the committal application on the basis that it had "ceased to be necessary" following the Court of Appeal's decision. Permission was granted by HHJ Cooke on 26 September 2020, with consequential applications to be dealt with at a subsequent date.

149. Although the committal application was made against Audey and Mersadie as well as Ivy, only Ivy was represented at the hearing that led to the order that is the subject of this appeal. In advance of the hearing Ivy's solicitor filed a witness statement in support of her application for costs. That witness statement exhibited a draft affidavit prepared for Ivy in response to the committal application, which responded to the allegations in some detail.

The judge's reasons

150. HHJ Cooke's reasons for making no order as to costs are recorded in a relatively brief ex tempore judgment: the transcript before us appears not to have been approved by the judge. The judge referred to submissions on behalf of Ivy that she was the winner, that she benefited from a presumption of innocence, and that the allegations were denied and would not have been proved. He then noted that the normal principle that an unsuccessful applicant must pay the respondent's costs was not an invariable rule. He described the incidents alleged in the application as serious rather than technical in nature, and as appearing to indicate

a "coordinated course of action" on the part of the respondents. Whilst some of the allegations against Ivy would have faced difficulties of proof:

> "Others however it seems to me had a very strong likelihood that they would have been proved, not least because [Ivy's] own draft affidavit in response to the application, arguably at least and I need go no further today, admits the substance of the facts alleged against her."

151. The judge added that Ivy sought to explain her actions in a way to excuse or minimise her conduct, but:

> "… I think what can be said at the moment, bearing in mind of course that I am not deciding the truth or otherwise of those allegations, is that [Ivy] faced a serious risk that some at least of those allegations would have been found to be proved against her."

152. The judge commented that the subsequent discharge of the order could not be regarded as trivialising or legitimising breaches of the order. He referred to a specific incident when Michael attended the Riverside site (where Ivy lives) with representatives from Savills and others, and Ivy had attempted to exclude them from the office. There was a dispute about whether Michael's action amounted to conduct of partnership business within the scope of the order or was for the furtherance of his litigation case, but the judge considered that even if it was not part of the operation of the business then (bearing in mind that Michael had charge of the running of the site) it was:

> "…at least arguably and I think strongly arguably, an incident that amounted to harassment or intimidation of Michael and his wife…"

One of the terms of the injunction prohibited the respondents from harassing or otherwise contacting Michael or his wife.

153. The judge concluded that it was not appropriate to start from the proposition that, because the application had been withdrawn, it must be regarded as an application that would never have succeeded. There was a serious risk that some allegations would have been proved, with Ivy being made responsible for at least a substantial part of the costs. He referred to Michael's position that his motivation in making the application had been enforcement rather than punishment, and suggested that deterrence and enforcement may also have been material to any decision that the court made. The application could not be described as unmeritorious and the allegations were not trivial. Withdrawing it once the injunction fell away was a pragmatic course, and the appropriate order was no order for costs.

The grounds of appeal

154. The grounds of appeal are, in summary, that the judge erred in holding that certain allegations in the committal application were likely or very likely to have been proved against Ivy. He should have proceeded without expressing any view, and should have recognised that the allegations were unproven and that Michael had abandoned his attempt to prove them. The effect was to take into account matters that the judge should not have taken into account and to leave out of account

matters that he should have taken into account. Alternatively, the judge exceeded the ambit of his discretion, since any judge acting reasonably would have awarded Ivy her costs on the indemnity basis, or failing that on the standard basis.

Submissions

155. Mr McCourt Fritz, who made submissions for Ivy on the costs appeal, submitted that Ivy was the clear winner. The committal application was withdrawn before Ivy was required to file evidence in response and she had made no concessions. The application had entirely failed. It was analogous to the withdrawal of an application for interim relief or to the discontinuance of a claim, where the default entitlement to costs is put on a statutory basis by CPR 38.6. The position in this case was however reinforced by the presumption of innocence to which Ivy was entitled. In addition, an award of indemnity costs was generally appropriate where allegations of contempt were made and not pursued. It was further justified in this case because the committal application would otherwise have been challenged as an abusive attempt to prejudice the Court of Appeal against Ivy, and in respect of individual allegations on the grounds that they had been made without any basis for them, and because when Michael indicated that he was going to withdraw the application Ivy offered to accept her costs on the standard basis, an offer that was refused.

156. Mr Anderson relied on the broad ambit of discretion afforded to costs decisions, and submitted that it had not been exceeded, and there had been no error of principle. The submissions made on Ivy's behalf amounted to an argument that it was impossible to make any assessment of the merits of a committal application which does not proceed to a substantive determination, such that the judge would have to award costs against the applicant. That would wrongly fetter the court's discretion and would not enable it to consider all the circumstances of the case. It was accepted that the court was entitled to consider the merits under CPR 38.6, and the case law supported the proposition that it was also possible to take account of the merits in committal applications. Contrary to what was asserted on behalf of Ivy, there had been admissions of breach in relation to the incident involving Savills. She had chosen to engage with the allegations in evidence, and the judge could not be criticised for having regard to that evidence. As to indemnity costs, the mere fact that this was an application alleging contempt did not justify indemnity costs, and Ivy could not simply assert that it was an attempt to prejudice the Court of Appeal. The decision not to proceed was based on the loss of the injunctions, and was sensible and proportionate. Michael should not be penalised for it.

Principles

157. The principle that a judge has a broad discretion in relation to costs is well established. In *Atlasjet Havacilik Anonim Sirketi v Kupeli* (aka *Kupeli v Kibris*) [2018] EWCA Civ 1264; [2019] 1 WLR 1235 at [5], Hickinbottom LJ described that principle and the role of an appellate court in the following terms:

> "5. In relation to that rule, several points are worthy of note.
>
> (i) In considering orders for costs, the court is of course bound to pursue the overriding objective as set out in CPR r 1.1 , i.e. it must

> make an order that deals justly with the issue of costs as between the parties. Therefore, when considering whether to make a costs order – and, if so, the order it makes – the court has to make an evaluative judgment as to where justice lies, on the facts and circumstances as it has found them to be.
>
> (ii) Before an appeal court will interfere with the exercise of that discretion, as with any appeal, it must be satisfied that the decision of the lower court was wrong or unjust because of a serious irregularity in the proceedings below: CPR r 52.21(3)…
>
> (iii) Before an appeal court concludes that the costs decision below was "wrong", it must be persuaded that the judge erred in principle, or left out of account a material factor that he should have taken into account, or took into account an immaterial factor, or that the exercise of his discretion was "wholly wrong": see, e g, *Adamson v Halifax plc* [2003] 1 WLR 60 , para 16, per Sir Murray Stuart-Smith, adopting (post-CPR) the conventional (pre-CPR) approach he described in *Roache v News Group Newspapers Ltd* [1998] EMLR 161 , 172.
>
> (iv) An appeal court will only rarely find that the exercise of discretion below is "wholly wrong", because not only is that discretion particularly wide but the judge below is usually uniquely well-placed to make the required assessment, having heard the relevant evidence."

158. The fact that a costs decision concerns a contempt application does not mean that different principles apply: *Symes v Phillips and ors* [2005] EWCA Civ 663; [2006] 4 Costs LR 553 (relying on *Knight v Clifton* [1971] Ch 700). However, as Pill LJ explained in *Symes v Phillips* at [7], factors may be present in contempt proceedings which are not normally present in civil proceedings.

159. CPR 38.6 does not apply in this case but both parties relied on it by way of analogy. It provides that, unless the court orders otherwise, a claimant who discontinues a claim is liable for the defendant's costs up to the date of service of the notice of discontinuance. The principles to apply in determining whether to make a different order under CPR 38.6 were considered by Moore-Bick LJ in *Brookes (and ors including Teasdale) v HSBC Bank Plc* [2011] EWCA Civ 354. In particular, the claimant must show a good reason for departing from the presumption created by the rule, which will usually require a change of circumstances brought about by some form of unreasonable conduct on the part of the defendant (paragraphs [6] and [8]). This is because a claimant who commences proceedings takes upon himself the risk of the litigation, and it is normally unjust to make the defendant bear the costs of proceedings which were forced upon him and which the claimant is unable or unwilling to carry through to judgment (paragraph [10], referring to the judgment of Proudman J in *Maini v Maini* [2009] EWHC 3036 (Ch)).

Discussion

160. In my view the judge fell into error in taking into account an assessment of the likelihood of any of the allegations being proved, in circumstances where Ivy had not filed evidence in response to the application and had not admitted any contempt of court. That was an error of principle.

161. Contempt proceedings are civil proceedings, but they are often described as quasi-criminal in character. Ivy was entitled to a presumption of innocence, and I disagree with Mr Anderson's submission that this has no relevance to the costs of a withdrawn application because Ivy is no longer at risk of losing her liberty.

162. The evidence filed by Ivy's solicitor in response to the costs application does not amount to any admission of contempt by Ivy. On the contrary, the statement records that Ivy "vehemently denies" the allegations, with the exception of the incident involving Savills. In respect of that, it is clear that there was a dispute about whether what occurred involved the conduct of partnership business and therefore a breach of the injunction. The judge was also not addressed on whether what had occurred amounted to a breach of the order against harassment. Further, the draft affidavit filed by Ivy's solicitor cannot be assumed to constitute Ivy's complete defence. If the application had been pursued she could have filed further or amended written evidence, and she could also have chosen to give oral evidence.

163. It does not follow from this that the merits may never be taken into account in determining the costs of a withdrawn committal application. Under CPR 44.2 the court is required to have regard to all the circumstances, which in an appropriate case will include the merits. For example, it may well be appropriate to take account of the fact that a respondent to a contempt application has admitted contemptuous breaches of it. There may also be cases where a respondent has not engaged to admit or deny the allegations, but where it is clear that there is no real scope for argument that contemptuous breaches have occurred. But where (as in this case) the question of breach has not been established, proper regard must be had to the presumption of innocence. Although the judge referred to that presumption, it is not apparent that sufficient regard was paid to it.

164. This approach is not inconsistent with the cases on which Mr Anderson relied. In *Symes v Phillips* at [7] Pill LJ recognised that it was appropriate to take account of admitted contempts. In *Cole v Carpenter* [2020] EWHC 3244 (Ch) Trower J reserved the question of whether to award the claimant her costs of a committal application made against her to the main trial, in circumstances where the defendant's application had been dismissed as being premature and disproportionate, but where the judge had also found (as he would have been required to do if the application in question were to proceed) that there was a strong prima facie case of a contempt. In that case there had not only been a hearing of the contempt application, but Trower J decided to reserve the question of the claimant's costs in order to allow a proper determination to be made as to whether the conduct complained of was proved, rather than taking a view himself as to what the position was likely to be.

165. Given the error of principle, the appeal against the judge's order in the partnership proceedings that there should be no order as to costs of the committal application must be allowed, and that part of the order must be set aside. Neither party suggested that it would be appropriate to remit the question of costs, and in the circumstances it is clearly appropriate for this court to assess them.

166. As already indicated, both parties relied on CPR 38.6 and case law that considers it. The statutory presumption in CPR 38.6 does not apply in this case so some

caution is required, but there is force in the analogy and in particular in the point that it is the claimant (or applicant) who chooses to bring and then discontinue proceedings. Nevertheless, it is the general rules in CPR 44 that apply.

167. Given the unilateral withdrawal of the application, Ivy was the successful party. The starting point under CPR 44.2 is therefore that she should be awarded her costs in accordance with the general rule, unless a different order is justified. In this case, taking account of the absence of any admission of contemptuous breaches and the scope for argument as to whether they existed, it was not appropriate to take into account any assessment of whether the application was likely to succeed in whole or in part.

168. Mr Anderson submitted that it was relevant to take account of Michael's role as quasi-prosecutor, and that it would be unfair to penalise him in costs if an application was properly withdrawn because it no longer served the public interest. However, this is not easily reconciled with the confirmation in *Symes v Phillips* that the same principles apply in determining costs applications in contempt proceedings as in normal civil proceedings. Pill LJ did recognise at [7] that factors may be present in contempt proceedings which are not normally present in civil proceedings. But those factors would not only include the nature of the applicant's role but also the fact that the liberty of the respondent was at stake. Whilst it was no doubt appropriate to withdraw the contempt application following the Court of Appeal's decision, that does not mean that Michael should be relieved of bearing the costs that Ivy had to incur in dealing with it while it was extant.

169. No other basis for denying Ivy her costs was suggested, so costs should be awarded in Ivy's favour.

170. The remaining issue is whether costs should be awarded on an indemnity rather than standard basis. I see no reason why withdrawn contempt applications should as a matter of principle attract an award of indemnity costs. Mr McCourt Fritz suggested that an award of indemnity costs was justified by the presumption of innocence. I do not agree. Contempt applications are governed by the general rules applicable to costs. In the absence of an adjudication of the allegations it is not possible to determine whether individual allegations were made without any foundation. The withdrawal of the committal application following the Court of Appeal's decision was obviously a sensible course. The presumption of innocence that Ivy enjoys does not extend to assuming against Michael that the application was not well founded, such that his conduct in bringing the application was "outside the norm" and justifies indemnity costs.

171. I also do not agree with the submission that indemnity costs were appropriate because the application related to an injunction that should never have been granted. At the time, the injunction remained in place and its terms were required to be observed.

172. However, there are some indications that the application was made tactically in connection with the appeal to the Court of Appeal. It was issued shortly after Carr LJ granted permission to appeal and shortly before her decision to expedite the appeal. Although the incident involving Savills had only recently occurred, most

of the other alleged breaches had occurred some time earlier. Michael also unsuccessfully attempted to rely on the allegations and evidence at the hearing of the appeal. Contempt applications brought for an improper purpose may be struck out (*Navigator Equities Ltd v Deripaska* [2020] EWHC 1798 (Comm) at [138]). It would not be appropriate to make any finding about Michael's purpose, but the timing calls for explanation and, in the absence of an explanation, it is a factor to take into account in determining whether any element of indemnity costs is appropriate.

173. Further, and importantly, Ivy offered to accept her costs on the standard basis. That would have avoided the need for a further hearing. In my view that is a material factor.

174. In the circumstances, I would allow the appeal against the costs order and substitute an order that Michael pay Ivy's costs in respect of the contempt application on the standard basis up to 14 August 2020, when Ivy made her offer, and on the indemnity basis thereafter, with costs to be assessed if not agreed.

CONCLUSIONS

175. In conclusion:

a) I would allow Ivy and Alldey's appeal in the company proceedings, with the result that the petition is struck out and the injunction in respect of the Intercompany Loans is set aside.

b) I would also allow Ivy's appeal in the partnership proceedings and award Ivy her costs of the contempt application on the standard basis up to 14 August 2020 and on the indemnity basis thereafter.

Lord Justice Nugee

176. I agree.

Lord Justice Bean

177. I also agree.